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**Datasheet for the decision  
of 25 April 2019**

**Case Number:** T 0802/15 - 3.2.06

**Application Number:** 08729862.6

**Publication Number:** 2150385

**IPC:** B28B3/20, D04H1/00

**Language of the proceedings:** EN

**Title of invention:**

SPUNLAID FIBERS COMPRISING COATED CALCIUM CARBONATE, PROCESSES  
FOR THEIR PRODUCTION, AND NONWOVEN PRODUCTS

**Patent Proprietor:**

Imerys Pigments, Inc.

**Opponents:**

Schaefer Kalk GmbH & Co. KG  
OMYA International AG

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)  
RPBA Art. 13(1)

**Keyword:**

Amendments - added subject-matter (yes)

Late-filed auxiliary requests - request clearly allowable (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 0802/15 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 25 April 2019**

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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
19 February 2015 concerning maintenance of the  
European Patent No. 2150385 in amended form.

**Composition of the Board:**

**Chairman** T. Rosenblatt  
**Members:** M. Hannam  
E. Kossonakou

## **Summary of Facts and Submissions**

- I. An appeal was filed by each of opponent II and the patent proprietor against the interlocutory decision of the opposition division in which it found that European patent No. 2 150 385 in an amended form met the requirements of the EPC. As the two parties are thus both appellant and respondent, for simplicity they will continue to be referred to as 'opponent II' and 'proprietor'.
- II. Opponent II requested that the decision under appeal be set aside and the patent be revoked. The proprietor requested that the decision under appeal be set aside and the patent be maintained according to a main request or, in the alternative, according to one of auxiliary requests 1 to 5.
- III. With letter of 16 November 2015 the proprietor filed a new main request, corresponding to the previous auxiliary request 1 which in turn corresponds to the claims found allowable in the impugned decision, and auxiliary requests 1 to 7 to replace those previously on file.
- IV. With letter of 17 November 2015 opponent II additionally requested that the proprietor's appeal be rejected as inadmissible.
- V. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of each of the main request and the auxiliary requests 1 to 7 appeared not to meet the requirement of Article 123(2) EPC.

VI. With letter of 18 April 2019, opponent I indicated that it would not attend the scheduled oral proceedings. It notably also did not make a substantive submission at any time during the appeal procedure.

VII. Oral proceedings were held before the Board on 25 April 2019 during which the proprietor filed a new auxiliary request 1 to replace all auxiliary requests previously on file. The final requests of the parties were as follows:

Opponent II (hereafter simply 'opponent') requested that the appeal of the patent proprietor be rejected as inadmissible, that the decision under appeal be set aside and the European patent No. 2 150 385 be revoked.

The patent proprietor requested that the opponent's appeal be dismissed (main request) or that the patent be maintained on the basis of the claims of auxiliary request 1 filed at the oral proceedings before the Board.

VIII. Claim 1 of the main request reads as follows:

"A spunlaid fiber comprising at least one polymeric resin and at least one coated filler having an average particle size of less than or equal to 3 microns, wherein the at least one coated filler is coated calcium carbonate and is present in the fiber in an amount ranging from 5 wt% to less than 25 wt%, relative to the total weight of the spunlaid fiber, the at least one coated filler is coated with at least one organic material and the at least one organic material is chosen from fatty acids and salts and esters thereof; wherein the calcium carbonate has a top cut of 15 microns or less; and wherein the calcium carbonate has

a top cut of not more than 100% of the average diameter of the spunlaid fiber."

Claim 1 of auxiliary request 1 reads as follows:

"A spunlaid fiber comprising at least one polymeric resin and at least one coated filler having an average particle size of less than or equal to 3 microns, wherein the at least one coated filler is coated calcium carbonate and is present in the fiber in an amount ranging from 5 wt% to less than 40 wt%, relative to the total weight of the spunlaid fiber, the at least one coated filler is coated with at least one organic material and the at least one organic material is chosen from fatty acids and salts and esters thereof; wherein the calcium carbonate has a top cut of 15 microns or less; and wherein the calcium carbonate has a top cut of not more than 100% of the average diameter of the spunlaid fiber, wherein the at least one coated filler has an average particle size of less than 100% of the average diameter of the spunlaid fiber."

Both the main request and auxiliary request 1 include further independent process claims, the wording of which is however not relevant for the present decision.

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

The subject-matter of claim 1 of the main request meets the requirement of Article 123(2) EPC. It would be clear to the skilled person from the overall disclosure of the application as filed that coated fillers, particularly coated calcium carbonate, was at the heart of the disclosure. The summary of the invention from paragraphs [029] to [031] disclosed exclusively coated

calcium carbonate. 'Coated calcium carbonate' was even a heading given to paragraphs [036] to [044] such that all disclosures therein clearly specifically related to such a filler. Further, the subject-matter of at least twelve originally filed independent claims included coated calcium carbonate thereby underlining that this feature was not untaught or an artificial selection, rather it could and would be understood as an unambiguous feature of the invention as filed. Whilst other fillers were indeed additionally disclosed, there was an abundance of discussion of coated calcium carbonate such that all the references to fillers in paragraph [044] would only be understood by the skilled person as meaning coated calcium carbonate. This was further supported by the examples in the application as filed which disclosed discrete weight percent values of coated calcium carbonate, each falling within the claimed range of 5 wt% to 25 wt%.

As regards auxiliary request 1, this should be admitted as claim 1 met the requirements of Article 83 EPC. Even if the high filler loading of up to 40 wt% resulted in clumps being formed, this did not hinder the skilled person from carrying out the invention.

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

The subject-matter of claim 1 of the main request did not meet the requirement of Article 123(2) EPC. The skilled person would not read the entire description as solely disclosing the filler to be coated calcium carbonate. Paragraph [036], for example, additionally disclosed talc and clay as fillers. Paragraph [042] further disclosed the filler coating to be optional. There was thus no basis for paragraph [044] to be regarded as disclosing coated calcium carbonate



whenever the feature 'filler' was mentioned.

Auxiliary request 1 was not *prima facie* allowable since the filler loading of 40 wt% did not meet the requirement of Article 83 EPC, as already found by the opposition division in its decision.

## **Reasons for the Decision**

### *1. Admissibility of proprietor's appeal*

The Board finds that the proprietor's appeal is admissible. The reasons therefore are however not provided here due to this finding not being relevant in view of the final decision (see below).

### *2. Main request*

#### *2.1 Article 123(2) EPC*

The subject-matter of claim 1 fails to meet the requirement of Article 123(2) EPC.

*2.1.1* The present claim 1 is based on a combination of claims 1, 4 and 5 as granted but with an amendment to the range of coated calcium carbonate present in the fiber to now read 'from 5 wt% to less than 25 wt%'. Lines 9 to 12 of paragraph [044] of the PCT publication (corresponding to the application as originally filed) allegedly provide the end values of the claimed range yet notably disclose the end values solely in relation to 'at least one filler', not in relation to the claimed coated filler. It is particularly noted that of the many embodiments in paragraph [044] disclosing weight percentages of filler relative to the total

weight of the fibres, just one single embodiment with a filler range from 5 wt% to about 40 wt% (in lines 17 to 20) indicates that the filler is coated, all others being silent on this matter. This embodiment moreover specifies neither the claimed composition of the filler nor that of its coating. This stark contrast between a single embodiment to a coated filler and all other embodiments being directed to fillers in general, contrary to the opinion of the proprietor, underlines the absence of a direct and unambiguous disclosure in paragraph [044] for the claimed coated calcium carbonate being present in the fiber in an amount ranging from 5 wt% to 25 wt%.

2.1.2 The proprietor's argument that the application as a whole was essentially directed to coated calcium carbonate fillers and that paragraph [044] would thus only be read by the skilled person in this context is not accepted. The proprietor's particular reference to paragraphs [029] to [031] in this regard is not helpful either, as those paragraphs simply disclose general statements of the invention, each notably including coated calcium carbonate in an amount less than about 40 wt% and therefore with no direct relation to the claimed 5 wt% to 25 wt% range of claim 1. Similarly the proprietor's indication that paragraphs [036] to [044] are entitled 'coated calcium carbonate' does not unambiguously indicate that all fillers disclosed in these paragraphs must be coated. This is exemplified *inter alia* already in paragraph [036] in which talc and clay are disclosed as possible fillers, coated calcium carbonate being presented as a filler 'in one embodiment' i.e. not universally for all embodiments. Paragraph [038], for example, then addresses the particle size of the 'at least one filler' of the invention disclosing a plurality of embodiments each

with a different particle size yet not one indicating that the filler might be coated. From all this the Board concludes that a coated calcium carbonate filler is simply one of the possible embodiments of the invention, possibly even a preferred one, but certainly not unambiguously the sole filler implicitly intended in all the embodiments discussed in the description.

2.1.3 The proprietor's reference to twelve independent claims all directed to coated calcium carbonate also fails to persuade that the patent as a whole can only be read in the context of the filler being coated. It has not been argued that these independent claims provide the basis for the presently claimed subject-matter, yet they also fail to indicate that the application as a whole can only be read in the context of the fillers being coated. The subject-matter of the present claim 1 comprises the coated calcium carbonate weight percent range taken from paragraph [044] of the description which, even in the light of originally filed claims being directed to coated calcium carbonate, does not unambiguously lead to the paragraph being read solely in such a context.

2.1.4 Regarding the proprietor's argument that the present claim 1 resulted from a combination of claims 1, 2, 5, 25 and 31 as filed in combination with the coated calcium carbonate range coming from paragraph [044], this is also not accepted. Notwithstanding the lack of basis from paragraph [044] for the claimed calcium carbonate range, the claims cited as basis are not multiply dependent one on another such that their combination into a single claim lacks a direct and unambiguous basis in the application as filed.

2.1.5 As regards the proprietor's argument that the examples in the application as filed disclosed discrete weight percent values of coated calcium carbonate, each falling within the claimed range of 5wt% to 25wt% and thus indicating that the application was unambiguously directed just to coated calcium carbonate as a filler, this is not accepted. Examples disclosed in the description offer nothing more than concrete indications of how the claimed invention may be carried out; the examples generally should therefore fall within the scope of the claims. The examples however generally do not provide a basis for a general teaching in which the basis for claimed subject-matter can be found. In the present case, whilst indeed disclosing discrete coated calcium carbonate weight percent values, the examples provide no unequivocal indication that the patent as a whole is directed solely to coated calcium carbonate fillers nor do they provide a direct and unambiguous basis for the claimed weight percent range of coated calcium carbonate.

2.1.6 The Board thus concludes that the feature of claim 1 regarding the coated calcium carbonate being present in the fiber in an amount ranging from 5 wt% to less than 25 wt% relative to the total weight of the spunlaid fiber lacks a direct and unambiguous basis in the application as filed. As a consequence, at least for this reason, the subject-matter of claim 1 fails to meet the requirements of Article 123(2) EPC. The main request is thus not allowable.

3. *Auxiliary request 1*

3.1 *Admittance*

3.1.1 Having been filed at oral proceedings, the admittance of this request is at the discretion of the Board (Article 13(1) of the Rules of Procedure of the Boards of Appeal, RPBA). One requirement placed on any request filed at such a late stage in the appeal procedure is that, at least in the interest of procedural economy, the new claims should be clearly allowable in the sense that they overcome all outstanding objections and that they do not introduce new objections.

3.1.2 In response to the finding to the subject-matter of claim 1 of the main request, claim 1 of auxiliary request 1 has been amended *inter alia* in that the upper limit of the coated calcium carbonate weight percent has been changed to 40 wt%.

3.1.3 The resulting claimed range of 5 wt% to less than 40 wt% was found by the opposition division, in the main request before it, not to comply with the requirements of Article 83 EPC due to the high filler loading of up to 40 wt% resulting in fiber clumps and fiber breakage (see point 3.2 of its decision). With the appeal grounds the proprietor notably did not contest this part of the opposition division's decision. The re-introduction of this claimed range is thus not *prima facie* clearly allowable.

3.1.4 The admittance of this request at this late stage of the proceedings would furthermore require an assessment of whether the requirements of Article 83 EPC were met now for the very first time in the appeal proceedings. The need to consider this matter for the first time at

such a late stage is not procedurally economic.

3.1.5 It thus follows that, not being *prima facie* clearly allowable and requiring Article 83 EPC objections to be considered for the first time at oral proceedings, admitting auxiliary request 1 would be procedurally uneconomic. The Board thus exercised its discretion according to Article 13(1) RPBA not to admit auxiliary request 1 into the proceedings.

4. In the absence of any set of claims complying with the requirements of the EPC, the patent has to be revoked (Article 101(3)(b) EPC).

## Order

### **For these reasons it is decided that:**

1. The decision of the opposition division is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Pinna

T. Rosenblatt

Decision electronically authenticated