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Datasheet for the decision of 6 November 2014

Case Number: T 1554/12 - 3.2.06

Application Number: 06728472.9

Publication Number: 1860966

IPC: A41D19/00

Language of the proceedings: EN

Title of invention:
WATERPROOF GLOVE

Patent Proprietor:
OutDry Technologies Corporation

Opponent:
W. L. Gore & Associates GmbH

Headword:

Relevant legal provisions:
EPC 1973 Art. 84
EPC Art. 123(3), 108
RPBA Art. 13(1)

Keyword:
Admissibility of appeal - (yes)
Claims - clarity (no) - main request, auxiliary request 1
Amendments - broadening of claim (yes) - auxiliary request 2

Decisions cited:
T 0220/83, T 0760/08

Catchword:

Europäisches Patentamt
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Case Number: T 1554/12 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 November 2014

Appellant: (Patent Proprietor)	OutDry Technologies Corporation 14375 NW Science Park Drive Portland, OR 97229-5418 (US)
Representative:	Busch, Thomas Leinweber & Zimmermann Rosental 7 / II. Aufgang 80331 München (DE)
Respondent: (Opponent)	W. L. Gore & Associates GmbH Hermann-Oberth-Strasse 22 85640 Putzbrunn (DE)
Representative:	Klunker . Schmitt-Nilson . Hirsch Patentanwälte Destouchesstraße 68 80796 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 25 April 2012 revoking European patent No. 1860966 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Sekretaruk

Summary of Facts and Submissions

I. An appeal was filed by the proprietor against the decision of the opposition division revoking European Patent No. 1 860 966, in which it found that the ground for opposition under Article 100(c) EPC was prejudicial to maintenance of the patent based on the main request, the subject-matter of claim 1 of the auxiliary request failing to meet the requirement of Article 56 EPC.

II. With its grounds of appeal, the appellant (proprietor) requested that the patent be maintained as granted, auxiliarily that it be maintained in an amended form according to one of auxiliary requests 1-4.

III. The respondent (opponent) requested that the appeal be dismissed as inadmissible, or that it be dismissed as unallowable.

IV. With letter of 1 August 2013 the appellant submitted a new main request and auxiliary requests 1 and 2, replacing all previous requests on file.

V. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that the admissibility of the appeal would be a first topic for discussion at the oral proceedings and furthermore that at least the requirements of Articles 84 and 123(2) EPC might require discussion with respect to all requests.

VI. With letter of 2 October 2014 the appellant filed a new main request and a new auxiliary request.

VII. Oral proceedings were held before the Board on 6 November 2014, during which the appellant filed a

further auxiliary request corresponding to auxiliary request 3 as filed with the statement of grounds of 3 September 2012. It requested that the decision under appeal be set aside and the European patent be maintained on the basis of the main request or the auxiliary request (hereafter called auxiliary request 1), both filed 2 October 2014, or on the basis of auxiliary request 3, as filed with the statement of grounds of 3 September 2012 (hereafter called auxiliary request 2).

The respondent requested that the appeal be dismissed.

VIII. Claim 1 of the main request reads as follows:
"Glove, comprising a semimanufactured product (3) made of leather and/or fabric which has the three-dimensional shape of a hand and is joined to a waterproofing sheath (4) comprising a three-dimensional breathable and elastomeric glove which is made of a single piece, is inserted and glued under pressure onto the inner surface of the semimanufactured product (3), characterized in that the waterproofing sheath (4) comprises at least one membrane of a semipermeable material which has a thickness between 5 µm and 100 µm, is non-porous and elastic and has a coefficient of elongation higher than 50 % the surface of the sheath which is not turned towards the semimanufactured product being fastened to a support sheet which is fixed and is made of elastic fabric, said glove being further characterized by being obtained by applying a thermoactivable glue pattern made up of polyurethane glue dots having a diameter comprised between 0.1 mm and 2 mm and a density comprised between 10 dots/cm^2 and 200 dots/cm^2 in a discontinuous manner onto a surface of said sheath (4) which is a three-dimensional, breathable and elastomeric glove which is made of a

single piece turned toward the semimanufactured product (3) and inserting said semimanufactured product into said waterproofing sheath (4), wherein said semimanufactured product (3) is supported on a shaped support (1), a collar (5), thanks to one or more screws (6), is applied and tightened around the waterproofing sheath (4) around a wrist zone of a shaped member (1a), in order to seal sheath (4) for preventing the transfer of fluids from the outside between the sheath (4) and the shaped support (1), the shaped support (1) provided with the semimanufactured product (3) and with the sealed sheath (4) is then inserted into an autoclave (7) for exerting a predetermined pressure onto the sheath (4) so as to press and glue the sheath (4) onto the semimanufactured product (3) wherein the temperature inside said autoclave (7) is greater than 100°C, and, after the time sufficient for joining the sheath (4) to the semimanufactured product (3) has lapsed, the latter is extracted from the autoclave (7), is separated from the collar (5) and from the shaped support (1) and is finally turned inside out so that its outer surface is turned outwards and its inner surface joined with the sheath (4) is turned inwards."

Claim 1 of auxiliary request 1 reads:
"A process for producing a glove comprising a semimanufactured product (3) made of leather and/or fabric which has the three-dimensional shape of a hand and is joined to a waterproofing sheath (4) comprising a three-dimensional breathable and elastomeric glove which is made of a single piece, is inserted and glued under pressure onto the inner surface of the semimanufactured product (3) wherein said semimanufactured product is inserted into said waterproofing sheath (4), wherein said semimanufactured product (3) is supported on a shaped support (1), a

collar (5), thanks to one or more screws (6), is applied and tightened around the waterproofing sheath (4) around a wrist zone of a shaped member (1a), in order to seal sheath (4) for preventing the transfer of fluids from the outside between the sheath (4) and the shaped support (1),
the shaped support (1) provided with the semimanufactured product (3) and with the sealed sheath (4) is then inserted into an autoclave (7) for exerting a predetermined pressure onto the sheath (4) so as to press and glue the sheath (4) onto the semimanufactured product (3) wherein the temperature inside said autoclave is greater than 100°C, and,
after the time sufficient for joining the sheath (4) to the semimanufactured product (3) has lapsed, the latter is extracted from the autoclave (7), is separated from the collar (5) and from the shaped support (1) and is finally turned inside out so that its outer surface is turned outwards and its inner surface joined with the sheath (4) is turned inwards, said process comprising the following steps:
- arranging on a shaped support (1, 1a, 1b) the semimanufactured product (3) with at least one waterproofing sheath (4) shaped for entirely or partially covering the surfaces to be waterproofed of the semimanufactured product (3), at least one glue layer being applied between these surfaces and the waterproofing sheath (4);
- sealing the semimanufactured product (3) and/or the waterproofing sheath (4) for preventing the transfer of fluids from the outside between the sheath (4) and the shaped support (1, 1a, 1b);
- inserting the shaped support (1, 1a, 1b) provided with the semimanufactured product (3) and with the sheath (4) into an autoclave (7) for joining under pressure the sheath (4) to the semimanufactured product

(3)
the waterproofing sheath (4) comprises at least one membrane of a semipermeable material which has a thickness between 5 µm and 100 µm, is non-porous and elastic and has a coefficient of elongation higher than 50% the surface of the sheath which is not turned towards the semimanufactured product being fastened to a support sheet which is fixed and is made of elastic fabric, said process being further characterized by applying a thermoactivable glue pattern made up of polyurethane glue dots having a diameter comprised between 0.1 mm and 2 mm and a density comprised between 10 dots/cm^2 and 200 dots/cm^2 in a discontinuous manner onto a surface turned toward the semimanufactured product (3) of said sheath (4) which is a three-dimensional, breathable and elastomeric glove which is made of a single piece."

Claim 1 of auxiliary request 2 reads:
"A process for producing a glove comprising a semimanufactured product (3) made of leather and/or fabric which has the three-dimensional shape of a hand and is joined to a waterproofing sheath (4) comprising a three-dimensional, breathable and elastomeric glove which is made of a single piece, is inserted and glued under pressure onto the inner surface of the semimanufactured product (3), said process comprising the following steps:
- arranging on a shaped support (1, 1a, 1b) the semimanufactured product (3) with at least one waterproofing sheath (4) shaped for entirely or partially covering the surfaces to be waterproofed of the semimanufactured product (3), at least one glue layer being applied between these surfaces and the waterproofing sheath (4);
- sealing the semimanufactured product (3) and/or the

waterproofing sheath (4) for preventing the transfer of fluids from the outside between the sheath (4) and the shaped support (1, 1a, 1b);
- inserting the shaped support (1, 1a, 1b) provided with the semimanufactured product (3) and with the sheath (4) into an autoclave (7) for joining under pressure the sheath (4) to the semimanufactured product (3)."

IX. The appellant's arguments may be summarised as follows:

Regarding the admissibility of the appeal, it was clear from the arguments presented in the grounds of appeal as a whole that claim 1 of auxiliary request 1 (as filed with the grounds) was that included from page 4 to 6 of the statement of grounds. While a contradiction was present between the content of this claim and that appended to the statement of grounds, there was no confusion regarding the intended version of the claim forming claim 1 of auxiliary request 1 as filed with the grounds of appeal.

The application of thermoactivable glue dots of a particular diameter and distribution density as defined in claim 1 of the main request would be identifiable in the finished glove. This process feature could thus be seen as a physical feature characterising the claimed glove in accordance with Article 84 EPC.

Claim 1 of auxiliary request 2 was restricted specifically to producing the glove of granted claim 1 and so did not extend the protection conferred relative to claim 1 as granted (Article 123(3) EPC).

X. The respondent's arguments may be summarised as follows:

Regarding the admissibility of the appeal, a contradiction existed between the arguments, in combination with the feature analysis, presented in support of auxiliary request 1 (filed with the grounds) and the actual wording of the appended auxiliary request 1; the consequence was that it was not clear which of the two versions of claim 1 of the request was the intended version.

Regarding the main request, it was not clear (Article 84 EPC) whether the specified glue dot diameters related to the glue pattern before or after pressing the sheath into contact with the semimanufactured product, nor indeed whether these claimed glue dot diameters would be recognisable at all in the finished glove.

Regarding auxiliary request 1, this at least suffered from a lack of clarity (Article 84 EPC) due to the incoherent amalgamation of process steps and resulting inconsistencies. For example, on line 7 of claim 1 a 'shaped support' was mentioned on which the semimanufactured product was supported. Later in the claim, on line 20, the semimanufactured product was stated to be arranged 'on a shaped support'. It was not clear from the wording of the claim whether these two 'shaped supports' were the same or different features.

Regarding auxiliary request 2, the subject-matter of claim 1 did not meet the requirement of Article 123(3) EPC. The claim was directed to a process for producing a glove, which subject-matter did not form part of the patent as granted.

Reasons for the Decision

1. Admissibility of the appeal

1.1 The appeal meets the requirements of Article 108 EPC in combination with those of Rule 99(2) EPC and is thus found to be admissible.

1.2 As also conceded by the appellant, auxiliary request 1, filed with the grounds of appeal, presents the primary basis on which the appeal is admissible. Despite the contradiction present between the appended auxiliary request 1 on the one hand and the appellant's written arguments in combination with the feature analysis provided on pages 4-6 in the body of the text on the other, the Board holds that the intention of the appellant is nonetheless clear. An objective reading of the grounds as a whole, particularly the paragraph on page 2 referring to the decision under appeal and the description on page 5, lines 1-5, leads the reader to see the contradictory appended claim as an error; the claim wording given by the feature analysis in the body of the text is clearly the intended wording of claim 1 of auxiliary request 1, not least since this claim includes the features identified as missing in the main request of the appealed decision and is furthermore referred to as overcoming the objection raised therein.

1.3 In support of its inadmissibility arguments the respondent referred to T760/08 and T220/83.

In T760/08 a contradiction existed between the features actually present in the characterising portion of the claim and those held to be present according to the arguments of the proprietor. This however has no bearing on the present case in which two different

versions of a claim are presented, one of which being identifiable as containing an error of omission. In T220/83 the appeal was found inadmissible due to a failure to adequately substantiate why a prior art document deprived the claims of an inventive step. This again is not decisive for the present case in which two differing claims for a single auxiliary request were presented.

1.4 The appeal is thus found to be admissible.

2. Main request

2.1 Claim 1 of the main request lacks clarity (Article 84 EPC 1973).

2.2 Claim 1 is directed to a product, specifically a glove, which in addition to physical features of the product is characterised by a number of features relating to the process by which the product is manufactured. One of these process features reads:

'applying a thermoactivable glue pattern made up of polyurethane glue dots having a diameter comprised between 0.1 mm and 2 mm and a density comprised between 10 dots/cm^2 and 200 dots/cm^2 in a discontinuous manner onto a surface of said sheath'.

The claim notably fails to specify the nature of the applied glue pattern in the finished glove, rather specifying only its characteristics at the time of application. The claim does not state which form the glue would have in the finished glove, nor is it clear for a skilled person how such a process feature could be identified in the product as such. This is particularly the case since the glue utilised in the

patent is suitable for application through spraying (see col. 2, lines 14-15) and thus must exhibit a low viscosity. Such a low viscosity glue, once applied to the semimanufactured product and brought into contact with the sheath, would spread on application of pressure in the autoclave. Appreciable deformation of the applied glue dots would thus be observable in the finished glove.

The above feature relating to the application of glue cannot therefore be considered as a feature characterising the finished glove in a clear manner since the glue dot diameter and density, defined in the claim at the time of glove manufacture, would be appreciably different in the finished glove.

2.3 Claim 1 thus lacks clarity (Article 84 EPC 1973) and the main request is not allowable.

3. Auxiliary request 1

3.1 Claim 1 of auxiliary request 1 also lacks clarity (Article 84 EPC 1973).

3.2 Claim 1 comprises a large number of process steps which are presented in an incoherent chronological order leading to an incoherence of the claim as a whole. Merely one such process step, amongst several in claim 1, concerns the semimanufactured product being supported on a shaped support; features appearing to relate to this are recited, using only slightly differing wording, twice in the claim: firstly in lines 6-7; secondly in line 20. On each occasion, 'a' shaped support is claimed, such that it is unclear whether the second recitation of the expression 'shaped support' (in line 20) in fact refers to the same shaped

support recited in lines 6-7 or perhaps refers to a further shaped support. This lack of clarity is not resolved within the claim. Notably the appellant also presented no arguments in support of the clarity of this claim at oral proceedings.

3.3 Since claim 1 lacks clarity (Article 84 EPC 1973), auxiliary request 1 is not allowable.

4. Non-admittance of auxiliary request 2

4.1 The subject-matter of claim 1 fails to meet the requirement of Article 123(3) EPC.

4.2 It can be accepted for the present case, that with claim 1 as granted being directed specifically to a glove, the protection conferred by that claim as granted thus extended also to at least a method of manufacturing that glove.

Regarding the present claim 1, however, and noting that claim 1 is actually directed to 'a process for producing a glove ...' (i.e. suitable for producing a glove), it is apparent that the protection conferred by this claim is in fact not at all restricted just to producing a glove. Furthermore the three process steps comprised in the claim are also not specifically restricted to producing a glove, rather are more broadly worded. It thus follows that claim 1 extends, in its broadest scope, to a process suitable for producing items other than just a glove such that the protection conferred by the claim indeed extends beyond that of claim 1 as granted, contrary to the requirement of Article 123(3) EPC.

4.3 The appellant's argument that claim 1 was restricted specifically to producing the glove of granted claim 1 and so did not extend the protection conferred relative to claim 1 as granted is not accepted. The language in claim 1 'a process for producing a glove' is to be interpreted as a process suitable for producing a glove and so is not specifically restricted to producing a glove but can include, as identified in paragraph [0013] of the patent, a process for producing footwear and clothing items. There are furthermore no method steps present in claim 1 which restrict the scope of protection specifically to the manufacture of a glove.

4.4 Since the subject-matter of claim 1 would not meet the requirement of Article 123(3) EPC, the Board exercised its discretion under Article 13(1) RPBA not to admit the request into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. H. A. Patin M. Harrison

Decision electronically authenticated