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D E C I S I O N
of 14 December 2004

Case Number: T 0397/01 - 3.3.6

Application Number: 92310721.3

Publication Number: 0544492

IPC: C11D 17/06

Language of the proceedings: EN

Title of invention:
Particulate detergent compositions

Patentee:
UNILEVER PLC, et al

Opponents:
Henkel KGaA
The Procter & Gamble Company

Headword:
Wholly non-tower route/UNILEVER

Relevant legal provisions:
EPC Art. 84, 123(2), (3), 111(1)

Keyword:
"Admissibility of new main request filed at oral proceedings (yes)"
"Clarity (main request): yes"
"Admissibility of main request under Article 123(2)(3) EPC (yes): the word "wholly" does not restrict further the meaning of the wording "non-tower route"
"Remittal (yes)"

Decisions cited:
T 1126/97, T 0051/99, T 0468/99, T 0383/88, T 0869/98

Catchword:

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Case Number: T 0397/01 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 14 December 2004

Appellants:
(Proprietors of the
patent)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 7 February 2001
revoking European patent No. 0544492 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Krasa
Members: L. Li Voti
E. Lachacinski

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division to revoke the European patent No. 0 544 92, relating to a particulate detergent composition and a process for its preparation, granted with a claim 1 reading as follows:

"1. A particulate detergent composition having a bulk density of at least 650 g/l, characterised in that it comprises:

(a) from 15 to 50 wt% of a surfactant system consisting essentially of:

(i) 60 to 100 wt% of ethoxylated nonionic surfactant which is a primary C₈-C₁₈ alcohol having an average degree of ethoxylation not exceeding 6.5 based on the total weight of the surfactant system,

(ii) 0 to 40 wt% of primary C₈-C₁₈ alkyl sulphate based on the total weight of the surfactant system;

(b) from 20 to 60 wt% of zeolite,

(c) optionally other detergent ingredients to 100 wt%; the composition being prepared by a wholly non-tower route by granulating the zeolite and surfactants in a high speed mixer/granulator."

II. In its notice of opposition the Opponents 01 and 02 sought revocation of the patent *inter alia* on the grounds of Article 100(c) EPC.

III. In its decision the Opposition Division found that

- the amended claim 1 of the then pending main request (comprising a proviso disclaiming a particular composition) required, like the granted claim 1, that

the claimed composition is prepared by a "wholly non-tower route";

- the originally filed application documents of the patent in suit described the use of non-tower technology in the preparation of the claimed composition;

- however, whilst the wording "non-tower route" could be interpreted as excluding any spray-drying step within the process of making the particulate composition starting from commercially available individual ingredients, the additional word "wholly" implied a further restriction in regard to the use of spray-drying technology, e.g. the exclusion of spray-drying technology in the preparation of the starting product themselves;

- therefore the wording "the composition being prepared by a wholly non-tower route" was not supported by the originally filed application documents of the patent in suit and claim 1 of the then pending main request did not comply with the requirements of Article 123(2) EPC;

- the respective claim 1 of each of the four auxiliary requests, not containing any longer the requirement of using a "wholly non-tower route" in the claimed process of preparation, contravened the requirements of Article 123(3) EPC.

IV. An appeal was filed against this decision by the Patent Proprietors (Appellants).

The statement of the grounds of appeal included a main request and four auxiliary requests corresponding to those considered at first instance.

- V. The Board informed the parties in a communication dated 14 September 2004 that the admissibility of claim 1 of each of the requests under Articles 123(2) and/or (3) and Article 84 EPC had to be discussed at the oral proceedings.

Moreover, the reasons of the decision under appeal had dealt only with the compliance of the claimed subject-matter with the requirements of Articles 123(2) and (3) EPC and did not include a discussion of the novelty and inventive step of the claimed subject-matter. The case had then to be remitted to the first instance for further prosecution if the decision under appeal would be set aside.

Under cover of a letter dated 12 November 2004 the Respondent and Opponent 02 communicated *inter alia* its intention not to attend the oral proceedings.

- VI. In the oral proceedings held before the Board on 14 December 2004 in the absence of the Respondent 02, the Appellants filed an amended main request.

The Respondent and Opponent 01 submitted that the amended main request was late filed and thus inadmissible.

Claim 1 according to this main request reads as follows:

"1. A particulate detergent composition having a bulk density of at least 650 g/l, characterised in that it comprises:

(a) from 15 to 50 wt% of a surfactant system consisting essentially of:

(i) 60 to 95 wt% of ethoxylated nonionic surfactant which is a primary C₈-C₁₈ alcohol having an average degree of ethoxylation not exceeding 6.5 based upon the total weight of the surfactant system, and

(ii) 5 to 40 wt% of primary C₈-C₁₈ alkyl sulphate based on the total weight of the surfactant system;

(b) from 20 to 60 wt% of zeolite,

(c) optionally other detergent ingredients to 100 wt%; the composition being prepared by a wholly non-tower route by granulating the zeolite and surfactants in a high speed mixer/granulator."

This claim differs from claim 1 as decided upon by the first instance insofar as **the upper limit of the concentration of primary alkyl sulphate in the surfactant system is 40 wt%** as in the granted claim instead of 35 wt% and **the proviso** contained at the end of the claim **that the particulate detergent composition does not consist of: (a) 50 wt% zeolite 4A, 23.4 wt% sodium carbonate, and 26.6 wt% nonionic surfactant, or (b) 56.6 wt% zeolite MAP, 13.3 wt% sodium carbonate, and 30.1 wt% nonionic surfactant,** has been deleted. Furthermore this claim differs from claim 1 as granted only insofar as **the surfactant system consists essentially of (i) 60 to 95 wt% of ethoxylated nonionic surfactant and (ii) 5 to 40 wt% of primary C₈-C₁₈ alkyl sulphate.**

The main request contains moreover dependent claims 2 to 9 and claims 10 to 12 relating to a process for the preparation of the claimed product.

VII. The Appellants submitted in writing and orally *inter alia* that

- the amendments to claim 1 of the main request filed at the oral proceedings were a response to the Board's communication of 14 September 2004, were clearly allowable and did not change the main matter of discussion;

- in fact, the deleted proviso contained at the end of the previous wording of claim 1 was redundant and the upper limit of the concentration of primary alkyl sulphate in the claimed surfactant system had been adjusted in order to exclude (at variance with the previous wording) the possible presence of additional unspecified surfactants not encompassed by the granted claim;

- the wording "the composition being prepared by a wholly non-tower route" related to the process steps for forming the claimed particulate detergent composition from the ingredients specified, irrespective of the way the starting products had been individually prepared, and required that such process steps did not involve any spray-drying;

- the word "wholly" was not intended to restrict further the term "non-tower route";

- this wording was supported by the passage bridging pages 7 and 8 of the application as originally filed (all references to the application as originally filed being based upon the published specification);

- thus, claim 1 did not contravene Article 123(2) EPC.

VIII. The Respondents and Opponents submitted *inter alia* that

- the wording "wholly non-tower route" was introduced during the examination proceedings for excluding processes wherein at least some of the starting products had been prepared by spray-drying;

- this wording had thus to be understood, at variance with the Appellants' view, as being more restrictive than the wording "non-tower route";

- such a limitation was not supported by the application as originally filed and thus claim 1 contravened the requirements of Article 123(2) EPC;

- furthermore, since there was not one single clear interpretation of the disputed wording, it could not be determined beyond any reasonable doubt that this wording complied with the requirements of Article 123(2) EPC; its introduction into the claim was thus inadmissible, as found e.g. in the decision T 383/88.

IX. The Appellants request that the decision under appeal be set aside and that the case be remitted to the first instance for further prosecution on the basis of the main request submitted during oral proceedings or on

the basis of one of the auxiliary requests 1 to 4, filed under cover of the letter of 18 June 2001.

The Respondents request that the appeal be dismissed

Reasons for the Decision

1. *Admissibility of the amended main request filed at the oral proceedings*

The Appellants replaced the main request at the oral proceedings with a newly amended set of claims.

According to the jurisprudence of the Boards of Appeal of the EPO new requests containing amended sets of claims, even if filed at the oral proceedings, can be exceptionally admitted into the proceedings if the introduced amendments

- are justified, e.g. being filed as a response to objections or comments not being part of the decision under appeal but raised in writing during the appeal proceedings,

- do not extend the frame of discussion determined by the decision under appeal and by the statement of the grounds of appeal;

- are clearly allowable and thus can be easily dealt with during oral proceedings by the other parties and by the Board (see e.g. the decisions unpublished in OJ EPO, T 1126/97, points 3.1.1 and 3.1.2 of the reasons for the decision; T 52/99, point 2 of the reasons for

the decision, first three full paragraphs; T 468/99, point 1.4 of the reasons for the decision).

Since the amendments carried out by the Appellants during oral proceedings were introduced as a response to the Board's communication of 14 September 2004 (see point V above), did not modify the main point of discussion defined by the decision under appeal and by the statement of the grounds of appeal, i.e. the admissibility of the wording "wholly non-tower route" (see points III and VII above), were clearly allowable (see point 2 hereinafter) and could be easily dealt with by the other party present at the oral proceedings and by the Board, the Board concludes that this request is admissible.

2. *Admissibility of the amendments to the main request introduced at the oral proceedings*

Claim 1 of the main request as amended at the oral proceedings differs from claim 1 as decided upon by the first instance insofar as **the upper limit of primary alkyl sulphate is 40 wt%** like in the granted claim and **the proviso contained at the end of the claim has been deleted** and differs from claim 1 as granted only insofar as **the surfactant system consists essentially of (i) 60 to 95 wt% of ethoxylated nonionic surfactant and (ii) 5 to 40 wt% of primary C₈-C₁₈ alkyl sulphate.**

The concentrations of the two components of the surfactant system are supported by page 3, lines 21 to 23 in combination with lines 33 to 35, line 38 and page 6, line 3 of the application as originally filed.

Claim 1 is clear since the sum of the two components of the surfactant system adds up to 100 wt% and the superfluous proviso relating to compositions no longer covered by the wording of the amended claim and having no limiting effect upon the claimed composition has been deleted.

Moreover, the claim is more restricted than claim 1 as granted requiring a surfactant system consisting essentially of 60 to 100 wt% of ethoxylated nonionic surfactant and 0 to 40 wt% of primary alkyl sulphate.

The deletion of the proviso also does not broaden the scope of the granted claims since the proviso was not contained in that claims.

The Board is thus satisfied that the amendments to claim 1 of the main request introduced at the oral proceedings comply with the requirements of Articles 84, 123(2) and (3) EPC.

3. *Admissibility of the wording "wholly non-tower route" in claim 1 of the main request*

3.1 Claim 1 of the main request requires, like the respective granted claim, that the claimed composition is prepared by a "wholly non-tower route".

As agreed by all parties the description of the application as originally filed specifies on the passage bridging pages 7 and 8 that "the compositions of the invention may also be prepared by other processes, involving spray-drying or non-tower technology or combinations of the two."

The Respondents and the Opposition Division argued that the disputed wording "wholly non-tower route" had been introduced during the examination proceedings for excluding compositions prepared by processes wherein at least some of the starting products had been prepared by spray-drying. This wording had thus to be understood as being more restrictive than the wording "non-tower route" in regard to the use of spray-drying technology and was thus not supported by the originally filed application.

Moreover, so the Respondents argued, the Appellants themselves had given different interpretations of this wording during the Examination and the Opposition proceedings.

Since it did not exist only one possible interpretation of the disputed wording, it followed that it could not be determined beyond any reasonable doubt that this wording complied with the requirements of Article 123(2) EPC and, consequently, it was also inadmissible according to the finding of T 383/88, unpublished in OJ EPO (see point 2.2.2 of the reasons for the decision).

3.2 The Board cannot accept these arguments.

It is the established Case Law of the Boards of Appeal of the EPO that a claim must be interpreted as it would be understood by the notional skilled person considering his common general knowledge and the description of the patent, if necessary, and ruling out illogical interpretations (see Case Law of the Boards of Appeal of the EPO, 4th ed., 2001, point II.B.4.1 on page 168).

The Board finds that the above mentioned passage "the compositions of the invention may also be prepared by other processes, involving spray-drying or non-tower technology or combinations of the two.", teaches that the claimed compositions may be prepared exclusively according to one of three distinct ways, spray-drying (the only "tower" process currently used in the preparation of particulate detergent compositions), a non-tower process or a process involving both kinds of technology.

Moreover, this teaching relates to the entire process of preparation of the claimed composition and not just to one of the possible steps of the process as interpreted by the first instance (see page 4, point 3.3, last 4 lines of the second full paragraph of the reasons for the decision).

Therefore, the original description of the patent in suit clearly and directly discloses the possibility of using entirely non-tower technology, i.e. a wholly non-tower process, for preparing a composition as claimed.

The Board finds also that features relating to the process of preparation of a composition regard only the manufacturing steps of a product from its starting components and the notional skilled person would have not interpreted the above mentioned passage to extend to the preparation of the starting components themselves, unless explicitly prescribed in the claim.

Moreover, the notional skilled person would not have found any support in the description for interpreting

the word "wholly" differently from its own known meaning, i.e. "entirely", and would have considered that the word "wholly" just underlines the fact that only non-tower technology should be used for preparing the claimed composition from the chosen starting materials but does not restrict further the claimed subject-matter.

Therefore, the Board agrees with the Appellants that the wording "wholly non-tower route" cannot be considered to extend to the manufacturing steps of the starting components but relates to the process of combining and processing the starting individual components, e.g. surfactant system and zeolite, independently from the way they have been individually prepared.

Since, on a technically reasonable reading of the description, it cannot be doubted that there is no other possible interpretation of the disputed wording for the notional skilled person, the finding of T 383/88 does not apply to the present case.

- 3.3 The Board concludes thus that the wording "wholly non-tower route" and thus all the claims of the main request comply with the requirements of Article 123(2) EPC.

4. *Remittal*

Although the claimed subject-matter has been found to satisfy the requirements of Articles 84, 123(2) and (3) EPC, it still has to be assessed whether the claims satisfy the other requirements of the EPC.

In the present case the decision under appeal was based on the ground of not compliance with the requirements of Articles 123(2) and (3) EPC.

Novelty and inventive step of the claimed subject-matter were, for example, not discussed neither in the decision under appeal nor in the written submissions of the parties during the appeal proceedings.

Since all parties have agreed that it was not appropriate under these circumstances to discuss the other grounds of opposition and the Appellants asked for the case to be remitted to the first instance for further prosecution, the Board finds that in order not to deprive the parties of the opportunity to argue the remaining issues at two instances, it is appropriate to make use of its powers under Article 111(1) EPC to remit the case to the department of first instance for further prosecution (see T 869/98, unpublished in OJ EPO, point 4 of the reasons for the decision).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the main request submitted during oral proceedings.

The Registrar:

The Chairman:

G. Rauh

P. Krasa