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**Datasheet for the decision
of 11 October 2016**

Case Number: T 1297/12 - 3.3.03

Application Number: 07725339.1

Publication Number: 2021385

IPC: C08F10/00, C08F2/00, C08F6/04,
C08F10/02, B07B1/24, C08F210/16

Language of the proceedings: EN

Title of invention:
POLYOLEFIN POWDER

Patent Proprietor:
INEOS Manufacturing Belgium NV

Opponent:
Basell Polyolefine GmbH

Relevant legal provisions:
EPC Art. 123(2), 111(1)

Keyword:
Amendments - allowable (no)- disclaimer not allowable -
disclosure not unrelated and remote (Main request)
Remittal to the department of first instance - (yes) first
auxiliary request

Decisions cited:

G 0001/03, G 0003/14, T 0014/01, T 1146/01



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Case Number: T 1297/12 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 11 October 2016

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
5 April 2012 concerning maintenance of the
European Patent No. 2021385 in amended form.

Composition of the Board:

Chairman F. Rousseau
Members: M. C. Gordon
R. Cramer

Summary of Facts and Submissions

- I. The appeal lies from the interlocutory decision of the opposition division according to which it was held that European patent number 2 021 385 (granted on European patent application number 07725339.1, derived from international application number PCT/EP2007/004429, published under the number WO 2007/137713) could be maintained in amended form on the basis of the second auxiliary request, submitted during oral proceedings.
- II. Claims 1, 2, 3, 5, 6, 10, 11 and 12 of the application as filed read as follows:
- "1. Uncompounded polyolefin powder having a particle size distribution such that D95 is less than 355µm and (D90-D10)/D50 is less than 1.2, where D95, D90, D50 and D10 are defined such that 95wt%, 90wt%, 50wt% or 10wt% of the polymer particles have a diameter of less than D95, D90, D50 and D10 respectively.
 2. Uncompounded polyolefin powder according to claim 1 which is polyethylene or polypropylene
 3. Uncompounded polyolefin powder according to claim 1 or 2, having a D95 of less than 300µm, preferably less than 250µm, and more preferably less than 210µm.
 5. Uncompounded polyolefin powder according to any preceding claim, having a D5 of at least 50µm, preferably at least 60µm.
 6. Uncompounded polyolefin powder according to any preceding claim which is a multimodal polyethylene.
 10. Uncompounded polymer powder according to any preceding claim, which when compounded and blown into a

200µm thickness film has a gel count, expressed as the number of gels larger than 200µm per square metre of film, of less than 500, preferably less than 200, and more preferably less than 100.

11. Blown film made from a polymer powder as defined in any preceding claim, which for a 200µm thickness film has a gel count, expressed as the number of gels larger than 200µm per square metre of film, of less than 500, preferably less than 200 and more preferably less than 100.

12. Pipe made from a polymer powder as defined in any of claims 1 to 10 which has been compounded."

The patent was granted on the basis of the unamended claims of the application.

III. A notice of opposition against the patent was filed in which revocation of the patent on the grounds of Art. 100(a) EPC (lack of novelty, lack of inventive step) and Art. 100(b) EPC was requested.

Inter alia the following document was relied upon by the opponent:

D3: US-B2-6 716 924.

IV. The decision of the opposition division was based on a main request and two auxiliary requests.

The decision held that the main request did not meet the requirements of Art. 54 EPC in view of the disclosure of an example of D3 and that the first auxiliary request did not meet the requirements of Art. 123(3) EPC. Novelty was not examined for the first auxiliary request and inventive step was not examined

for either the main request or the first auxiliary request.

It is recorded in the minutes of the oral proceedings before the opposition division that the opponent stated that there were "no formal remarks and no objections" to the second auxiliary request.

- V. The patent proprietor lodged an appeal against the decision.
Together with the statement of grounds of appeal amended main, first and second auxiliary requests were submitted.
- VI. The respondent/opponent replied, *inter alia* raising objections to the allowability of a disclaimer in claim 1 of the main request and to a lack of clarity pursuant to Art 84 EPC in respect of claim 1 of the first auxiliary request. It was stated that maintenance on the basis of the second auxiliary request was not challenged.
- VII. In its response, the appellant/patent proprietor filed amended main and first auxiliary requests. In particular the formulation of the disclaimer in claim 1 of the main request was modified.
- VIII. The board issued a summons to oral proceedings and a communication in which concerns were expressed as to the allowability of the disclaimer in the main request and to the clarity of the first auxiliary request.
- IX. The appellant/patent proprietor filed with letter of 19 September 2016 further amended main and first auxiliary requests.
Claim 1 of the main request read as follows:

"Uncompounded polyolefin powder which is a multimodal polyethylene and has a particle size distribution such that D95 is less than 335 μ m, D5 is at least 60 μ m, and (D90-D10)/D50 is less than 1.2, where D95, D90, D50 and D10 are defined such that 95wt%, 90wt%, 50wt% or 10wt% of the polymer particles have a diameter of less than D95, D90, D50 and D10 respectively, but excluding the case in which all of the uncompounded polyolefin powder is a sieved fraction in which:

the minimum particle size is 75 μ m and the maximum particle size is 100 μ m, or

the minimum particle size is 100 μ m and the maximum particle size is 180 μ m, or

the minimum particle size is 180 μ m and the maximum particle size is 250 μ m."

X. Oral proceedings were held before the board on 11 October 2016.

In the course of the oral proceedings the appellant/patent proprietor filed an amended first auxiliary request, replacing that on file.

Claim 1 of the new first auxiliary request read as follows:

"Blown film, which for a 200 μ m thickness film has a gel count, expressed as the number of gels larger than 200 μ m per square metre of film, of less than 500, preferably less than 200, and more preferably less than 100, made from an uncompounded polyolefin powder, or pipe made from an uncompounded polyolefin powder which has been compounded, wherein the uncompounded polyolefin powder is a multimodal polyethylene and has a particle size distribution such that D95 is less than 335 μ m, D5 is at least 60 μ m and (D90-D10)/D50 is less than 1.2, where D95, D90, D50 and D10 are defined such that 95wt%, 90wt%, 50 wt% or 10wt% of the polymer particles have a diameter of less than D95, D90, D50

and D10 respectively."

XI. The arguments of the appellant/patent proprietor can be summarised as follows:

(a) Main request - Art. 123(2) EPC - allowability of the disclaimer.

D3 itself was not a remote teaching. However that part of the disclosure identified as novelty destroying, i.e. three sieved fractions of example 1 reported in table 3 having defined particle size ranges was remote, as the skilled person would never have considered any of these fractions as being relevant to the invention of D3 or to the problem underlying D3 or that of the patent in suit. These measurement fractions did not represent the teaching of D3 itself. The objection of lack of novelty was merely a consequence of the sieves which had been employed. Had different sieves been used, then arguably the novelty objection would not have arisen, although the same product was being analysed. This demonstrated that the cited disclosures were in, the terminology of decision G 1/03, accidental.

In this connection relevance had to be assessed not on the basis of the entire document but with respect to the specific disclosure within it. Thus it was possible for a document which in its totality was relevant to contain disclosures e.g. in the report of examples which were not relevant.

(b) First auxiliary request

The amendments made established novelty over D3. The claims as amended reflected the structure of the claims as granted meaning that an objection of Art. 84 EPC could not be raised (following G 3/14). Novelty and inventive step should be dealt with by

the first instance following remittal.

XII. The arguments of the respondent/opponent can be summarised as follows:

(a) Main request - Art. 123(2) EPC - allowability of the disclaimer.

Evidence that D3 was not a remote teaching was provided by the patentee itself which proposed the document as the closest prior art in the response to the notice of opposition.

"Remoteness" had to be decided on the basis of the entire document - not a part thereof in isolation. Even following the position of the appellant in this respect, a sieved fraction could not be considered as remote since the patent in suit itself proposed the use of screening to provide the desired particle size distribution. Since D3 was related to obtaining polymers of defined morphology, the particle size distribution, demonstrated by the sieved fractions, was central to the teaching thereof. Consequently, following G 1/03, in particular section 2.3.4 of the reasons, the cited sieved fractions could not be considered to represent a remote teaching.

(b) First Auxiliary request

Although Art. 84 EPC was not available in respect of this request the claims still presented some ambiguities which impinged on the questions of novelty and inventive step. Further it was considered that there were defects in respect of sufficiency of disclosure, although it was not possible to formulate these in respect of the amended claims within the time constraints of the oral proceedings.

- XIII. The appellant requested that the decision under appeal be set aside and the case be remitted to the department of first instance for further prosecution on the basis of the main request filed with letter of 19 September 2016, or on the basis of the first auxiliary request filed during the oral proceedings, or on the basis of the second auxiliary request filed with the statement of grounds of appeal.
- XIV. The respondent requested that the main request be refused and that in the event the new first auxiliary request be admitted to the proceedings the case be remitted to the department of first instance for further prosecution.

Reasons for the Decision

1. Main request
 - 1.1 Art. 123(2) EPC - allowability of the disclaimer.
 - 1.1.1 The patent in suit relates to polyolefin powders of a defined particle size distribution (paragraph [0001]. The powders have uses in the production of pipes or films (paragraph [0006]). In respect of these uses it is stated that it has been found that a high proportion of large polymer particles can lead to problems in the final products. According to paragraph [0008] it was found that the problems can be obviated by controlling not only the width of the particle size distribution but in particular by reducing the proportion of large particles, while maintaining a low content of fines.

Thus the patent is concerned with polyolefin powders of

controlled - narrow - particle size distribution.

1.1.2 D3 also addresses the problem of the provision of controlled morphology polyolefin moulding powders in particular for the production of films ("Field of the Invention").

According to examples 1 and 2 multimodal polyethylene/1-butene copolymers were produced.

The particle size distribution of the polymers were evaluated by sieving giving the results reported in Table 3:

TABLE 3

	Particle size distribution (μm) (% by weight)							Particle size distribution index	
	>850	>500	>250	>180	>100	>75	>45		45>
Ex. 1	0.2	0.4	0.2	2.3	54.3	26.2	14.7	1.8	1.4
Ex. 2	0.4	0.4	0.6	6.3	63.6	17.4	9.6	1.7	1.4
Comp. Ex. 1	5.5	6.5	14.2	11.9	13.8	15.0	23.4	9.8	2.8
Comp. Ex. 2	2.5	6.1	11.8	8.1	17.6	13.5	30.5	9.9	2.5

The fractions of example 1 between 180 μm and 100 μm were considered according to the decision of the opposition division to anticipate the subject-matter of claim 1 of the main request, which finding was not disputed by the appellant/patent proprietor. On the contrary, in the statement of grounds of appeal the appellant indicated that the fractions between 250 μm and 180 μm and those between 100 μm and 75 μm also anticipated the subject-matter claimed. As a result disclaimers in respect of these fractions were inserted into claim 1.

1.1.3 D3 is a document comprised in the prior art pursuant to Art. 54(2) EPC. Consequently a disclaimer in respect of the disclosure thereof is only permissible if the anticipation is "accidental", i.e "so unrelated and remote that the person skilled in the art would never have taken it into consideration when working on the

invention" (G 1/03, reasons 2.2.2.)

- 1.1.4 The document D3 itself is not unrelated and remote since it relates to the same field as the patent in suit, namely polyethylene polymers in particulate form having defined morphology, in particular a narrow particle size distribution. The appellant/patent proprietor has acknowledged the relevance of D3.

However it was considered by the appellant/patent proprietor that the cited novelty destroying disclosures i.e. the three sieved fractions of example 1 were "unrelated and remote".

- 1.1.5 To understand what is meant by an "unrelated and remote" disclosure it is necessary to consider G 1/03, and some of the case law developed subsequently.

(a) According to point 2.2.2 of the reasons of G 1/03:

"What counts is that from a technical point of view, the disclosure in question must be so unrelated and remote that the person skilled in the art would never have taken it into consideration when working on the invention" and "In the case of an accidental anticipation, its definition (see above) makes clear that it has nothing to do with the teaching of the claimed invention, since it cannot be relevant for examining inventive step. Therefore, a mere disclaimer excluding the subject-matter of an accidental anticipation may be assumed not to change the technical information in the application as filed and, for this reason, also not to change the subject-matter of the application as filed, within the meaning of Article 123(2) EPC".

In the present case disclaiming certain polyolefin powders having specific particle size distributions cannot be held not to change the technical information of the application as filed, which information aims at defining in the first part of claim 1 itself the polyolefin powder by its particle size distribution.

- (b) The question of what constitutes "unrelated and remote" disclosures was considered in more detail in decisions subsequent to G 1/03.

In T 14/01, it was held in section 1.5 of the reasons, with reference to section 2.2.2 of the reasons of G 1/03 that a disclosure can be considered to be accidental only when it appears from the outset to have nothing to do with the invention. In the subsequent section 1.6, T 14/01 held that an allegation that a teaching leading away from the invention would have been extracted from the prior document presupposed that the document would have in fact initially been taken into consideration. However for an anticipation to be accidental it was necessary that the disclosure in question would never have been taken into consideration (T 14/01, section 1.6 of the reasons, third paragraph).

T 1146/01 in sections 4.2.3 concludes, with reference to section 2.2.2 of G 1/03 that a comparative example of a document, although teaching what not to do nevertheless served to elucidate the teaching of the document as a whole and was closely related to the other experiments - inventive and comparative - disclosed therein. Although a comparative example has a "negative relevance" it is, according to T 1146/01 neither

remote from nor unconnected with the disclosure in the document (section 4.2.3, second paragraph). Thus a comparative example cannot be considered as an accidental disclosure in the sense of G 1/03.

- 1.1.6 In the present case the anticipatory disclosures are neither an example, nor a comparative example but three sieved fractions isolated from a composition obtained in the course of an - in this case inventive - example.

Following the finding of T 14/01 these fractions are disclosed in a relevant document, D3 and so cannot be considered to represent an "accidental" disclosure. Thus based on this assessment alone a disclaimer in respect of these disclosures would not be allowable.

Even if one were, for the sake of argument, to follow the position of the appellant that although D3 in itself is relevant the particular fractions cited as novelty destroying did not constitute a relevant disclosure, the conclusion would be the same because, as will now be explained, the fractions in question cannot be considered to constitute remote or unrelated disclosures.

The purpose of producing the fractions was to demonstrate the particle size distribution of the product of D3, which, as noted is related to the technical problem common to the patent in suit and to D3.

Consequently, to apply the vocabulary of T 1146/01, the fractions of example 1 of D3 cited as novelty destroying serve to "elucidate" the teaching of D3 and as such cannot, by the standards of the case law discussed above, be seen as "unrelated and remote" from the invention of D3 or from the technical problem common to D3 and the patent in suit.

Consequently even following the differentiated approach of the appellant, a disclaimer in respect of the specific sieved fractions of D3 would, following G 1/03 not be allowable since the individual sieved fractions of D3 were not "unrelated and remote" with the consequence that the anticipation was not accidental.

1.1.7 One argument of the appellant/patent proprietor addressed the question of whether the skilled person would have considered these particular fractions as potentially pertinent prior art for arriving at the invention now claimed. However based on the foregoing assessment and conclusions relating to the meaning of "unrelated and remote" in the context of the case law developed in the light of G 1/03 this argument is no longer relevant. However, the board notes that, following the approach of the above-cited T 14/01 the very premise that the skilled person would even have considered a particular fraction as potentially constituting the closest prior art - even if then disregarded - presupposes that the teaching would, in the terminology of G 1/03, have been "taken into consideration". Thus also on this approach the conclusion would be that the disclosed fraction was not "unrelated and remote" from the invention of the patent in suit.

1.2 For the above reasons it is concluded that the cited disclosures of D3 do not constitute an "accidental" anticipation, with the result that a disclaimer in respect thereof is not allowable (G 1/03 reasons 2.2 and Order, paragraph 2.1, second bullet point).

1.3 The main request therefore does not meet the requirements of Art. 123(2) EPC.

2. First auxiliary request

2.1 The first auxiliary request was filed during the oral proceedings before the board.

2.2 Admissibility

Claim 1 as amended corresponds in effect to claim 1 of the first auxiliary request as submitted before the opposition division, modified to take account of discussions before the board. The amendments made consist of combining existing claims and are neither complicated or extensive.

The respondent did not object to the admission of the request to the proceedings and the request was therefore admitted.

2.3 Objections under Article 123(2) or 123(3) EPC were not raised by the respondent. In view of the requests of both parties for remittal to have the first auxiliary request dealt with with respect to the requirements of the EPC, the Board considers it appropriate to exercise the power conferred on it by Article 111(1) EPC to remit the case to the opposition division for further prosecution.

Nevertheless the board would like to make the following observation in respect of the permissible extent of scrutiny of this request in the light of decision G 3/14.

Claim 1 corresponds to a combination of features of granted claims which were linked by dependency and reference.

As such the subject-matter of claim 1 of the first auxiliary request corresponds to a "Type B" amendment as dealt with in decision G 3/14 (see G 3/14, Reasons

for the decision section B.2) for which it was concluded in section G.(ii) of the reasons of G 3/14 that the claims of the patent may be examined for compliance with the requirements of Article 84 EPC only when, and then only to the extent that the amendment introduces non-compliance with Article 84 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution

The Registrar:

The Chairman:



B. ter Heijden

F. Rousseau

Decision electronically authenticated