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**Datasheet for the decision
of 5 December 2013**

Case Number: T 1031/12 - 3.2.05

Application Number: 01999701.4

Publication Number: 1349986

IPC: D21G 3/00

Language of the proceedings: EN

Title of invention:

Doctor or coater blade and method in connection with its manufacturing

Patent Proprietor:

Swedev Aktiebolag

Opponent:

Rolf Meyer GmbH

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Relevant legal provisions (EPC 1973):

EPC Art. 111(1)

EPC R. 67

Keyword:

"Extension beyond the application as filed - no"

"Substantial procedural violation - no"

"Remittal to the first instance"

Decisions cited:

T 0087/88

Catchword:

-



Case Number: T 1031/12 - 3.2.05

D E C I S I O N
of the technical board of appeal 3.2.05
of 5 December 2013

Appellant: SWEDDEV AKTIEBOLAG
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Representative: Lars-Erik Johannson
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Respondent: Rolf Meyer GmbH
(Opponent) Heinrich-Hertz-Str. 17
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Representative: Heinrich Niebuhr
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Decision under appeal: Decision of the opposition division of the
European Patent Office posted 28 February 2012
revoking European patent No. 1349986 pursuant
to Article 101(3) (b) EPC.

Composition of the board:

Chairman: M. Poock
Members: H. Schram
G. Weiss

Summary of Facts and Submissions

- I. The patent proprietor lodged on 25 April 2012 an appeal against the decision of the opposition division, posted on 28 February 2012, by which European patent No. 1 349 986 was revoked. The statement setting out the grounds of appeal was filed on the same day.

The opposition division held that the additional feature "the coating (8) on the underneath side of the blade (1) exhibits at least two different layers (8a; 8b; 8c) and has a total thickness of 10-20 μm " present in claim 1 of the main request and of the first and second auxiliary requests did not meet the requirements of Article 123(2) EPC.

- II. Oral proceedings were held before the board of appeal on 5 December 2013.

- III. The appellant (patent proprietor) requested that the appeal fee be reimbursed and that the decision under appeal be set aside and that the case be remitted to the first instance or that a patent be maintained in amended form on the basis of claim 1 as filed with the letter of 23 October 2013 as main and auxiliary requests 1 and 2 or, as auxiliary request 3, that the patent be maintained as granted.

The respondent (opponent) did not file any request.

- IV. Claim 1 of the main request reads as follows:

"1. Doctor or coater blade (1) of steel, having a nickel coating, wherein said coating is constituted by

an electrolytic nickel layer comprising abrasion resistant particles, which nickel layer constitutes a first coating layer (8a; 8b; 8c; 9a; 9b), which is arranged at least on an underneath side of a front part (4) of the blade (1), the coating (8) on the underneath side of the blade (1) exhibits at least two different layers (8a; 8b; 8c) and has a total thickness of 10-20 μm ."

- V. The arguments of the appellant, in writing and during the oral proceedings, can be summarized as follows:

Decisions of the European patent Office shall be reasoned, cf Rule 111(2) EPC. The minimum requirement was that the logical chain of the reasoning in the decision under appeal was sufficiently clear to be properly understood by the parties on an objective basis, ie which provisions of the EPC were contravened or met, and the legal and factual reasons therefore. However, the legal and factual reasons for the revocation of the patent were not given in the impugned decision. In the reasons for the decision points 1 and 2, it was concluded that none of the requests fulfilled the requirements of Article 123(3) EPC. In contrast, in the minutes of the oral proceedings before the opposition division it was stated that none of the requests fulfilled the requirements of Article 123(2) EPC. It was not possible to unambiguously deduce from the reasons given in point 1 of the reasons, whether the opposition division considered that the amendment extended the scope of protection, or extended beyond the content of the application as filed. Accordingly, it was left open to the patent proprietor to guess which legal provision was considered not to be

fulfilled. This lack of reasoning was contrary to all accepted requirements of procedural law and constituted a substantial procedural violation. Moreover, assuming that the opposition division intended to make an objection under Article 123(2) EPC rather than under Article 123(3) EPC, its conclusion was reached by a grave misinterpretation of the text of the application documents as filed. For reasons of equity the appeal fee was to be reimbursed, also because the opposition division had not yet examined the issues of novelty and inventive step.

VI. The respondent did not file any substantive arguments during the appeal proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. Reimbursement of appeal fees
 - 2.1 Rule 67 EPC 1973 provides inter alia that the appeal fees shall be reimbursed where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.
 - 2.2 The reference to Article 123(3) EPC at the end of points 1 and 2 of the reasons of the decision under appeal is clearly a clerical error. This follows inter alia from point 1 of the reasons of the decision under appeal, where not only the additional feature of claim 1 of the main request with respect to claim 1 as

granted is correctly identified but also the alleged support for this feature as given by the appellant in its letter dated 22 December 2011 is quoted. Moreover, a lack of disclosure is mentioned in the first paragraph on page 4 of the decision under appeal (cf "However, there is no disclosure in this passage ..."). Hence the reasons for revoking the patent are without ambiguity that the amendments to claim 1 of the main request and of the first and second auxiliary requests introduced subject-matter extending beyond the contents of the application as filed, for which the legal provision is Article 123(2) EPC (as correctly stated in point 3 of the reasons of the decision under appeal and in the minutes of the oral proceedings before the opposition division).

2.3 For completeness' sake, it is noted that the appellant's further submissions that the opposition division arrived at its conclusion, ie alleged lack of support for two nickel layers comprising abrasion resistant particles, "by a grave misinterpretation of the text of the application documents as filed" (see statement setting out the grounds for appeal dated 25 April 2012, page 3, penultimate paragraph) is not convincing.

Firstly, according to the established jurisprudence of the Boards of Appeal, a misinterpretation of a document normally constitutes an error of judgment rather than an error of law and is therefore no "procedural" violation (see for instance Case Law of the Boards of Appeal, 7th Edition, Chapter 8.3.5, page 1044, penultimate paragraph), let alone a substantial one. Secondly, the alleged error of judgment of the

opposition division does not appear to reside in a misinterpretation of the application documents as filed but in an interpretation of the amended claims which differs from that of the board (each layer rather than at least one layer comprising abrasion resistant particles).

2.4 It follows that no substantial procedural violation has occurred and that the appeal fee cannot be reimbursed, Rule 67 EPC 1973.

3. Allowability of the amendments, Article 123(2) EPC

3.1 Claim 1 of the main request differs from claim 1 as granted in that the expression "characterized in that" has been replaced by the word "wherein", and in that the expression "the coating (8) on the underneath side of the blade (1) exhibits at least two different layers (8a; 8b; 8c) and has a total thickness of 10-20 μm " has been added at the end of the claim.

A basis for the added feature is the passage on page 7, lines 24 and 25, of the application as filed (published version), which reads: "*On its underneath side, the blade 1 exhibits a coating 8, which is formed from at least two different layers 8a, 8b, 8c and which exhibits a total thickness of 10-20 μm* ".

Claim 11 of the main request differs from claim 11 as granted in that the wording "8-25 μm , preferably " and "even more" have been deleted and that the expression "13 - 15 μm " has been corrected to read "3 -15 μm ". The deletions merely bring claim 11 into conformity with claim 1 of the main request. The range "3 -15 μm " for

the thickness of the coating is disclosed on page 3, line 26, of the application as filed (published version).

- 3.2 The opposition division was of the opinion that claim 1 of the main request defined a doctor or coater blade having at least two different layers on the underneath side of it, whereby each of these two layers had to comprise abrasion resistant particles (see decision under appeal, page 3, third paragraph from the bottom). It held that there was no disclosure in the passage on page 4, lines 24 to 34, of the application as filed, nor in the remaining part thereof, of a blade exhibiting on its underneath side two different layers each comprising abrasion resistant particles (see decision under appeal, page 4, first paragraph).

It appears that the opposition division arrived at this conclusion by starting from the premise that the first requirement ("a layer comprising abrasion resistant particles") implied that, when said layer was redefined as having "at least two layers" (cf requirement (ii)), that each layer had to fulfil the first requirement as well.

This cannot be accepted. Claim 1 of the main request requires that:

- (i) said coating is constituted by an electrolytic nickel layer comprising abrasion resistant particles,
- (ii) which nickel layer constitutes a first coating layer (8a; 8b; 8c; 9a; 9b) ... and that

(iii) it exhibits at least two different layers on the underside of the blade.

A straightforward interpretation of the claim read as a whole is that of the claimed at least two different layers on the underside of the blade at least one layer comprises abrasion resistant particles. This interpretation is in conformity with all of the examples of the invention shown in Table 1, each meeting the requirements (i) to (iii). It is also in conformity with the passage on page 3, lines 44 and 45 of the patent in suit, which reads "at least one of these layers comprising particles that increase the abrasion resistance of the coating (abrasion resistant particles)".

For example, if the doctor or coater blade has two different layers on its underside, there are three possibilities: only the layer closest to be blade comprises abrasion resistant particles (cf. examples 1 and 3), only the layer further away comprises abrasion resistant particles (cf. examples 4 and 8), or both layers comprise abrasion resistant particles (cf. example 2).

3.3 Consequently, the amendments to claims 1 and 11 do not introduce subject-matter that extend beyond the content of the application as filed and therefore claims 1 and 11 of the main request meet the requirements of Article 123(2) EPC.

4. The opposition division has not yet had expressed its view on the grounds for opposition under Article 100(a) EPC 1973 (lack of novelty, Article 54 EPC 1973 and lack

of inventive step, Article 56 EPC 1973). It is thus considered appropriate to remit the case to the department of first instance for further prosecution, Article 111(1) EPC 1973.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

D. Meyfarth

M. Poock