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**Datasheet for the decision
of 11 September 2024**

Case Number: T 1640/22 - 3.3.05

Application Number: 07729492.4

Publication Number: 2029497

IPC: C03C17/02, C03C17/00, C03C8/16

Language of the proceedings: EN

Title of invention:
COATED GLASS SHEET

Patent Proprietor:
AGC Glass Europe

Opponent:
Ferro Corporation

Headword:
Glass sheet/AGC

Relevant legal provisions:
EPC Art. 83, 99(1), 111(1), 123(2)
EPC R. 134(1), 134(2)
RPBA 2020 Art. 11

Keyword:

Opposition deemed to have been filed - notice in time (yes)
Amendments - extension beyond the content of the application
as filed (no)
Sufficiency of disclosure - main request (yes)
Remittal - special reasons for remittal (yes)
Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

J 0001/81, J 0010/20, T 0702/89

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1640/22 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 11 September 2024

Appellant: AGC Glass Europe
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Respondent: Ferro Corporation
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 May 2022
revoking European patent No. 2029497 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman E. Bendl
Members: T. Burkhardt
S. Fernández de Córdoba

Summary of Facts and Submissions

I. The patent proprietor's (appellant's) appeal lies from the opposition division's decision to revoke European patent No. 2 029 497 B1.

II. Of the documents discussed at the opposition stage, the following one is relevant to the present decision:

D16 Email from EPO customer services dated
12 May 2020

III. The opposition division held, *inter alia*, that neither the main request then on file nor auxiliary requests 1 to 3 then on file met the requirements of Article 83 EPC.

IV. Claim 1 of the main request submitted with the reply to the notice of opposition (current main request) reads as follows:

"1. Glass sheet having a coating comprising enamel provided on at least part of its surface characterised in that the enamel comprising a powder made of a glass frit, pigments and a medium comprising acrylic resins, the enamel precursor being curable under infrared rays, the coating being dried at temperature between 100 and 300°C, and the contact angle between a demineralized water droplet and the dried coating at a portion of the glass sheet carrying the coating is greater than 80°."

Dependent claims 2 to 6 relate to specific embodiments.

- V. The arguments put forward by the appellant during the appeal proceedings which are relevant to the present decision can be summarised as follows:

The opposition was not admissible.

The case should be remitted to the department of first instance for consideration of novelty and inventive step.

- VI. The arguments put forward by the opponent (respondent) during the appeal proceedings which are relevant to the present decision can be summarised as follows:

The main request met neither the requirements of Article 123(2) EPC nor those of Article 83 EPC.

- VII. In its notice of opposition, the respondent referred to the "Notice from the EPO dated 18 January 2018 concerning the safeguards available under the EPC and the PCT in case of unavailability of means of electronic communication" (OJ EPO 2018, A25). In the following, this document will be designated **D35**.

- VIII. With its reply to the grounds of appeal, the respondent submitted the following document:

D34 "Notice from the European Patent Office dated 1 May 2020 concerning the disruptions due to the COVID-19 outbreak", OJ EPO 2020, A60

- IX. After the initial phase of the appeal proceedings, the appellant submitted auxiliary request 4.

- X. In a communication under Article 15(1), the board shared its preliminary view that

- the main request met the requirements of Articles 123(2) and 83 EPC,
- the case was to be remitted to the department of first instance for further prosecution.

XI. In response, the appellant withdrew its request for oral proceedings provided that the board stayed with its preliminary opinion.

The respondent announced that it would not file a response to the board's communication and would not be attending the oral proceedings already scheduled.

The board then cancelled the oral proceedings.

XII. The appellant requested that the decision under appeal be set aside (i.e. that the patent be maintained in amended form on the basis of the main request submitted with the reply to the notice of opposition).

Alternatively, it requested that the patent be maintained in amended form on the basis of

- one of auxiliary requests 1 and 2, submitted during opposition proceedings by letter of 7 July 2021
- auxiliary request 3, submitted during opposition proceedings by letter of 8 December 2021
- auxiliary request 4, submitted at the appeal stage by letter of 17 July 2023.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. Notice of opposition

- 1.1 It has not been contested that the respondent submitted its notice of opposition during the COVID-19 pandemic after the nine-month period specified in Article 99(1) EPC.

The appellant argues that the opposition was not admissible. While the "[n]otice from the European Patent Office dated 1 May 2020 concerning the disruptions due to the COVID-19 outbreak" (D34) related to Rule 134(2) EPC, it did not justify the late filing because the notice only applied to "parties and their representatives". Prior to the filing of the notice of opposition, however, the opponent was not a party to the proceedings.

- 1.2 However, for the reasons set out below, the opposition is deemed to have been filed and is admissible.

Rule 134(2) EPC does not indicate that the opposition period of Article 99(1) EPC was an exception.

Although not bound by the Guidelines, the board concurs with section E-VIII, 1.6.2.3, which clarifies that the provisions of Rule 134(2) EPC also apply to "the opposition period under Art. 99(1)".

The term "party" in the case at issue should be given a broad interpretation so that it includes not only persons who are already a party to pending proceedings but also persons who intend to become a party, such as

potential opponents. Only that interpretation appears to be in accordance with the purpose of the provision of Rule 134(2) EPC, which is intended to grant extraordinary relief where, due to general dislocation, users of the EPO system cannot make their submissions in time.

This finding is in line with point 2.1.1 of the reasons of T 702/89, which indicates that Rule 85(2) EPC 1973 (predecessor of Rule 134(2) EPC) also applies to the time limit of Article 99(1) EPC for filing a notice of opposition (reasons 2.1.1), even if in that case the opposition was eventually not admissible because there was no *general* dislocation within the meaning of Rule 85(2) EPC.

Moreover, the respondent was told by the EPO's legal service, with reference to **D35** and J 1/81, that D34 also applied to the time limit for filing an opposition (see email exchange **D16**). In fact, Example 1 of D35 clarifies with reference to J 1/81 (reasons 6) that the provisions of Rule 85(1) EPC 1973 (corresponding to Rule 134(1) EPC) also apply to the opposition period of Article 99(1) EPC.

Email exchange D16 therefore raised legal expectations of the respondent. In the context of the case at issue, these appear to weigh heavier than the appellant's expectations that the nine-month period of Article 99(1) EPC was not prolonged (see J 10/20, reasons 1.17).

The opposition is therefore deemed to have been filed and admissible.

Main request

2. Article 123(2) EPC

The respondent considers that the main request did not meet the requirements of Article 123(2) EPC.

However, for the reasons set out below, this is not convincing.

2.1 "Acrylic resin"

In the respondent's view, claim 1 did not meet the requirements of Article 123(2) EPC since acrylic resins were only disclosed in combination with "crosslinkable elements" in the application as originally filed, on page 6, lines 3 to 12. In fact, "[a]crylic resin" (line 11) exclusively related to the group of "[m]ediums containing crosslinkable elements" (lines 7 to 10), and not to the group of "[o]ther mediums" (line 10), in particular since the term "resins" in the expression "phenolic resins" (line 10) referred back to "acrylic" (line 8).

However, the end of the passage on page 6, lines 6 to 12 of the application as originally filed makes it clear that "[a]crylic resin" is the preferred "medium", irrespective of whether it belongs to the first group "[m]ediums containing crosslinkable elements", to the second group "other mediums" or to both groups.

Moreover, because of a further occurrence of the term "resin" (namely in "amino resins", line 10), the term "resins" in "[...] phenolic resins" does not necessarily relate to "acrylic".

2.2 "Contact angle" for "dried coating"

In the respondent's view, there was no basis in the application as originally filed for the "contact angle" having to be determined for the dried coating.

However, the passage on page 7, line 19 to page 8, line 2 of the application as originally filed clarifies that the angle is measured after drying (see in particular lines 22 and 23). This is confirmed by inventive Example 7 (page 10, lines 24/25).

Admittedly, said passage on page 7 of the application as originally filed discloses angles greater than 75° or greater than 90° but not greater than 80° , but an angle of greater than 80° is disclosed on page 2, lines 21 to 28 as originally filed and there is no indication that the measurement is to be carried out in a different state.

2.3 Contact angle of a portion of the glass sheet

The respondent also disputes that the application as originally filed discloses that the contact angle is determined for a *portion* of the glass sheet.

However, this feature is disclosed in claim 1 as originally filed.

3. Article 83 EPC

According to the decision under appeal (points 18.8 and 18.9), it is an undue burden to test every enamel product to assess whether the angle criterion of claim 1 is met, in particular since the patent in suit

discloses too few structural features of the composition and the coating.

The respondent further argues that Examples 1 to 6 of the patent in suit all resulted in the same contact angle in spite of different process parameters. The contact angle thus primarily depended on the composition of the "medium". However, there was only one inventive example, i.e. Example 7. The composition of TEMPVER 3400 and MEDIUM 3480 A, which were construed as the "medium" within the meaning of claim 1, in particular the exact type of the acrylic compound and the concentration within TEMPVER 3400 and MEDIUM 3480 A, was unknown. The patent in suit contained no further guidance in this regard.

However, for the reasons set out below, the main request meets the requirements of Article 83 EPC.

Claim 1 indicates the ingredients of the enamel, namely glass frit, pigments and a medium comprising acrylic resin. The enamel has to be IR curable, too. Paragraph [0010] of the patent in suit explains that the claimed "contact angle" of the enamel is linked to the hydrophobic quality of the enamel, the latter being favoured by a higher proportion of the medium.

Inventive Example 7 indicates the amounts of crosslinkable material in TEMPVER 3400 and MEDIUM 3480 A, namely 5% and 15% respectively. On the other hand, the concentrations of acrylic resin within TEMPVER 3400 and MEDIUM 3480 A are unknown.

It has not been disputed that Example 7 is the only inventive example. At the opposition stage, the respondent, however, accepted that Example 7 of the

patent in suit was reproducible (see appellant's submission dated 17 July 2023, last paragraph on page 5, referring to paragraph [0086] of the grounds for opposition).

In view of this teaching and the absence of counter-evidence provided by the respondent, there is no reason for the invention being deemed insufficiently disclosed.

4. Remittal

The appellant requests that the case be remitted to the department of first instance for consideration of novelty and inventive step. The respondent has not disagreed.

According to established case law, remittal is frequently considered by the boards in cases where a first-instance department has issued a decision against a party based solely on one particular issue which was decisive for the case, but left other essential issues outstanding. This practice is in keeping with the primary object of appeal proceedings of reviewing the decision under appeal in a judicial manner (Case Law of the Boards of Appeal, 10th edition, 2022, V.A.9.3.2 a)).

Consequently, the case is remitted to the department of first instance for further prosecution (Article 111(1) EPC, Article 11 RPBA 2020).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated