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D E C I S I O N
of 18 November 2004

Case Number: T 0531/00 - 3.3.6

Application Number: 93924771.4

Publication Number: 0672103

IPC: C11D 17/00

Language of the proceedings: EN

Title of invention:
Lavatory cleansing blocks

Patentee:
JEYES GROUP LIMITED

Opponent:
Proplan Marketing AG

Headword:
Cleansing Block/JEYES

Relevant legal provisions:
EPC Art. 54, 56, 123(2)
EPC R. 57(a)

Keyword:
"Novelty - no (main and 3rd auxiliary request)"
"Amendment - inadmissible (1st, 4th and 5th auxiliary request)"
"Inventive step - no (2nd auxiliary request)"

Decisions cited:
G 0001/03

Catchword:
-



Case Number: T 0531/00 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 18 November 2004

Appellant:
(Opponent)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 30 March 2000
rejecting the opposition filed against European
patent No. 0672103 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P. Krasa
Members: P. Ammendola
U. J. Tronser

Summary of Facts and Submissions

- I. This appeal is from the decision of the Opposition Division dated 30 March 2000 rejecting the opposition against the European patent No. 0 672 103, relating to lavatory cleansing blocks based on a surface active component, a halogen release agent component (hereinafter "HRA") and a non-oxidisable material (hereinafter "NOM").
- II. The patent as granted comprised 4 claims, whereof independent claim 1 read:
- "1. A solid lavatory cleansing block formed of a composition comprising*
- (A) from 5-80% by weight of a surface active component comprising one or more anionic surface active agents;*
- (B) from 10-75% by weight of a halogen release agent component; and*
- (C) from 1-25% by weight of a non-oxidisable material which is liquid or liquefied during manufacture of the block and is selected from liquid ketones, liquid tertiary alcohols and liquid complex esters selected from glycerol, propylene glycol, triethylene glycol esters of C₈-C₁₀ fatty acids and/or succinic acid."*
- The dependent claims 2 to 4 as granted define preferred embodiments of the compositions of the invention.

III. The Opponent had sought revocation of the patent in suit on the grounds of lack of industrial applicability, novelty and of inventive step (Article 100(a) in combination with Articles 52(1), 54, 56 and 57 EPC) and of insufficient disclosure (Article 100(b) EPC). It cited, *inter alia*, the following documents:

Document (2) =EP-A-0 462 643,

and

Document (3) =WO 92/18605

IV. From the decision under appeal it is apparent that the Opposition Division interpreted the expression "*non-oxidisable*" in the definition of the NOM component as substantially equivalent to "*non-oxidisable by halogen-release agents*", or "*chlorine-resistant*" (see the decision under appeal, line 11 of page 4 and line 8 of page 5) and found that the subject-matter of the granted claims was sufficiently disclosed and industrially applicable, because the patent in suit described several examples of the NOMs of the invention.

The Opposition Division considered also that, in the absence of evidence that the perfumes identified only by their tradenames in Document (2) actually comprised ketones, tertiary alcohols or complex esters, the patented subject-matter was to be considered novel vis-à-vis the prior art rim blocks disclosed in this citation.

The Opposition Division finally acknowledged the presence of an inventive step because none of the

available citations rendered obvious to increase the stability of the HRA, and therefore the shelf-life, of the lavatory blocks disclosed in Documents (2) or (3) by replacing the chlorine-resistant components mentioned therein with the ketones, tertiary alcohols or complex esters defined in present claim 1.

- V. The Opponent (hereinafter "Appellant") lodged an appeal against this decision. Under cover of the statement setting out the grounds of appeal it filed a statutory declaration of Mr Barry Purdy, a patent advisor of the firm Unilever PLC, the latter being the applicant of the European patent application above-labelled as Document (2). The amounts of tertiary alcohols and/or ketones contained in the perfumes mentioned in this citation were disclosed in this declaration (hereinafter indicated as "Purdy's data"). The Appellant stated in the grounds of appeal also that the chemical composition of the perfumes sold under these tradenames had remained always the same and offered witnesses to support this statement.
- VI. The Patent Proprietor (hereinafter "Respondent") filed under cover of a letter of 14 February 2001, i.e. its reply to the grounds of appeal, five sets of amended claims labelled as 1st to 5th auxiliary request and, under cover of a letter dated 18 October 2004, experimental data in the form of a witness statement of Mr Nigel Fredrick Cooper (hereinafter "Cooper's data").
- VII. At the oral proceedings before the Board, held on 18 October 2004, the Respondent replaced the previously filed 2nd auxiliary request by a new one.

VIII. Claim 1 of the **1st auxiliary request** differs from the granted one only in that in item "(C)" the expression "*manufacture of the block and*" has been replaced by "*manufacture of the block, is not an odoriferous material in use, and*".

The only claim of the **2nd auxiliary request** differs from claim 1 as granted only in that the initial wording "*A solid*" has been replaced by "*In a solid*" and in that the last wording "*succinic acid.*" has been replaced by "*succinic acid, use of said non-oxidisable material as a solubility control agent.*".

Claim 1 of the **3rd auxiliary request** differs from the granted one only in that in item "(C)" the range "*1-25%*" has been replaced by "*4-15%*"

Claim 1 of the **4th auxiliary request** differs from the granted one only in that in item "(C)" the expression "*manufacture of the block and*" has been replaced by "*manufacture of the block, is not provided by a perfume, and*".

Claim 1 of the **5th auxiliary request** differs from the granted one only in that the last wording "*succinic acid.*" has been replaced by "*succinic acid and wherein, when a perfume is provided in the block, said non-oxidisable material is provided in addition to the perfume.*".

IX. The Appellant argued substantially as follows.

Since tertiary alcohols, ketones or complex esters that are "non-oxidisable" under any circumstances would not

exist, the NOM ingredient "(C)" of the patented block was not existing either and the subject-matter of claim 1 as granted (see above item III) lacked of industrial applicability (Article 57 EPC). If "*non-oxidisable*" was instead to be understood as non-oxidisable in the environment of the block, then the patented invention lacked of any disclosure as to which tertiary alcohols, ketones or complex esters would have such property and/or as to how to identify those who had such property. On the contrary, the examples in the patent and the Cooper's data would demonstrate that even the few NOMs specifically disclosed in the patent were oxidised to some extent. Therefore, the patented invention could not be carried out by a skilled person on the basis of the original disclosure (Article 100(b) EPC). However, the Appellant did not dispute the Respondent's submission at the oral proceedings before the Board that none of the available experimental data (i.e. including the patent examples as well as the Cooper's data on which the Appellant itself relied) would allow to establish unambiguously which of the chemical compounds present in these experiments had actually been oxidised by the HRAs.

The Appellant finally argued that "*non-oxidisable*" was at most to be understood as "*substantially*" non-oxidisable in the environment of the block and, therefore, that this term would be unclear and could not be considered a distinguishing feature of the patented block. In particular, it refuted the existence in textbooks of a general classification of tertiary alcohols, ketones and complex esters in term of the property of being "*non-oxidisable*" either in general

or, in particular, by HRAs in the environment of a lavatory cleansing block.

In respect of the novelty of claim 1 of the main and 3rd auxiliary request, the Appellant stressed that firms producing perfumes would not sell under the same tradename perfumes with different chemical composition and, thus, that the Purdy's data would disclose the always constant chemical composition of the perfumes mentioned in Document (2).

With regard to the other auxiliary requests it contested *inter alia* the admissibility of the amendments introduced in claim 1 of the 1st, 4th and 5th auxiliary requests in respect of the requirements of Article 123(2) EPC, as well as the novelty and presence of an inventive step for the subject-matter of claim 1 of the second auxiliary request.

The Appellant requested that the Cooper's data (late filed by the Respondent) should be admitted in the proceedings.

X. The Respondent argued substantially as follows.

It initially maintained at the oral proceedings before the Board that general chemistry textbooks would define which ketones, tertiary alcohols and complex esters were oxidisable and which non-oxidisable. For instance saturated tertiary alcohols would be defined in any textbook as being stable to oxidation. On the contrary, the skilled person would immediately recognise that the unsaturated ones would be prone to oxidation. However, it finally conceded that the skilled person would only

interpret the definition of component "(C)" in granted claim 1 as defining those tertiary alcohols, ketones and complex esters that are "non-oxidisable" by the HRAs in the environment of the block.

It contested for the first time at the oral proceedings before the Board that the perfumes mentioned in Document (2) and whose composition was partially disclosed in the Purdy's data would not have been readily available to the public because of the exclusive contract normally existing between perfume producer (in this case the firm IFF) and the exclusive buyer of that perfume (i.e. the firm Unilever, from which the Purdy's data have been obtained).

With regard to the novelty of claim 1 of the main and 3rd auxiliary request the Respondent did not dispute that it would be possible for the skilled person to assess the content of tertiary alcohols and/or ketones in the perfumes used in Document (2), but argued that their chemical structure had been disclosed neither in this citation nor in the Purdy's data and that, therefore, the Appellant had provided no evidence that these perfume ingredients were "non-oxidisable". However, in this respect it conceded eventually that none of the available experimental data allowed reliable conclusions as to whether or not the NOMs of the invention and/or the tertiary alcohols and ketones contained in the perfumes of Document (2) had been oxidised to some extent by the HRAs (see also above item IX).

In respect of the compliance of the amendments of the 1st, 4th and 5th auxiliary requests with Article 123(2)

EPC, it maintained that these amendments were based on the implicit disclosure of the patent application as originally filed and/or would represent allowable disclaimers of the anticipation disclosed in Document (2).

With regard to the presence of an inventive step for the subject-matter of claim 1 of the 2nd auxiliary request the Respondent stressed that the skilled person would not have regarded the perfumes used in Document (2) as an obvious alternative to the odiferous solubility controlling agents mentioned in Document (3). In particular, the fact that the former citation considered clearly oxidisable fatty alcohol as equivalent to the perfumes also mentioned therein would indicate to the skilled person that the level of resistance to oxidation by HRAs of these perfumes should be expected to be lower than that expressly required in Document (3) for the odiferous solubility controlling agent.

XI. The Appellant requested that the decision under appeal be set aside and that the European patent No. 0 672 103 be revoked.

XII. The Respondent requested that the appeal be dismissed and that the patent be maintained as granted or the patent be maintained on the basis of the claims according to one of the 1st, 3rd, 4th or 5th auxiliary requests submitted under cover of the letter dated 15 February 2001 or on the basis of the claim of the 2nd auxiliary request submitted at the oral proceedings.

Reasons for the Decision

Claim 1 of the patent as granted (Respondent's main request)

1. Interpretation of the claim and Appellant's objections based on Article 100(a) EPC in combination with Articles 52(1) and 57 EPC and on Article 100(b) EPC.
 - 1.1 In the Appellant's opinion, the subject-matter of claim 1 as granted (see above item III) lacked of industrial applicability (Article 57 EPC) because no tertiary alcohol, ketone or complex ester was "*non-oxidisable*" and therefore the NOM of the patented block did not exist.
 - 1.1.1 According to the established jurisprudence of the Boards of Appeal (see e.g. the Case Law of the Boards of Appeal of the European Patent Office - Fourth Edition December 2001, II.B.4.1), the skilled person, when considering a claim, should rule out interpretations which are illogical or which do not make technical sense.
 - 1.1.2 It is undisputed by the parties that any conventional organic compound is oxidisable and, hence, also that no tertiary alcohols, ketones or complex esters possibly encompassed in the definition of the NOM ingredient in present claim 1 can ever be literally "*non-oxidisable*" in strict terms (i.e. resistant to oxidation by any other chemical compounds and under any circumstances).

The skilled reader of present claim 1 would, therefore, rule out the literal interpretation of the adjective "*non-oxidisable*", because it makes no technical sense

to characterize ingredients of a claimed aggregation of matter by a manifestly impossible property.

1.1.3 Since the Appellant's objection under Article 57 EPC is not based on a technically meaningful interpretation of the granted claim 1 but only on its literal wording, the Board finds it not convincing.

1.2 The Board concurs instead with the decision under appeal that the adjective "*non-oxidisable*" defining the NOM of present claim 1 can only mean those tertiary alcohols, ketones and complex esters that are non-oxidisable by the HRAs in the environment of the block.

1.2.1 This is evident when considering that among the block ingredients defined in claim 1 only the HRA is a notoriously powerful oxidising agent. Its strong oxidising power is also explicitly underlined in the patent in suit (see the patent in suit page 2, lines 16 and 17). Moreover, it is also evident to the person skilled in the art that the occurrence of oxidation reactions involving the HRA is detrimental to the properties of the block because it would manifestly reduce the amount of HRA to be dispensed in the water flush for producing the aimed cleansing and sanitising of the lavatory.

Therefore, it is immediately apparent to the skilled reader that in the context of claim 1 the adjective "*non-oxidisable*" can only reasonably describe that the NOM ingredients are "*non-oxidisable by the HRAs during the storage and the use of the block*".

1.2.2 This interpretation has been finally agreed by the Respondent too at the oral proceedings before the Board.

1.3 The Appellant has instead argued that this interpretation would be contradicted by the fact that the comparison of the data in Table I of the patent in suit (referring to examples 4 to 10) with the values determined for the reduction of the available chlorine upon storage reported in the Cooper's data, would show that also (some of) the specific NOMs exemplified in the patent in suit would be as stable against the HRA as the compounds that the Respondent itself considered oxidisable. Therefore, the term "non-oxidisable" must have a meaning, undisclosed in the patent in suit, different from that indicated above (at item 1.2.). Accordingly, the patented invention would be insufficiently disclosed (Article 100(b) EPC).

1.3.1 The Board observes that the Appellant, who carries the burden of providing evidence supporting its argument as to the alleged lack of sufficient disclosure of the patented invention, has not even attempted to carry a single test for demonstrating the alleged oxidation by the HRA of the NOM ingredients specifically disclosed in the patent in suit.

In addition, neither the patent examples nor the Cooper's data on which the Appellant relied for its objection allow assessing unambiguously whether the preferred NOMs of the invention are oxidisable or non-oxidisable by the HRAs in the environment of the block. This is evident when considering that the observed loss of HRA upon storage of the lavatory cleansing blocks (measured as remaining chlorine content) could be

indifferently attributed to oxidation of NOMs of the invention, as well as to oxidation of the other compounds present in the tested blocks in addition to the NOM.

Therefore, the patent examples and the Cooper's data reporting the extent of chlorine loss upon storage could at most demonstrate that the amount of HRA taking part in oxidation reactions is lower in the blocks containing the preferred NOMs of the invention and higher in those containing no NOMs or wherein the NOMs are replaced by the perfumes mentioned in Document (2), but do not allow to identify which of the chemical compounds present in these experiments are actually oxidised in these reaction and to which extent.

Finally, also the other tests reported in the Cooper's data (i.e. those carried out in a water slurry and those relative to dichromate reduction) do not allow to identify which of the chemical compounds present in these experiments had actually been oxidised in these reactions and to which extent, because in addition to the NOMs of the invention and to the tertiary alcohols other ingredients potentially oxidisable were also present in all these experiments.

The Board finds appropriate to stress here that the Cooper's data are similarly inappropriate even for assessing unambiguously whether or not the tertiary alcohols present in the tested perfumes of Document (2) are oxidised by the HRA. This is due to the fact that also in the experiments using these perfumes other components, possibly oxidisable, are undisputedly present in addition to the tertiary alcohols.

1.3.2 Hence, the Board concludes that none of the available experimental data allows assessing unambiguously whether or not the NOMs of the invention or the tertiary alcohols contained in the perfumes of Document (2) have been oxidised to any extent by the HRAs. This has also been explicitly conceded by the Respondent at the oral proceedings and has not been disputed by the Appellant.

1.3.3 Therefore, these data cannot provide any credible evidence in favour of the Appellant's allegation that NOMs mentioned in the patent in suit are oxidised by the HRAs.

1.3.4 Accordingly, the Board finds not convincing the objection of the Appellant (resumed above at item 1.3) as to the insufficiency of disclosure of the patented invention and concludes that the patent in suit complies with the requirements of Article 83 EPC.

2. *Novelty*

2.1 The claim under consideration defines a lavatory cleansing block (i.e. possibly a rim block, see page 2, lines 8 to 11 of the patent in suit) comprising 5 to 80% by weight of a surface active component, 10 to 75% by weight of a HRA and 1 to 25% by weight of a NOM selected from tertiary alcohols, ketones and certain complex esters.

2.2 The Board observes that the rim block of Example 3 of Document (2) comprises 60% by weight of a surfactant,

15% by weight of a HRA and 8% by weight of a perfume with tradename "Verdeo IFF 989".

The description of this citation further specifies that this perfume is "*stable in the presence of the water-soluble bleaching agent*" (see page 2, lines 38 to 39) and is obtainable by the firm IFF (see page 2, lines 41 to 42 and the note "2)" in the table of page 3). The fact that this perfume is liquid is self-evident and undisputed by the parties.

2.3 The Appellant has filed with the grounds of appeal the Purdy's data demonstrating that Verdeo 898 contains about 88% by weight of unspecified tertiary alcohols and has maintained that no producer of perfume would sell different perfumes under the same tradename. It has also offered witnesses of the firm IFF to demonstrate that that the composition of this perfume has always been the same, starting already at the time in which the priority Document (2) had been filed.

2.3.1 The Respondent has contested for the first time at the oral proceedings before the Board, that the perfumes mentioned in Document (2) would have been not readily available to the public because of the exclusive contract normally existing between their producer (in this case the firm IFF) and the exclusive buyers of these perfumes (i.e. the firm Unilever, from which the Purdy's data have been obtained).

2.3.2 Even disregarding the fact that this objection has been raised by the Respondent clearly too late, the Board observes that it evidently amounts to a mere allegation. As a matter of fact, the Respondent has provided no

evidence that it (or someone else) had unsuccessfully attempted to obtain a sample of Verdeo 898 from the firm IFF, nor of the existence of a contract between this firm and Unilever which would have excluded the provision to the public of even very limited amounts of these perfumes, e.g. for non commercial uses. On the contrary, these perfumes have been used by the Respondent to make the experiments reported in the Cooper's data, without indicating any difficulties to obtain the used samples of these perfumes.

2.3.3 The Board notes additionally that the Respondent has:

- neither contested that at the time of publication of Document (2) the skilled person would not had been able to determine the nature of the (most abundant) components of the perfumes mentioned therein, and therefore to identify that, e.g., about 88% by weight of Verdeo 898 was constituted by tertiary alcohols,
- nor challenged the Appellant's statement that the chemical composition of Verdeo 898 had never changed with time.

On the contrary, the Board finds credible the Appellant's observation that firms producing perfumes would not sell under the same tradename perfumes with different chemical compositions.

2.3.4 Therefore, the Board comes to the conclusion that the Purdy's data credibly show that the publication of Document (2) rendered available to the public a rim block according to example 3 of this citation and that

it was sufficient to analyse a sample of Verdeo 898 perfume to establish that the block of this prior art contained about 13% (i.e. 88% of 15%) by weight of tertiary alcohols.

2.4 The Respondent has argued to the contrary by maintaining that

- (a) the specific nature of the tertiary alcohols present in such a perfume according to the Purdy's data has not been disclosed by the Appellant and these alcohols have not been demonstrated to be "*non-oxidisable*",
- (b) components of perfumes are notoriously very labile and
- (c) the fact that Document (2) indicates that fatty acids or fatty alcohols represent an alternative to the perfumes (see Document (2) page 2, lines 43 to 44) would imply that the level of stability of the perfume against the HRA should be comparable to that of fatty alcohols and fatty acids, whereby these compounds notoriously comprise C=C double bonds, i.e. a functional group known to be easily oxidisable by the HRA.

2.4.1 In respect to objections (a) and (b) the Boards notes that, as discussed above at item 1.2 the only reasonable meaning of the adjective "*non-oxidisable*" defining the NOM ingredient is "*non-oxidisable by the HRAs during the storage and the use of the block*". It is self-evident that this is substantially the same property of the perfumes defined in Document (2) by the

wording "*stable in the presence of the water-soluble bleaching agent*". Therefore, also the ingredients of these perfumes - and, hence, also the tertiary alcohols forming them - are expected to be "*non-oxidisable*" in sense of the definition of NOM ingredient in present claim 1.

2.4.2 Under these circumstances the Respondent had the burden of providing evidence to the contrary, i.e. evidence demonstrating the alleged oxidizability by the HRAs of the tertiary alcohol contained in the perfumes of Document (2).

However, as already discussed above at item 1.3.3, the Respondent has provided no convincing evidence that the tertiary alcohols contained in these perfumes are oxidised by HRAs.

With regard to the argument (c), it is to be noted that the Appellant has contested that the double bonds of fatty acids or alcohols would be regarded by the skilled person as clearly oxidisable in the environment of the block and that the Respondent has provided no evidence supporting its arguments. Therefore, this objection amounts to an unproven allegation, which cannot support the Respondent's argument. Moreover, the Board notes that fatty acids or alcohols do not necessarily contain double bonds.

2.5 For these reasons, the Board concludes that the Appellant has credibly demonstrated that the prior art disclosed in Example 3 of Document (2) (see above item 2.2 and 2.3.4) has all the features required by the correctly interpreted definition (see above item 1.2)

of the block of present claim 1. Thus, the subject-matter of claim 1 of the patent in suit is found anticipated by example 3 of Document (2) and the ground of opposition mentioned in Article 100(a) in combination with Articles 52(1) and 54 EPC is found to prejudice the maintenance of the European patent as granted.

Claim 1 of the Respondent's 1st auxiliary request

3. *Admissibility in view of Article 123(2) EPC*

3.1 Claim 1 of this request (see above item VIII) differs from the granted one only in that the definition of the NOM component "(C)" has been amended to specify that the NOM "*is not an odiferous material*".

3.2 Article 123(2) EPC prohibits amendments of a European patent that result in the extension of its subject-matter beyond that of the application as filed. However, an amendment to a claim by the introduction of a disclaimer may not be refused under Article 123(2) EPC for the sole reason that neither the disclaimer nor the subject-matter excluded by it from the scope of the claim have a basis in the European patent application as filed (see the decision G 1/03 of the Enlarged Board of Appeal, OJ EPO 2004, p.413, headnote I).

3.3 The Respondent has maintained that the basis for this amendment was to be found in the description of the patent application (in particular at page 9, lines 1, 4 and 14), defining the possible presence of chlorine-resistant odiferous materials and the general exclusion of perfumes non-resistant to the HRA.

3.4 The Board finds instead that the description of the patent application as filed identifies initially the NOM mandatorily present as component "(C)" in the claimed block and then, separately, mentions a group of optional components including perfumes and odiferous material, explicitly indicating that the latter are different from the mandatory ingredients as well as from any other previously mentioned ingredient (compare in the published patent application page 5, from line 6 to the end of the page, with the wording at page 8, lines 16 to 18 "...any other ingredient..." introducing the portion of the patent specifications cited by the Respondent).

Accordingly, the portion of the original patent application cited by the Respondent refers only to optional "*perfumes*" and "*odoriferous materials*" and not to the mandatory component "(C)".

Therefore, the amendment introduced into claim 1 according to the 1st auxiliary request has no basis in the patent application as originally filed.

3.5 The Respondent has argued, alternatively, that the introduced amendment would amount to an admissible disclaimer of the prior art under Article 54(2) PC disclosed in Document (2).

The Board notes instead that this citation not only belongs to the same technical field as the patent in suit but addresses also the technical problem of ensuring that the block provides for satisfactory prolonged time a surfactant and a bleaching agent to

the flush water (see Document (2) page 2, lines 22 to 24 and the last sentence at page 3), i.e. substantially the same technical problem addressed in the patent in suit (see the published patent application page 3, first 4 lines and examples 1 to 3).

Therefore, the prior art disclosed in this citation does not represent an accidental anticipation but is **close and related** to the present invention and, thus, would have been taken into consideration by a skilled person when working on the invention. Thus, the amendment introduced in present claim 1 is not an allowable disclaimer in the sense of G 1/03.

- 3.6 Therefore, the Board finds that the amendment introduced in present claim 1 does not comply with the requirements of Article 123(2) EPC and concludes that the 1st auxiliary request is not admissible.

The claim of the Respondent's 2nd auxiliary request

4. *Admissibility in view of Articles 84, 123(2) and (3) and Rule 57(a) EPC*

4.1 The only claim in the 2nd auxiliary request (see above item VIII) defines the use of the NOM ingredient to control the solubility of the lavatory cleansing block that was the subject-matter of claim 1 of the granted patent.

4.2 The Board finds the use defined in the only claim of this request (see above item VIII) as an amendment occasioned by the grounds of opposition and based on the application as originally filed. It does not result

in a lack of clarity and is more restricted in its subject-matter than the claims of the patent as granted. Therefore, this claim is considered formally admissible.

In view of the finding of the Board as to the lack of inventive step for this request (see hereinafter item 6) no reason needs to be given in this respect.

5. *Novelty*

5.1 The Board concurs with the Respondent that the skilled person would understand that the clear scope of this use is to achieve an acceptable rate of block dissolution.

5.2 This has not been disputed by the Appellant, who has contested, however, the novelty of the claimed use on the basis of the prior art disclosed in Document (2).

It has alleged that even if this effect of the perfume on the block solubility was not explicitly disclosed in Document (2), it belonged to the skilled reader's common general knowledge. He would know that designating in this citation perfumes as "*hydrophobic structurant*" (see Document (2) page 2, line 37) indicated to the skilled reader that these perfumes would necessarily control the block solubility too, thereby implicitly disclosing the claimed use.

5.2.1 The existence of such common general knowledge of the skilled person has been contested by the Respondent and the Appellant did not produce any textbook evidence in support of its submission, but referred merely to Document (3). Since this citation, being a patent

publication, can only serve as evidence for the respective author's opinion, but not for the existence of common general knowledge, the Appellant argument has to be dismissed as an unproven allegation.

5.3 Therefore the Board finds that the Appellant has not credibly demonstrated that the subject-matter of the only claim of this request is anticipated by the prior art disclosed in Document (2) and concludes that the subject-matter of this claim complies with the requirements of Article 54 EPC.

6. *Inventive step*

6.1 As discussed already above (see item 5.2) Document (2) mentions exclusively the specific problem of low solubility of the block originating from the use of large amounts of ionic fillers. Instead, Document (3) discloses in general the existence of ingredients which may be used to control the block dissolution rate: see in this citation from page 4, line 17 to page 5, line 15 (referring to the "*solubility controlling agent*") as well as at page 7, lines 3 to 9 (referring to "*odoriferous materials*" which are "*adequately resistant*" to the chlorine release agents and "*additionally serve as solubility controlling agents*").

Hence, the Board concurs with the Respondent that the most appropriate starting point for the inventive step assessment in respect of the present claim is represented by the prior art disclosed in Document (3).

6.2 The patent in suit discloses in general the use of the NOM ingredient as solubility controlling agent of the

block of the invention (see the patent in suit page 2, lines 39 to 40, and page 3, lines 20 to 24), without indicating any further advantage associated therewith.

Therefore, the technical problem credibly solved by the claimed subject-matter vis-à-vis the prior art disclosed in Document (3) can only be seen as that of providing an alternative to the solubility controlling agents of the prior art.

6.3 This problem has been solved in the claimed used by replacing the perfumes (resistant towards the chlorine release agent) and which act also as solubility controlling agents disclosed in Document (3) (see the above identified part at page 7 of this citation) with the NOMs of the present invention.

6.4 The Board observes, however, that also the perfumes suitable for rim-blocks mentioned in Document (2) are odoriferous materials resistant to the chlorine release agents (see above item 2.2). Thus, the above-identified technical teaching of Document (3) in respect of the odoriferous materials additionally serving as solubility controlling agents applies necessarily also to the perfumes of Document (2). Accordingly, it was obvious for the skilled person to control the solubility of rim blocks by regulating the amount of perfumes which, as demonstrated by the Purdy's data (see above item 2.3.4) are mostly composed of tertiary alcohols and ketones, thereby arriving at the subject-matter of the present claim, without exercising any inventive activity.

6.5 The Board comes therefore to the conclusion that the subject-matter of the only claim of the 2nd auxiliary request does not comply with the requirements of Article 56 EPC and, hence, that this request is not allowable.

Claim of the Respondent's 3rd auxiliary request

7. *Admissibility in view of Articles 84, 123(2) and (3) and Rule 57(a) EPC*

7.1 This claim (see above item VIII) differs from claim 1 of the granted patent only in that the range for the amount of the NOM ingredient has been reduced from "1-25% by weight" to "4-15% by weight".

7.2 The Board is satisfied that this amendment is occasioned by the grounds of opposition and based on the application as originally filed. It does not result in a lack of clarity and is more restricted in its subject-matter than the claims of the patent as granted. Therefore, this claim is considered formally admissible.

8. *Novelty*

Since, as discussed above at item 2.3.4, the rim block of an example of Document (2) comprises about 13% by weight of tertiary alcohols resistant to HRA, the same reasons given in item 2 as to the fact that this example destroys the novelty of claim 1 of the granted patent apply as well to the subject-matter of the present claim 1.

Therefore, the Board finds that also this claim does not comply with the requirements of Article 54 EPC and concludes that the 3rd auxiliary request is not allowable.

Claim 1 of the Respondent's 4th auxiliary request

9. Admissibility in view of Article 123(2) EPC

9.1 This claim (see above item VIII) differs from the granted one only in that the definition of the NOM ingredient has been amended to specify that the NOM "*is not provided in a perfume*".

The Respondent relied on the same portion of the application as originally filed already mentioned in respect of the amendment of the 1st auxiliary request (see above item 3.3) as a basis for this amendment too. However, as discussed above (see above item 3.4) this portion discloses only "*perfumes*" different from the mandatory NOMs and cannot identify neither directly nor implicitly those NOMs which **are** (part of) perfumes and/or those which **are not** (part of) perfumes.

It follows that, the amendment introduced in claim 1 according to the 4th auxiliary request has no basis in the patent application as originally filed.

9.2 Therefore, the Board concludes that the amendment introduced in present claim 1 violates Article 123(2) EPC and that the 4th auxiliary request is not admissible for the same reasons given already - *mutatis mutandis* - in item 3 above.

Claim 1 of the Respondent's 5th auxiliary request

10. *Admissibility in view of Article 123(2) EPC*

10.1 This claim (see above item VIII) differs from the granted one only in that the definition of the NOM component "C" has been amended to specify that the NOM is present in addition to the possibly present perfume (see above item VIII).

10.2 The Respondent considered that this amendment excluded the possible presence of any perfume as replacement of the NOMs and relied on the portion of the application as originally filed already mentioned in respect of the amendment of the 1st auxiliary request (see above item 5.3) as basis thereof.

10.3 The skilled person would note that already the remaining portion of claim 1 requires the mandatory presence of the NOM ingredient (i.e. also requires the NOM to be present in addition to any possible optional ingredient, including perfume). Therefore, if the term "perfume" in this claim is to be interpreted as in the patent specifications (see above item 3.4), i.e. indicating exclusively compounds different from the mandatory NOMs, then the amended part in present claim 1 would define the requirement that **when a perfume different from the NOMs is present in the block, then the (mandatory) NOM must be additionally present.** It is self evident that such meaning, although consistent with the description of the patent in suit, amounts to no amendment at all, in the sense that it leaves the claimed subject-matter identical to that of the same claim without that feature. Moreover, a

redundant amendment cannot possibly be regarded as occasioned by a ground of opposition, as required by Rule 57(a) EPC.

Therefore, it seems appropriate to interpret the amended wording independently from the patent description.

- 10.4 The skilled reader of the present claim *per se* would normally assume that therein "perfume" may also indicate those odiferous materials possibly consisting of or comprising the NOMs of the present invention, i.e. as if the amended wording defined the additional requirement that even when the optional perfume ingredient already consists of or comprises NOMs, this perfume cannot replace the mandatory NOM.

However, as discussed above (see above item 3.4) the portion relied by the Respondent provides no basis for this amendment since it discloses only "perfumes" different from the mandatory NOMs and cannot identify neither directly nor implicitly the additional presence of perfumes which consist of or comprise NOMs.

- 10.5 In conclusion, the amendment introduced in claim 1 according to the 5th auxiliary request is either redundant or has no basis in the patent application as originally filed.

- 10.6 For the same reasons discussed above (see item 3.5) the prior art relevant under Article 54(2) disclosed in Document (2) cannot even represent an accidental anticipation in the sense of G 1/03 and, hence, the

amendment in claim 1 of this request cannot even amount to an admissible disclaimer.

10.7 Therefore, the Board finds that the amendment introduced in present claim 1 violates either Rule 57(a) or Article 123(2) EPC and concludes that the 5th auxiliary request is found not admissible.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent EP 0 672 103 is revoked.

The Registrar:

The Chairman:

G. Rauh

P. Krasa