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**Datasheet for the decision
of 13 September 2017**

Case Number: T 0634/15 - 3.3.06

Application Number: 07012481.3

Publication Number: 1852548

IPC: D06N3/00, B29C41/14, B29C41/22,
B29C41/20, A41D31/00

Language of the proceedings: EN

Title of invention:
Polymeric garment material

Patent Proprietor:
ATG Ceylon (Private) Limited

Opponents:
01) Midas Safety Inc.
02) Kimberly-Clark Worldwide, Inc.
03) Ansell Healthcare Products LLC
04) Showa Glove Co.

Headword:
Garment material with a layer of coagulated foam / ATG Ceylon
(Private) Limited

Relevant legal provisions:
EPC Art. 123(2)

Keyword:

Amendments (all claim requests) - not allowable: extension beyond the content of the application as filed

Decisions cited:

Catchword:



Beschwerdekammern
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Chambres de recours

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Case Number: T 0634/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 13 September 2017

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 21 January 2015
revoking European patent No. 1852548 pursuant to
Article 101(3)(b) EPC.**

Composition of the Board:

Chairman G. Santavicca
Members: P. Ammendola
C. Vallet

Summary of Facts and Submissions

- I. This appeal lies from the decision of the Opposition Division to revoke European patent no. 1 852 548.
- II. The patent had been granted on the basis of application 07 012 481.3 (herein below **the application**).
- III. During the opposition proceedings the Patent Proprietor filed with letter of 7 March 2011 a set of amended claims labelled as Main Request, claim 1 of which read as follows:

"1. A garment or garment material comprising a substrate and a layer of porous coagulated foam polymeric material, which penetrates at least partially the substrate, characterized in that the outer surface of the layer of coagulated polymeric material has a porous surface and a film skin is not formed on the outer surface of the coagulated polymeric material."

- IV. In its decision (see reason 2.2) the Opposition Division found, *inter alia*, that the feature of claim 1 of the Main Request reading

"a film skin is not formed on the outer surface of the coagulated polymeric material" (herein below this feature is referred to as "**the no-film-skin feature**")

had no basis in the application as originally filed and thus did not comply with Article 123(2) EPC.

In particular, it was found that the application as originally filed only disclosed a specific process for

manufacturing garments or garment materials (herein below the term **garment materials** is used to indicate also garments) that required no formation of a film skin (on an intermediate product) as well as several other operational features (see paragraph "(i)" in reason 2.2 of the decision).

As also the other versions of claim 1 according to the then pending Auxiliary Requests did not meet the requirements of Article 123(2) EPC) for the same reason, the patent was revoked.

- V. With the statement setting out the grounds of appeal the Patent Proprietor (herein below Appellant) filed two sets of amended claims labelled as **Main Request** and **First Auxiliary Request**.

Claim 1 of the Main Request is identical to that of the Main Request decided upon by the Opposition Division (see III, *supra*).

Claim 1 of the First Auxiliary Request reads as follows (the amendments with respect to claim 1 of the Main Request are made apparent):

*"1. A garment or garment material comprising a substrate and a layer of porous coagulated foam polymeric material, which penetrates ~~at least~~ partially **but not fully** the substrate, characterized in that the outer surface of the layer of coagulated polymeric material ~~has a~~ **is** porous ~~surface~~ and a film skin is not formed on the outer surface of the coagulated polymeric material."*

Still in the statement setting out the grounds of appeal, the Appellant argued that each version of claim

1 according to these claim requests had a basis in the application as originally filed. In particular, the first paragraph at point 2 of the statement setting out the grounds reads as follows:

"The opposition division concluded that the lack of a film skin on the surface of the polymeric material is described in the specification as filed as only a step in the process of the manufacture of the final product. However it is submitted that, from reading the specification as a whole, this is clearly not the case. Page 12 lines 19 to 23 describe how partial coagulation of the foam layer is allowed leaving an uncoagulated layer on the top. It is stated specifically that, at that point, there is no film skin on the foam layer. The next step, as described on page 12 lines 25 to 31 is that *"the outer layer of excess, uncoagulated foam is removed from substantially the whole area"*. Clearly if the uncoagulated foam is removed, all that will be left is coagulated foam, and that cannot skin over, regardless of how much coagulant is left in the foam layer. It is therefore the inevitable result of carrying out the method as described that the finished product will have no film skin formed on its outer surface."

VI. Opponents (herein below Respondents) 1, 2 and 4 submitted instead that the passage in the application as originally filed, invoked by the Appellant, provided no basis for the no-film-skin feature of the present versions of claim 1 substantially for the same reasons indicated by the Opposition Division, including the argument discussed in paragraph "(i)" in reason 2.2 of the decision (see IV, *supra*), i.e. *inter alia* also because these versions of claim 1 imposed no limitation

as to how the claimed garment material had been made, whereas the passage on page 12, lines 19 to 31, of the application was part of the disclosure of the specific process for manufacturing garment materials that required no formation of a film skin (on an intermediate product) together with several other operational features.

- VII. The Parties were summoned to oral proceedings to be held on 13 September 2017.
- VIII. With letter of 19 July 2017 the Appellant announced its absence at the forthcoming oral proceedings.
- IX. In a communication dated 27 July 2017 the Board expressed its preliminary opinion that none of the versions of claim 1 on file appeared to comply with Article 123(2) EPC. The section "VII" of this communication reads:

"In the Board's preliminary opinion, the Patent Proprietor's submissions appear not convincing for substantially the same reasons given in the decision under appeal, reasons also repeated by the Opponents in their written submissions.

For instance, the original description at page 12, lines 19 to 31, of the application as filed - referred to by the Patent Proprietor at point 2 of the statement of grounds of appeal as the basis for the feature in claim 1 of both requests on file reading: "*a film skin is not formed on the outer surface of the coagulated polymeric material*" - manifestly appears to be part of the description of the whole process depicted in Figure 3. However, the original description of this process also

comprises a number of further process features (see at point 2.2, page 7, lines 16 to 25, of the decision under appeal). Thus, the original disclosure relating to such process may at most implicitly render available to its skilled reader those sorts of garments or garment materials with a layer of coagulated foam polymeric material that are the inevitable result of all the originally disclosed features of the process of Figure 3. On the contrary, both versions of claim 1 on file appear not limited to the sorts of garments or garment materials that are obtainable by the process of Figure 3, but rather to embrace any kind of garment or garments materials with a layer of coagulated foam polymeric material in which "*a film skin is not formed on the outer surface of the coagulated polymeric material*". Hence, if only for this reason, both versions of claim 1 on file appear objectionable in view of Article 123(2) EPC."

- X. No written submission was filed by the Appellant after this communication.
- XI. Respondents 2 to 4 (Opponents 2 to 4) announced in writing their absence at the then forthcoming hearing.
- XII. The oral proceedings took place on 13 September 2017 in the announced absence of the Appellant and of Respondents 2 to 4. Only Respondent 1 (Opponent 1) was represented.
- XIII. The Appellant (Patent Proprietor) requested in writing that the decision under appeal be set aside and the patent be maintained on the basis of the claims of the

Main Request or alternatively of the First Auxiliary Request.

The Respondents (Opponents 1 to 4) requested that the appeal be dismissed.

Reasons for the Decision

Main Request

1. Non compliance of claim 1 with Article 123(2) EPC.

The Opposition Division has found claim 1 of the Main Request objectionable, *inter alia*, in view of Article 123(2) EPC, *inter alia*, because the application as originally filed and, in particular, the disclosure therein of a specific garment manufacturing process did not provide any basis for a garment material with the no-skin-film feature (see IV, *supra*).

- 1.1 The Appellant disputes this finding in the first paragraph of point 2 of the statement setting out the grounds of appeal (also reported verbatim at V, *supra*). In its submissions it exclusively refers to the disclosure relating to the manufacturing process at page 12, lines 12 to 31, of the application as originally filed. Hence, and since no other portion of the application even mention a "*film skin*", it is apparent that this is also the only original disclosure that the Board needs to take into consideration for the point at issue.

- 1.1.1 The passage at page 12, lines 12 to 31, of the application as originally filed (herein below **the referred to passage**) reads:

"This period is controlled so that the underside of the foam layer that is in contact with the substrate 32 coagulates, but the outer part of the foam layer does not coagulate. Therefore, a film skin is not formed on the outer surface of the foam layer. The foam layer has a thickness in the range 0.5 - 1.5 mm.

At step 230 the outer layer of excess, uncoagulated foam 38 is removed from substantially the whole area of the foam layer on the substrate 32. This may be done by directing one or more sprays of water 40 at the substrate 32. The water is directed at the substrate 32 via one or more nozzles 42. Each spray of water 40 has a pressure in the range 1-4 bar (1×10^5 - 4×10^5 N/m²). The spraying process lasts for about 5-20 seconds."

- 1.1.2 According to the Appellant's line of argument, this paragraph, by explicitly disclosing an intermediate step in which a film skin is not formed on an intermediate product of the manufacturing process, also necessarily implied (as an "inevitable result") no formation of a film skin on the coagulated polymeric layer in the final garment material.

- 1.2 The Board has however found immediately apparent that the referred to paragraph cannot possibly provide a basis for the no-film-skin feature of claim 1 for reasons (given below) that are independent as to whether the Appellant's line of argument is found convincing or not.

Hence, the following reasons are given assuming, *arguendo*, for the sake of an argument in favour of the Appellant, that the referred paragraph necessarily implies no formation of a film skin not only on an intermediate product (as explicitly disclosed) but also on the coagulated polymeric layer in the final garment material.

1.3 The Board notes that, as already explicitly stressed in "(i)" of the reason 2.2. of the decision under appeal, in the referred to passage the no formation of a film skin "... is disclosed in relation to step 228 of partial coagulation of the foam (p 12/1 8-22), which is one of the steps of the whole process of fig. 3 and further specified in the description on p 8/1 20 - p 15/1 6. According to this teaching not only the no formation of a film skin but also other features are necessary to carry out the process of the invention. In this respect, step 222 requires that the foam has a density in the range 15-35% (p. 11/1 8-9) and contains stabilisers and curatives (p 11/1 17-18), in step 228 only a partial coagulation takes place (p 12/1 19-21), removal of the excess of foam is made by directing fluid at the substrate (p 14/1 18-19) and the polymeric layer must have a certain thickness (p 12/22-23; p 14/1 20-21; p 15/1 1-2)."

1.3.1 It is thus immediately apparent to the Board that the invoked disclosure in the application as originally filed, to which the referred to passage belongs, only renders available certain sorts of garment materials, namely, the garment materials that are actually obtainable by the described manufacturing process. This implies, for instance, that this disclosure only makes available to the skilled reader those garments

materials wherein the layer of coagulated polymeric material have a specific thickness (i.e. that described at page 15, lines 1 to 2, for the dried layer), apparently also in consequence of the specific thickness of the foam layer from which the layer of coagulated polymeric material derives (see page 12, lines 22 - 23).

- 1.3.2 On the contrary, as also already indicated in the decision under appeal (see in "(i)" of the reason 2.2 the sentence immediately following the part already reported verbatim at 1.3, *supra*, sentence which reads "However, none of these other features are present in claim 1"), claim 1 at issue neither explicitly mentions nor necessarily implies features limiting the subject-matter to those garment materials obtainable by the manufacturing process disclosed in the application as originally filed. For instance, claim 1 at issue imposes no limitation as to the thickness of the layer of coagulated polymeric material.

1.4 Hence, the Board concludes that, as already stated in the Board's communication, "...the original disclosure relating to such process may at most implicitly render available to its skilled reader those sorts of garments or garment materials with a layer of coagulated foam polymeric material that are the inevitable result of all the originally disclosed features of the process of Figure 3. On the contrary, both versions of claim 1 on file appear not limited to the sorts of garments or garment materials that are obtainable by the process of Figure 3, but rather to embrace any kind of garment or garments materials with a layer of coagulated foam polymeric material in which *"a film skin is not formed on the outer surface of the coagulated polymeric material."* (see IX, *supra*).

1.4.1 Thus, the Board concurs with the finding at point 2.(i) of the decision under appeal that the no-film-skin feature finds no basis in the disclosure of the garment manufacturing process described in the application as originally filed.

1.5 If only for this reason, the Board therefore comes to the conclusion that the subject-matter of claim 1 according to the Main Request at issue is objectionable in view of Article 123(2) EPC and, consequently, that the Main Request is not allowable.

First Auxiliary Request

2. The admissibility of the First Auxiliary Request into the proceedings is not in dispute.

3. As the no-film-skin feature is identically present also in claim 1 of the First Auxiliary Request and since also this claim is not limited to the garments

materials obtainable by the garment manufacturing process disclosed in the application as filed to which the referred to paragraph relates, also the subject-matter of claim 1 according to the First Auxiliary Request is found objectionable in view of Article 123(2) EPC, for the same reasons given above for claim 1 of the Main Request. Thus, also the First Auxiliary Request is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Rodriguez Rodriguez

G. Santavicca

Decision electronically authenticated