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File Number: T 288/90 - 3.3.3

Application No.: 83 200 645.6

Publication No.: 0 094 135

Title of invention: Process for the preparation of a thermoplastic moulding composition with low surface gloss

Classification: C08L 51/04

D E C I S I O N
of 1 December 1992

Applicant: Stamicarbon B.V.

Opponent: Bayer AG, Leverkusen
BASF Aktiengesellschaft, Ludwigshafen

Headword:

EPC Art. 54(2)

Keyword: "Novelty (no) - reading citation in the light of common general knowledge"

Catchwords



Case Number : T 288/90 - 3.3.3

D E C I S I O N
of the Technical Board of Appeal 3.3.3
of 1 December 1992

Appellant :
(Opponent)

Bayer AG, Leverkusen
Konzernverwaltung RP
Patente Konzern
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Appellant :
(Opponent)

BASF Aktiengesellschaft, Ludwigshafen
Patentabteilung C6
Carl-Bosch-Strasse 38
W-6700 Ludwigshafen (DE)

Representative :

Respondent :
(Proprietor of the patent)

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Representative :

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Decision under appeal :

Interlocutory decision of the Opposition Division
of the European Patent Office of 16 November
1989, issued on 19 March 1990 concerning
maintenance of European patent No. 0 094 135 in
amended form.

Composition of the Board :

Chairman : F. Antony
Members : R. Lunzer
M. Aúz Castro

Summary of Facts and Submissions

- I. European patent No. 94 135 was granted with 8 claims on 16 April 1986 on the basis of application No. 83 200 645.6 filed on 6 May 1983, having a priority date of 7 May 1982 derived from Dutch Application No. 8 201 893.
- II. Oppositions were filed by the two Appellants Bayer AG and BASF AG, on 8 August and 14 November 1986 respectively, on the ground of Article 100(a) EPC, alleging lack of novelty (Article 54 EPC), and lack of inventive step (Article 56 EPC). The Appellants relied in particular on the following documents:
- (1) US-A-2 802 808
 - (2) DE-B-2 420 357 and
 - (8) Chemie, Physik und Technologie der Kunststoffe, Dispersionen synthetischer Hochpolymerer, Teil I Eigenschaften, Herstellung und Pruefung (F. Hoelscher), which was introduced by Bayer during the oral proceedings before the Opposition Division.

On 11 November 1988 the Appellant filed a new set of claims, of which independent Claims 1 and 6 read as follows:

"1. Process for the preparation of a thermoplastic moulding composition having low surface gloss comprising a graft copolymer of vinyl aromatic compound and acrylic compound on rubber prepared in emulsion, and optionally a copolymer of a vinylaromatic compound and an acrylic compound prepared in emulsion, whereby a latex of the graft copolymer and optionally the copolymer is mixed with a latex of a rubber, without a substantial degree of a coagulation during mixing, the mixture obtained is coagulated, dewatered, washed and dried, characterized in

that the latex of a rubber has an average particle size between 0.05 and 1.5 μm .

6. Thermoplastic moulding compound having a low surface gloss comprising:

- A. 25-95 parts by weight graft copolymer of a vinyl aromatic compound on a rubber,
- B. 0-70 parts by weight copolymer of a vinyl aromatic compound and an acrylic compound, and
- C. 5-35 parts by weight rubber, the rubber in the form of a latex being mixed with a latex of the graft copolymer and/or the copolymer and the resultant mixture being coagulated and further processed in a way known per se,

characterized in that the rubber (C) has an average particle size between 0.05 and 1.5 μm ."

III. By its decision given orally on 16 November 1989 and issued in writing on 19 March 1990, the Opposition Division held that the amended claims were novel, and were inventive over the prior art. In reaching those conclusions, the Opposition Division held that lack of novelty was overcome because document (I) did not disclose the particle size range which was a feature of Claim 1 as amended, and that while it was true that other documents referred to rubber latices having particle sizes coming within or close to the claimed range, their teachings could not be combined with that of document (I) so as to deny novelty. Regarding inventiveness, the Opposition Division held that the alleged invention could only be said to be obvious by making use of an illegitimate ex post facto analysis. As the problem with which it was concerned was to produce a product having low gloss, the

proper starting point for any problem and solution analysis was one of the documents which dealt with the topic of avoiding gloss. None of the documents in that category included or suggested the essential step of latex mixing before coagulation. The Opposition Division was therefore satisfied that there was an inventive step, and accordingly the patent was upheld as amended.

- IV. By way of an Auxiliary Request before the Opposition Division the Appellant had sought to replace the particle size range of 0.05 to 1.5 microns by 0.5 to 1.5 microns in Claims 1 and 6.

- V. Appeals against that decision were lodged by both of the opponents. BASF filed its appeal on 6 April 1990, paid its appeal fee on the same day, and filed its grounds of appeal on 19 July 1990. Bayer filed its appeal, paid the requisite fee, and filed its Statement of Grounds of appeal all on the same date, 20 April 1990.

- VI. Together with its Statement of Grounds of Appeal, the Appellant Bayer sought to introduce as document (12) Industrial and Engineering Chemistry, Vol. 44 No. 4, April 1952, which includes a list of the latices commercially available in April 1952, i.e. some 15 months before the application date of document (I). It was relied on as fairly reflecting the kind of latices which were available at that time. The Appellants contended that the alleged invention lacked both novelty and inventiveness on the basis of document (I), read on its own, or read in association with document (12) treated as being representative of the general technical knowledge of the skilled reader of document (I).

- VII. The Respondent argued in its counterstatement, filed on 28 November 1990, that even the newly filed document (12)

emphasised the fact that the particle size of rubber latices could vary over a wide range, and that there was therefore no reason why the skilled reader of document (I) should read into it any specific range, and that document (12) did not include all known GR-S latices. There was therefore no pointer towards the use of a latex having the defined particle size in a polymer made in accordance with the claims.

- VIII. By a written communication of 25 September 1992 the Rapporteur indicated to the Respondent that he had difficulty in accepting the Opposition Division's view with respect to novelty over the disclosure of document (I) of the claims before the Board, i.e. those in accordance with the Main Request before the Opposition Division. Furthermore he had serious doubts as to the inventiveness of the subject matter of the claims, even in accordance with the previous Auxiliary Request, when compared with document (I), read in the light of common general knowledge, which included the knowledge that a proportion of coarse particles should be included in a composition intended to have a matt surface.
- IX. By a letter dated 2 November 1992 the Respondent indicated that it was willing to accept a decision based on the written submissions already on file, and its previous request for oral proceedings was withdrawn.
- X. The Appellants requested that the decision under appeal be set aside, and the patent revoked. The Respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeals are admissible.

2. Although document (12) was not filed until the appeal stage, the Board admits it because it is regarded as relevant to the issue of what the skilled reader of document (I) would have understood from its teaching. In that respect it includes a more comprehensive review of the particle sizes of available latices than can be derived from any of the previously cited documents.

3. Admissibility of amendments

The amendments are allowable for the purposes of Article 123(2) and (3). Materially, they involve introducing into Claim 1 the feature of granted Claim 6 concerning the particle size range of the rubber latex. The relevant feature was disclosed in the application as filed at page 5 second complete paragraph, which corresponds with page 3, lines 47 to 49 of the patent as granted. Claim 7 of the patent as granted has become new Claim 6, and granted Claim 8 has been cancelled.

4. Novelty

4.1 The attack on novelty is based on document (I). In Example II, which has the title - "VARIATION OF THE CONSTITUTION OF THE INDIVIDUAL POLYMERIC CONSTITUENTS", reference is made to Table II, which is included as Fig. 4 of the drawings. That Table discloses some 11 compositions, of which the most pertinent is the one containing a polybutadiene styrene latex in the proportion of 70/30. At col. 9 lines 6 to 8 this substance is identified as being "A conventional buna-S, GR-S latex containing 70% butadiene, balance styrene prepared in emulsion system at 140°F".

- 4.2 It was not disputed that this Example, in combination with the rest of the disclosure of document (I), in fact discloses each of the features of Claims 1 and 6 of the patent in suit, with the sole exception of the size range of the latex particles.
- 4.3 The issue of novelty turns, not on whether it was inevitable that that latex would have the specified particle size, as seems to underlie the reasoning of the Opposition Division, but rather on whether the skilled reader would derive from (I), in the light of his general technical knowledge, the information that the latex concerned would normally have a particle size falling within the claimed size range. That claimed range is very wide.
- 4.4 Document (12) is a review of available latices published only fifteen months before the application date of document (I), and as such may be taken as fairly representative of the general technical knowledge available at the relevant time. Although for the purposes of assessing novelty it is not normally legitimate to read two documents together, nevertheless, when interpreting a single document, it is necessary to read it having the general technical knowledge in mind, and for this purpose to look at representative technical literature as an aid to the correct interpretation of any particular term of art encountered. Here, the term of art which needs to be interpreted is, "a conventional buna-S, GR-S latex", and what needs to be ascertained is what would have been the normal particle size of such a latex available in commerce. On that topic, document (12) in Table III on page 778 identifies seventeen GR-S latices, and among them four 70/30 GR-S latices. The average particle sizes of the seventeen latices are without exception in the range of

0.05 to 0.22 microns, and those of the four 70/30 GR-S latices are 0.22, 0.15, 0.20 and 0.22 microns.

4.5 With regard to that disclosure, the Respondent argued that not all known GR-S latices are listed in the Table. That is accepted by the Board, because it is inherently likely. But the issue of novelty does not turn on what latices could possibly be used, but instead on what were the commonly available ones which the skilled reader of document (I) would understand as being the most likely to be used. The Respondent has not succeeded in casting any doubt on the Appellants' argument that a latex most likely to be used in making a composition in accordance with the relevant example taken from document (I), would have a particle size within the range there disclosed of 0.05 to 0.22 microns. From that it follows that the independent Claims 1 and 6 lack novelty over document (I).

4.6 There being only one request before the Board, viz. dismissal of the appeals, implying maintenance of the patent in suit on the basis of the Claims upheld by the Opposition Division, the decision under appeal must be set aside, and the patent revoked.

5. Nevertheless, as the Respondent may have expected the Board also to consider the Auxiliary Request which was before the Opposition Division, the Board has looked into that aspect as well. In so doing, it found that the Request would have related to novel subject matter, but would have been lacking in any inventive step. Accordingly, there was no point in asking the Respondent whether it intended its previously filed Auxiliary Request to be considered in the course of the present appeal.

Order

For these reasons, it is decided that:


1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:



E. Gergmaier

The Chairman:



F. Antony