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# Datasheet for the decision of 31 March 2022

**Case Number:** T 0248/18 - 3.3.10

**Application Number:** 05713278.9

**Publication Number:** 1725627

**IPC:** C09J107/02, C09D107/02, C08L7/02, B65D33/20, B65D65/14, C08L33/08

**Language of the proceedings:** EN

**Title of invention:**
COHESIVE COATING FOR SNACK FOOD PACKAGING

**Patent Proprietor:**
Bostik, Inc.

**Opponent:**
Henkel AG & Co. KGaA

**Headword:**

**Relevant legal provisions:**
EPC Art. 100(a), 100(c), 114(2)

**Keyword:**
Grounds for opposition - lack of patentability (no)

**Decisions cited:**
T 1345/12, T 0661/09, T 1286/14

**Catchword:**

Europäisches Patentamt
European Patent Office
Office européen des brevets

**Beschwerdekammern**

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**Case Number: T 0248/18 - 3.3.10**

# D E C I S I O N
# of Technical Board of Appeal 3.3.10
# of 31 March 2022

| | |
|---|---|
| **Appellant:** (Opponent) | Henkel AG & Co. KGaA<br>Henkelstrasse 67<br>40589 Düsseldorf (DE) |
| **Representative:** | Viering, Jentschura & Partner mbB<br>Patent- und Rechtsanwälte<br>Hamborner Straße 53<br>40472 Düsseldorf (DE) |
| **Respondent:** (Patent Proprietor) | Bostik, Inc.<br>11320 Watertown Plank Road<br>Wauwatosa, Wisconsin 53226-3413 (US) |
| **Representative:** | Sandersons<br>D2 Knowledge Gateway<br>Nesfield Road<br>Colchester, Essex CO4 3ZL (GB) |
| **Decision under appeal:** | **Decision of the Opposition Division of the European Patent Office posted on 27 November 2017 rejecting the opposition filed against European patent No. 1725627 pursuant to Article 101(2) EPC.** |

**Composition of the Board:**

| | |
|---|---|
| **Chair** | P. Gryczka |
| **Members:** | R. Pérez Carlón |
| | F. Blumer |

## Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division rejecting the opposition against European patent No. 1 725 627.

II. Claim 1 of the patent as granted, which is the respondent's (patent proprietor) main request, reads as follows:

*"A water based cold seal cohesive coating for bonding one or more substrates together to form a flexible package to contain an article, said cohesive coating comprised of the following components:*

*25% to 90% by weight of a natural rubber latex emulsion;*

*10% to 75% by weight of a non-self-crosslinking acrylic emulsion;*

*0.01% to 10% by weight water; and*

*one or more ingredient selected from an anti-foam agent, ammonium hydroxide, a surfactant, an anti-blocking agent, an inert filler, and a conditioning agent;*

*so that in combination the components total 100% by weight of said cohesive coating and wherein the cohesive coating forms a peelable and non-resealable closure for a flexible package, said closure having a cohesive strength of at least 118.11 g/cm after being dried on a substrate for said package at a temperature of above 127°C."*

III. Notice of opposition was filed on the grounds of insufficiency of disclosure (Article 100(b) EPC) and lack of novelty and inventive step (Article 100(a)

EPC).

IV. The documents filed during the proceedings include the following:

D1 GB 1 067 568

The experimental evidence filed includes the following:

Annex I, filed by the appellant with its fax of 25 April 2016

Annex 1, prepared by H. Story and filed by the respondent with its letter dated 22 August 2018

V. This is the second appeal on the case. In T 1345/12, the board concluded that the claimed invention was sufficiently disclosed for it to be carried out by a person skilled in the art. The case was remitted to the opposition division for further examination.

VI. Subsequent to the remittal, the opposition division's conclusions in the decision under appeal were as follows:

The opposition division did not admit the ground of opposition set by Article 100(c) EPC into the proceedings, as it was not *prima facie* relevant.

The prior art did not disclose a coating which formed a closure having the cohesive strength required by claim 1. The claimed coating was thus novel.

Document D1 was the closest prior art. The problem underlying the claimed invention was to provide a cold seal cohesive coating for flexible packaging systems

which could be used at temperatures above 127°C without losing the cohesive strength. The solution, which was characterised by including a non-self-crosslinking acrylic polymer, would not have been obvious to the skilled person and was thus inventive.

VII. The appellant's arguments were as follows:

The ground for opposition set by Article 100(c) EPC should be allowed into the proceedings due to its relevance.

Examples 1 and 4 of document D1 and paragraphs [0054] and [0055] disclosed coatings having the composition required by claim 1, which for this reason was not novel. The functional features of claim 1, namely "*wherein the cohesive coating forms a peelable and non-resealable closure for a flexible package, said closure having a cohesive strength of at least 118.11 g/cm after being dried on a substrate for said package at a temperature of above 127°C*" were mere "desiderata" and should therefore be ignored in examining inventive step. Document D1 was the closest prior art. The technical problem defined by the opposition division, namely to provide a cold seal cohesive coating for flexible packaging systems which formed peelable and non-resealable closures and could be used at temperatures above 127°C without losing the cohesive strength, was not solved in view of the breadth of the claim and the available experimental data. The desiderata in claim 1 would have been obvious to the skilled person, who would have sought an adhesive that could withstand higher temperatures; the threshold of cohesive strength set by claim 1 was merely arbitrary. In the absence of a technical effect, the claimed

subject-matter was not inventive.

VIII. The respondent's arguments were as follows:

The opposition division had made correct use of its discretion in not admitting the fresh ground for opposition under Article 100(c) EPC into the proceedings. This decision should not be reversed by the board.

Neither D1 nor D2 disclosed coatings which led to closures having the cohesive strength required for the subject-matter of claim 1, which was novel for this reason alone.

Document D1, which was the closest prior art, did not disclose a coating containing a non-self-crosslinking acrylic emulsion. In addition, D1 related to resealable coatings and was silent on the cohesive strength of the closures. The problem underlying the claimed invention was to provide cohesive coating compositions for forming peelable and non-resealable closures which avoided seal deadening at high temperatures. The skilled person would not have considered the teaching of D1 or D2 in this respect, as these concerned peelable, resealable closures. The claimed coating was thus inventive.

IX. The board informed the parties in a communication dated 12 August 2020 that it was inclined to conclude that the opposition division had correctly used its discretion not to admit the ground of opposition set by Article 100(c) EPC into the proceedings, that the claimed subject-matter was novel and that it involved an inventive step.

X. Oral proceedings before the board of appeal took place on 31 March 2022 in the form of a videoconference. At the oral proceedings, the respondent did not maintain its request that the proceedings be postponed so that they could be carried out in person.

XI. The final requests of the parties were as follows:

The appellant requested that the decision under appeal be set aside and that European patent No. 1 725 627 be revoked.

The respondent requested that the appeal be dismissed, or alternatively that the patent be maintained with the claims of one of the first to eighth auxiliary requests, all filed with the reply to the grounds of appeal.

XII. At the end of the oral proceedings, the decision was announced.

## Reasons for the Decision

1. The appeal is admissible.

2. **Ground for opposition under Article 100(c) EPC**

2.1 This ground for opposition was invoked after expiry of the nine-month period set by Article 99(1) EPC. The opposition division disregarded it using its discretion under Article 114(2) EPC, for the reason that it was late and not *prima facie* relevant.

2.2 The appellant requested that this ground be admitted, as it was clearly prejudicial to maintenance of the

patent as granted.

2.3 It is established case law that *prima facie* lack of relevance is a criterion for not admitting a late-filed ground of opposition. The opposition division provided reasons why the objection raised by the opponent was, in its view, not *prima facie* relevant. For this reason alone, the board concludes that the opposition division made correct use of its discretion and sees no reason to revise that discretionary decision (Case Law of the Boards of Appeal, 9th Ed. 2019, V.A.3.5.5, and in particular reference to T 1286/14 on page 1205). The appellant's request thus cannot be allowed.

3. **Novelty**

3.1 The appellant argued in the written procedure that examples 1 and 4 of D1 and paragraphs [0054] and [0055] of D2 disclosed coatings according to the claimed invention, which for this reason was not novel.

It did not allege that D1 and D2 explicitly disclosed the bond strength required by claim 1, or that the coatings were non-resealable.

It argued, however, that these features related merely to "desiderata" or results to be achieved by the claimed invention and should thus be disregarded. A composition containing the components required by claim 1 inevitably formed a peelable and non-resealable closure and had the required cohesive strength. This was also the conclusion of the previous decision on the case, T 1345/12.

The compositions of D1 and D2, having the components required by claim 1, were thus indistinguishable from

the claimed coating.

3.2 However, it has already been decided in the first decision T 1345/12 in this case that the claimed coating is defined both by compositional features and, additionally, functionally by the result to be achieved (Reasons 2.1 and 2.2). Not every composition having the components required by claim 1 inevitably has the functional features defined therein. Only a composition meeting both conditions is thus in accordance with claim 1.

In the absence of evidence showing that the compositions of D1 and D2 inevitably meet the functional features required by claim 1, the board concludes that the claimed coating is novel (Article 54(2) EPC).

4. **Inventive step**

4.1 The invention underlying the patent seeks to provide a water based cohesive coating which can be used in combination with so-called "extreme dryers" operating at temperatures above the critical temperature for initiating crosslinking, which is 127°C, see paragraph [0004] of the patent. Previously-known coatings contained materials susceptible of crosslinking, which became tougher at that temperature, leading to what is commonly known as "seal deadening". This was common ground.

4.2 Claim 1 relates to a water based cold seal cohesive coating having defined relative amounts of a natural rubber latex emulsion, a non-self-crosslinking acrylic emulsion, water and at least one further ingredient. In addition, the coating forms a peelable and non-

resealable closure for a flexible package. Lastly, the closure should have a cohesive strength of at least 118.11 g/cm after being dried on a substrate at a temperature above 127°C.

4.3 Closest prior art

Both parties agreed with the opposition division that D1 was the closest prior art. The board sees no reason to differ.

4.4 The parties were, however, divided as to what features distinguished the claimed invention from the coatings of examples 1 and 4 of D1.

4.4.1 The appellant argued that the functionally defined features, which required a closure formed from the claimed coating to be non-resealable and to have a cohesive strength over 118.11 g/cm, could not limit the claimed subject-matter. These properties were inevitably achieved by a composition having the components required by claim 1. This was in line with the board's conclusion in T 1345/12.

However, according to T 1345/12, the claimed coating must not only have the components required by claim 1, but also the features functionally defined therein (Reasons 2.2). There is thus no reason to disregard the functionally defined features (see point 3. *supra*).

4.4.2 D1 explicitly discloses coatings for resealable closures (page 2, lines 31 to 42). The appellant argued that the coating of example 1 was nevertheless non-resealable, since it discloses that "when the bond is broken the rubber in the coating breaks off short, i.e. it does not stretch; this was due to the

terpolymer" (page 2, lines 79 to 82, in the context of example 1).

However, a similar statement can also be found in the general part of document D1 on page 1, lines 32 to 39. It explains in fact that the polymer in the rubber prevents it from stretching when the bond is broken. This effect applies, in general, to the closures of D1, which are explicitly disclosed as resealable (page 2, lines 39-42). The quoted sentence thus does not disclose example 1 as a non-resealable closure, as argued by the appellant.

4.4.3 The respondent argued that the coatings of D1 did not contain a non-self-crosslinking acrylic emulsion, and that said emulsion was therefore a distinguishing feature of the claimed invention.

The appellant argued that "Tenaxatex 3001/A" had the monomers disclosed in paragraph [0023] of the patent and lacked bifunctional monomers necessary for self-crosslinking (D1, page 2, lines 67 to 70, in the context of example 1). It was thus inevitably a non-self-crosslinking acrylic emulsion.

In the appellant's favour, the board will examine the claimed coating on the assumption that D1 discloses a composition comprising a non-self-crosslinking acrylic emulsion as required by claim 1. As the board's conclusion is that the claimed subject-matter is inventive even given this assumption, it is not necessary to elaborate further on this point.

4.4.4 The board thus concludes that the claimed subject-matter differs from the disclosure of D1 at least by virtue of the required cohesive strength and non-

resealable properties of the closure formed from the claimed coating.

4.5 Technical problem underlying the invention

The technical problem underlying the claimed invention is seen as providing a water-based peelable coating for flexible packages.

4.6 Solution

The solution to this technical problem is the claimed coating, characterised in that

- it forms closures having a cohesive strength of at least 118.11 g/cm after being dried on a substrate for said package at a temperature of above 127°C, and
- it is cohesive and forms a non-resealable closure.

4.7 Success

The claimed coating necessarily solves the problem of providing a water based peelable coating for flexible packages, as only that type of coating is in accordance with claim 1 due to the functionally defined feature "wherein the cohesive coating forms a peelable and non-resealable closure for a flexible package".

4.8 It thus remains to be decided whether the proposed solution to the objective problem defined above would have been obvious to the skilled person in view of the prior art.

4.8.1 Document D1 discloses compositions comprising the components required by claim 1. The coatings formed with them are, however, resealable.

D1 does not provide any indication that a composition having these components could also form non-resealable coatings. Such an indication cannot be found in any of the available pieces of prior art either.

The claimed solution is thus inventive for this reason alone.

4.8.2 With reference to the experimental data filed as Annex I with its fax of 25 April 2016, the appellant argued that there was no plausible connection between the components of the coating and the desired result, required by the functionally defined features. The distinguishing features were nothing other the technical effect sought, in the form of desiderata. It referred in this respect to T 661/09. As the distinguishing features were nothing other than the effect sought, they were unsuitable for establishing inventive step.

The case underlying T 661/09 related to a claim including features that the board termed "desiderata", lacking any concrete measures as to how these features were to be achieved. The board argued that said properties remained at an abstract or conceptual level. The board, however, did not ignore these features, as requested by the appellant, but examined whether they would have been obvious to a skilled person (Reasons 2.3 to 2.6).

The distinguishing features of claim 1, expressed in functional terms, can be put into practice as proven by the experimental report filed by the appellant itself (Annex I), by that provided by the respondent (Annex 1), and as concluded by the board in T 1345/12.

In addition, the appellant's experimental data in fact show that the effect sought is not the inevitable result of the composition features but a further, independent, requirement of the claimed coating. The data also shows that the required cohesive strength can be achieved.

The issue is therefore whether the type of closure required by claim 1 in combination with the composition features known from D1 is obvious in view of the prior art. The board concluded that this would not have been the case, lacking any indication in the prior art.

4.8.3 The appellant also submitted arguments with respect to the cohesive strength. It argued that none of the examples were dried at the temperature required by claim 1. It also argued that it was well-known that the cohesive strength should be as high as possible. The cohesive strength, furthermore, depended on a number of variables, which were not features of claim 1.

The board arrived at the conclusion that the claimed subject-matter is inventive even disregarding this part of the claimed solution. It is for this reason not required to elaborate on this point.

4.8.4 The claimed coating is thus inventive within the meaning of Article 56 EPC.

5. None of the grounds for opposition raised pursuant to Article 100 EPC precludes maintenance of the patent as granted.

**Order**

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

The appeal is dismissed.

The Registrar: The Chair:

C. Rodríguez Rodríguez P. Gryczka

Decision electronically authenticated