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D E C I S I O N
of 16 June 2004

Case Number: T 0725/00 - 3.2.4

Application Number: 92906554.8

Publication Number: 0604425

IPC: A46B 7/06

Language of the proceedings: EN

Title of invention:

Toothbrush having a flexibly linked zone in its head

Patentee:

SmithKline Beecham Consumer Healthcare GmbH

Opponents:

The Procter & Gamble Company
Colgate-Palmolive Company

Headword:

-

Relevant legal provisions:

EPC Art. 84, 123

EPC R. 71(2)

Keyword:

"Clarity - main request - no"

"Extension of subject-matter - first auxiliary request - yes"

"Disclaimer - second auxiliary request - unallowable"

Decisions cited:

G 0001/03, G 0002/03, T 0917/95

Catchword:

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Case Number: T 0725/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 16 June 2004

Appellant: SmithKline Beecham Consumer Healthcare GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 10 May 2000
revoking European patent No. 0604425 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: T. Kriner
Members: M. G. Hatherly
H. Preglau

Summary of Facts and Submissions

- I. European patent No. 0 604 425 was revoked by the opposition division's decision dispatched on 10 May 2000.

The appellant (proprietor) filed an appeal on 10 July 2000, paid the appeal fee simultaneously and then filed the statement of grounds of appeal on 6 September 2000. Together with the statement of grounds of appeal the appellant filed new sets of claims according to a main request, a first and a second auxiliary request.

- II. Claim 1 of the main request reads

"A toothbrush having a handle (41) and at one end thereof a bristle-bearing portion which comprises a bristle bearing head (44), the handle (41) and bristle bearing portion being made of a plastics material, the head (44) being flexibly and resiliently linked to an extended portion (42) of the handle (41), the head (44) being capable of rocking motion relative to the handle (41),

the head (44) being provided with a socket (43) which is open on the side of the head (44) facing the handle (41), into which socket (43) the extended portion (42) extends so that the extended portion (42) is partly surrounded by the head (44), the extended portion (42) being flexibly and resiliently linked to the head (44) by a link (46) within the socket (43), the relative dimensions of the extended portion (42) and the socket (43) being such as to leave a gap (43) between the head (44) and the extended portion (42),

the gap (43) being wholly or partly closed with an elastomeric material,

characterised in that a spine (42) is positioned at and integral with the end of the extended portion, and the spine (42) extends into the socket (46) in a direction generally in line with the longitudinal axis of the toothbrush, and the end of the spine remote from the handle (41) is integrally joined to the head (44) at the bottom of the socket (43), being the part of the socket most longitudinally distant from the handle (41), to thereby link the extended portion and the head (44), the space between the spine (42) and the head (44), including the socket (43) being filled with an elastomeric material (46)."

Claim 1 of the first auxiliary request reads

"A toothbrush having a handle (41) and at one end thereof a bristle-bearing portion which comprises a bristle bearing head (44), the handle (41) and bristle bearing portion being made of a plastics material, the head (44) being flexibly and resiliently linked to an extended portion (42) of the handle (41), the head (44) being capable of rocking motion relative to the handle (41),

the head (44) being provided with a socket (43) which is open on the side of the head (44) facing the handle (41), into which socket (43) the extended portion (42) extends so that the extended portion (42) is partly surrounded by the head (44), the extended portion (42) being flexibly and resiliently linked to the head (44) by a link (42, 46) within the socket (43), the relative dimensions of the extended portion (42) and the socket (43) being such as to leave a gap

(43) between the head (44) and the extended portion (42), the gap being wholly or partly closed with an elastomeric material,

characterised in that a spine (42) is positioned at and integral with the end of the extended portion, and the spine (42) extends into the socket (46) in a direction generally in line with the longitudinal axis of the toothbrush, and the end of the spine remote from the handle (41) is integrally joined to the head (44) at the bottom of the socket (43), being the part of the socket most longitudinally distant from the handle (41), to thereby link the extended portion and the head (44), the space between the spine (42) and the head (44), including the socket (43) being filled with an elastomeric material (46), the socket (46) being open on the upper surface of the head (41) from which bristles (45) extend and also open on the lower surface to allow the head (41) to rock relative to the extended portion in a plane which contains the longitudinal axis direction of the toothbrush, the space between the spine (42) and the head (44), including the socket (43) being filled with an elastomeric material (46)."

Claim 1 of the second auxiliary request reads

"A toothbrush having a handle (41) and at one end thereof a bristle-bearing portion which comprises a bristle bearing head (44), the handle (41) and bristle bearing portion being made of a plastics material, the head (44) being flexibly and resiliently linked to an extended portion (42) of the handle (41), the head (44) being capable of rocking motion relative to the handle (41),

characterised by the head (44) being provided with a socket (43) which is open on the side of the head (44) facing the handle (41), into which socket (43) the extended portion (42) extends so that the extended portion (42) is partly surrounded by the head (44), the extended portion (42) being flexibly and resiliently linked to the head (44) by a link (46) within the socket (43), the relative dimensions of the extended portion (42) and the socket (43) being such as to leave a gap (43) between the head (44) and the extended portion (42), the gap being wholly or partly closed with an elastomeric material,

provided that a toothbrush in which the head and handle consist of stable elements located next to each other and are linked by an element of greater flexibility in such a way that a reversible torsion of the head and handle against each other is given, is excluded."

III. All parties were summoned to attend oral proceedings.

The summons was accompanied by a communication containing among other things the following provisional and non-binding comments of the board:

- that parts of claim 1 of the main request were unclear;
- that claim 1 of the first auxiliary request was objectionable under Article 123(2) EPC;
- that the allowability of the disclaimer contained in the second auxiliary request had to be

discussed in view of the then pending cases G 1/03 and G 2/03.

- that adapted descriptions and drawings for the three requests should be filed at least two months before the oral proceedings.

IV. The only substantive comment on the board's communication came in respondent I's letter of 14 May 2004, namely that the disclaimer in claim 1 of the second auxiliary request was unallowable in view of the by then decided case G 1/03 (not yet published in OJ EPO).

V. The appellant (proprietor) stated in the letter of 11 February 2004 that he would not be attending the oral proceedings.

Respondent I (opponent I) stated in the letter of 14 May 2004 that he did not intend to attend the oral proceedings.

Respondent II (opponent II) stated in the letter of 14 May 2004 that, if the board intended to revoke the patent, he would not attend oral proceedings.

Indeed, none of the parties attended the oral proceedings on 16 June 2004 which, in accordance with Rule 71(2) EPC, took place without them.

VI. The appellant (proprietor) requests (in writing) that the decision to revoke the patent is set aside and that the patent is maintained according to

- the main request based on claims 1 to 4 (main request) filed with the statement of grounds of appeal,
- the first auxiliary request based on claims 1 to 4 (first auxiliary request) filed with the statement of grounds of appeal, or
- the second auxiliary request with claims 1 to 7 (second auxiliary request) filed with the statement of grounds of appeal.

There are no adapted descriptions and drawings for these requests.

VII. Respondents I and II (opponents I and II) request (in writing) that the appeal be dismissed.

Reasons for the decision

1. The appeal is in accordance with Articles 106 to 108 EPC and is thus admissible.
2. *Claim 1 of the main request*
 - 2.1 The characterising part of this claim commences with the words "*characterised in that a spine (42) is positioned at and integral with the end of the extended portion*".

However, as already explained at the start of section 6.2 of the board's communication accompanying the summons to oral proceedings, there is not a spine **and**

an extended portion, they are one and the same, see original page 9, lines 36 and 37: "an extended portion (72) in the shape of a thin flexible, resilient spine, The spine (72) ...". Thus they even bear the same reference numeral. See also the original claim 16: "the extended portion is itself in the form of a thin, flexible, resilient spine ...".

- 2.2 The pre-characterising portion of claim 1 of the main request refers to "the extended portion (42) being flexibly and resiliently linked to the head (44) by a link (46) within the socket (43)".

As already explained in section 5.7 of the board's communication, this link is not the integral join of the end of the spine to the head at the bottom of the socket because the reference numeral is 46 (on Figures 4A to 4C of the patent but 76 on the original Figures 7A to 7C) which is the elastomeric material which fills the socket and surrounds the extended portion. Therefore it is true that this elastomeric material flexibly and resiliently links the extended portion to the head. However this part of the claim is confusing when read with the statement in the characterising portion that "the end of the spine remote from the handle (41) is integrally joined to the head (44) at the bottom of the socket (43), being the part of the socket most longitudinally distant from the handle (41), to thereby link the extended portion and the head (44)" referring to a link of extended portion and head at the bottom of the socket (as already explained in sections 6.4 and 6.5 of the board's communication).

2.3 Thus amendments to the wording of claim 1 of the main request after grant have made it unclear (Article 84 EPC).

3. *First auxiliary request*

3.1 The characterising portion of claim 1 of the first auxiliary request includes the feature (not present in the granted claims) of "**the socket (46) being** open on the upper surface of the head (41) from which bristles (45) extend and also **open on the lower surface**".

As explained in section 8.1 of the board's communication, while the granted Figure 4A shows that the socket 43 (46 in the claim is wrong) is open on the upper surface of the head, the board cannot see a disclosure of the socket being open on the **lower** surface of the head (the socket is hidden in Figure 4B by the elastomeric material 46).

Therefore the addition of this feature results in a claim 1 which is unallowable under Article 123(2) EPC.

4. *Second auxiliary request*

4.1 Claim 1 of the second auxiliary request contains a disclaimer to "attempt to re-establish the novelty of the claim over the teaching of this prior document" (D1 = DE-A-3 737 223), see paragraph 2 of page 4 of the statement of grounds of appeal.

4.2 Section 2.1 of the Order of decision G 1/03 dealing with disclaimers states that "A disclaimer may be allowable in order to ... restore novelty by delimiting

a claim against an accidental anticipation under Article 54(2) EPC; an anticipation is accidental if it is so unrelated to and remote from the claimed invention that the person skilled in the art would never have taken it into consideration when making the invention ...".

4.3 D1 is not an accidental anticipation. Like the present patent it concerns a flexible link for adjusting the relative positions of the toothbrush handle and head to limit the brushing pressure on the teeth, compare the present patent, column 1, lines 6 to 19 and D1, column 1, lines 37 to 48. Thus it is related to and close to the claimed invention and the person skilled in the art would have taken it into consideration when making the claimed invention, all the more so because D1 was published less than two years before the first priority date of the present patent.

4.4 The disclaimer is therefore unallowable.

5. With respect to the above findings none of the appellant's requests is allowable.

6. Moreover the description and drawings have not been adapted to the amended claims of the requests.

The description and drawings relate to subject-matter which is no longer claimed. Thus even if the board had come to the conclusion that the subject-matter of claim 1 of one of the requests was allowable, it would not have been possible to maintain the patent in amended form, see section 5.2(ii) and (iii) of the decision T 917/95 (not published in OJ EPO).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

T. Kriner