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**Datasheet for the decision
of 21 November 2019**

Case Number: T 0229/16 - 3.2.06

Application Number: 10007077.0

Publication Number: 2405040

IPC: D04B1/18, D02G3/40, D03D15/08,
D03D15/00, D03D1/00, D04B21/16

Language of the proceedings: EN

Title of invention:

A penetration-resistant fabric manufacturing method which prevents yarn breakage during the manufacturing process

Patent Proprietor:

Yu, King Yeung

Opponent:

Stretchline Intellectual Properties Limited

Headword:

Relevant legal provisions:

RPBA Art. 13(1), 12(2)
EPC Art. 123(2)

Keyword:

Late-filed request - admitted (no)

Decisions cited:

Catchword:



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Case Number: T 0229/16 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 21 November 2019

Appellant: Yu, King Yeung
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Respondent: Stretchline Intellectual Properties Limited
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 December
2015 revoking European patent No. 2405040
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: M. Dorfstätter
J. Hoppe

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (proprietor) against the decision of the opposition division revoking European patent No. 2 405 040.
- II. In its grounds of appeal, the appellant requested solely that the decision under appeal be set aside and the patent be maintained as granted.
- III. The respondent (opponent) requested that the appeal be dismissed.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated that the grounds for opposition under Article 100(a) EPC and under Article 100(c) EPC appeared to prejudice maintenance of the patent.
- V. With letter of 19 November 2019, the appellant filed a new main request including a new set of claims.
- VI. Oral proceedings were held before the Board on 21 November 2019.
- VII. The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and the patent be maintained in amended form based on the new main request filed on 19 November 2019.

The respondent requested that the appeal be dismissed.

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

"A penetration-resistant fabric manufacturing method which prevents yarn breakage during the manufacturing process, comprising the steps of:

(i) intertwisting a fusible yarn and a support yarn by a two-for-one twister to form an intertwisted yarn, wherein the intertwisted yarn comprises 22.2% by weight of the fusible yarn and 77.8% by weight of the support yarn;

(ii) the intertwisted yarn and an elastomeric yarn are formed into a fabric;

(iii) treating the fabric by heating so that the fusible yarn melts and spreads over the fabric;

(iv) cooling the fabric to form a penetration barrier;

(v) wherein the fabric comprises 22.1% by weight of the intertwisted yarn."

IX. The appellant's arguments relevant to the decision may be summarised as follows:

Although filed very late, the new request should be admitted into the proceedings. The client being based in Hong-Kong, communication had been difficult particularly at the time following receipt of the Board's communication. Furthermore, the amendments had a basis in the original application, both in the dependent claims as well as in several parts of the description, such that the requirement of Article 123(2) EPC was met. The application as a whole referred throughout to particular weight percentages while changes could be made with respect to other features such as, for example, the materials.

- X. The respondent's arguments relevant to the decision may be summarised as follows:

The new main request should not be admitted into the proceedings as it had been filed extremely late and there was no reason why it could not have been filed much earlier. The objections had not changed during the entire proceedings. Moreover, the amendments made did not correspond to subject-matter defined in the claims of the application as originally filed. They also did not have a direct and unambiguous basis in the original description, which only disclosed particular weight-percentages together with further features which had however not been added to claim 1. Claim 1 of the request was thus *prima facie* not allowable.

Reasons for the Decision

1. Admittance of the new main request
 - 1.1 The Board exercised its discretion under Article 13(1) RPBA not to admit the new main request into the proceedings for the reasons given below.
 - 1.2 The new main request was filed after the grounds of appeal, the appeal grounds constituting the appellant's complete case (Article 12(1) and (2) RPBA). According to Article 13(1) RPBA, any amendment to a party's case may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

In order to be in line with the requirement of procedural economy, amendments should be *prima facie* allowable in the sense that they at least overcome the objections raised against previous requests without giving rise to any new ones.

- 1.3 The appellant's argument that the subject-matter of the claims fulfilled the requirement of Article 123(2) EPC because the amendments had a basis in claims 1, 5 and 8 of the application as originally filed is not accepted.

Claim 1 of the new main request is a combination of claim 1 with the features of dependent claims 5 and 7 as granted. However, these dependent claims, and more importantly the corresponding dependent claims 5 and 8 of the original application were each only dependent on claim 1 and not upon each other. There is hence *prima facie* no basis in these claims from which the skilled person can unambiguously derive the subject-matter of claim 1.

- 1.4 The appellant's further argument that the subject-matter of claim 1 of the new main request was also disclosed in the description of the original application is not persuasive either.

- 1.4.1 Contrary to the argument of the appellant, the subject-matter of claim 1 does not correspond to the specific embodiment presented in paragraph [0009] of the published application (EP 2 405 040 A1). Whilst lines 44 and 45 in column 2, cited by the appellant, indeed refer to the weight percentages of the blended yarn together with a two-for-one twister, this has to be read in context with the further features presented in the same paragraph. In particular, lines 50 and 51 refer to the very same yarns but also describe that

they are formed into a fabric of a tubular tape by weaving. Claim 1 of the new main request neither defining a tubular tape nor the step of weaving, paragraph [0009] and the specific fabric manufacturing method described therein therefore cannot *prima facie* form a basis in the original disclosure from which the more general method claimed can be directly and unambiguously derived.

1.4.2 The Board also does not accept the appellant's argument that the weight percentages are disclosed separately from other features in paragraph [0006], column 1, lines 52 and 53 of the published application. Lines 54 and 55 directly thereafter, again describe that "the yarns are formed into a fabric in form of a tubular tape by weaving".

1.4.3 The appellant further argued that paragraph [0007] referred to "the fabric or tubular tape" and that paragraph [0006] and [0009] should consequently be interpreted as referring to a fabric or a tubular tape. The Board however disagrees that a fabric of a general form is disclosed thereby, i.e. one which is not necessarily tubular and not manufactured by weaving, but would nevertheless include the particular weight percentages as now claimed. Paragraph [0007] reads "The fabric or tubular tape may be used for receiving underwire of brassiere, or for other purposes for all tapes." However, it must be noted that it is the preceding paragraph [0005] which refers generally to a fabric, but that paragraph [0006] is the first paragraph to include the weight percentages and this is specifically directed to an embodiment describing weaving the fabric in the form of a tubular tape. Thus, if the term "fabric" is indeed being used as an alternative to the term "tubular tape" in paragraph

[0007] this would logically refer to paragraph [0005], such that nothing in paragraph [0007] can be understood to alter the meaning of paragraph [0006] nor that of paragraph [0009], let alone unambiguously. Furthermore, no alternative to weaving is disclosed nor is it stated that weaving is optional.

- 1.4.4 As regards the appellant's argument that the whole application was directed to the weight percentages but other features could be varied or omitted, this is not persuasive. No basis is apparent for this allegation. The Board sees no difference in the way these particular details (i.e. the weight percentages, the two-for-one twister, the fabric in the form of a tubular tape and the manufacturing by weaving) are presented in the original application. All of these details are described as being part of the same preferred embodiment.
- 1.5 The argumentation of the appellant in view of the difficulties in communication with its client particularly at the time following receipt of the Board's communication cannot alter the Board's finding on *prima facie* allowability of the new request. Nor can it justify why this request was not put forward already when filing the grounds of appeal (i.e. constituting the appellant's complete case in accordance with Article 12(2) RPBA).
- 1.6 As there is *prima facie* no basis in the application as originally filed for a fabric manufacturing method including the limitations in the weight percentages without the step of forming a tubular tape by weaving, the subject-matter of claim 1 of the new main request does not *prima facie* fulfill the requirement of Article 123(2) EPC. The Board thus exercised its

discretion under Article 13(1) RPBA not to admit the new main request into the proceedings.

2. In the absence of any further request submitted by the appellant, the appeal has to be dismissed.

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