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**D E C I S I O N**  
**of 8 January 2003**

**Case Number:** T 0553/01 - 3.2.4

**Application Number:** 93306412.3

**Publication Number:** 0611533

**IPC:** A46B 5/00

**Language of the proceedings:** EN

**Title of invention:**  
Self-standing toothbrush

**Patentee:**  
JOHNSON & JOHNSON CONSUMER PRODUCTS

**Opponent:**  
UNILEVER PLC/UNILEVER NV

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 99, 100(a), 106, 107, 108  
R. 1, 55, 64, 65, 100

**Keyword:**  
"Admissibility (opposition and appeal (yes))"  
"Inventive step (yes)"

**Decisions cited:**  
G 0003/99

**Catchword:**  
-



**Case Number:** T 0553/01 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 8 January 2003**

**Appellant:** UNILEVER PLC / UNILEVER NV  
(Opponent) UNILEVER HOUSE BLACKFRIARS / WEENA 455  
London EC4P 4BQ (GB)/  
NL-3013 Rotterdam (NL)

**Representative:** Pearce, Timothy  
Unilever Research  
Quarry Road East  
Bebington, Wirral L63 3JW (GB)

**Respondent:** JOHNSON & JOHNSON CONSUMER PRODUCTS, INC.  
(Proprietor of the patent) Grandview Road  
Skillman,  
New Jersey 08558-9418 (US)

**Representative:** Fisher, Adrian John  
CARPMAELS & RANSFORD  
43 Bloomsbury Square  
London WC1A 2RA (GB)

**Decision under appeal:** Interlocutory decision of the Opposition Division  
of the European Patent Office posted 28 March  
2001 concerning maintenance of European patent  
No. 0 611 533 in amended form.

**Composition of the Board:**

**Chairman:** C. A. J. Andries  
**Members:** C. D. A. Scheibling  
C. Holtz

## Summary of Facts and Submissions

I. By its interlocutory decision dated 28 March 2001 the Opposition Division maintained the European patent 0 611 533 in amended form.

On 30 April 2001 the appellant (opponent) filed a notice of appeal, the appeal fee was paid simultaneously. The statement setting out the grounds of appeal was received on 27 July 2001.

II. The patent was opposed on the grounds based on Article 100(a) (54 and 56) EPC. During the appeal proceedings the appellant only referred to grounds based on Article 100(a) EPC with respect to inventive step (Article 56 EPC).

III. The following documents played a role in the appeal proceedings:

D4: DE-C-145 597

D5: DE-C-155 244

D6: US-A-4 158 413

D7: DE-A-35 23 891

D8: DE-U-79 30 644

D10: US-A-4 558 483

D24: US-S-240 981

IV. Oral proceedings took place on 8 January 2003.

During the oral proceedings the respondent (patentee) argued that the appeal should be deemed inadmissible.

The appellant countered said arguments. He further brought forward that the aim of the invention was to provide a new self-standing toothbrush comprising an angled head section as currently used.

He argued that a skilled person would start from the known self-standing toothbrush according to D4, which he considered to be the closest prior art document.

The appellant further argued that the toothbrush according to claim 1 of the patent in suit differed from that of D4 in that:

- (a) it comprises a suction cup the face of which is in a plane substantially orthogonal to the longitudinal axis of said handle,
- (b) the head and the upper region of said neck lie in substantially the same plane, and are angled relative to said longitudinal axis of said handle at an angle of about 9° to 15°, and
- (c) said upper region and said head lie within the right cylinder defined by the rim of said suction cup.

The appellant considered that the problem to be solved with respect to D4 was to improve stability of the self-standing toothbrush and to improve the cleaning effect of the toothbrush.

The appellant further argued that it was obvious for a skilled person to provide a toothbrush according to D4 with a suction cup as known from D10, that it was obvious for a skilled person in order to increase stability to have said upper region and said head lying within the right cylinder defined by the rim of said suction cup, and that it was also obvious to provide an angled neck as known from D24 in order to obtain the corresponding effects. Moreover, he argued that there was no interrelation between the features (a) and (b), and that feature (c) had no technical effect.

The respondent countered said arguments and held that a skilled person would not consider D4 to be an appropriate starting point for the invention, since said document was ninety years old and did not comprise an angled head.

The parties agreed that the toothbrush handle of D4 was made of bone.

- V. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patentee) requested that the appeal be deemed inadmissible or be dismissed.

- VI. Independent claim 1 as maintained reads as follows:

"1. A self-standing toothbrush (10) comprising:  
a head (16)  
a plurality of bristles (18) disposed on said head (16);  
a neck (14) having an upper region (32) and a lower

region (30);  
a handle (12) having a top portion (20) connected via said neck (14) to said head (16) and a bottom portion (22) forming a base; and  
means (24) affixed to said base for enhancing the stability of said toothbrush while disposed in a substantially upright position relative to a support surface;  
characterised in that  
said means is a suction cup the face of which is in a plane substantially orthogonal to the longitudinal axis (1-1) of said handle (12),  
said head (16) and the upper region (32) of said neck (14) lie in substantially the same plane, and are angled relative to said longitudinal axis (1-1) of said handle (12) at an angle (34) of about  $9^{\circ}$ - $15^{\circ}$ , and  
said upper region (32) and said head (16) lie within the right cylinder defined by the rim (35) of said suction cup".

## **Reasons for the Decision**

### *1. Admissibility*

1.1 On 30 April 2001 a notice of appeal was filed on a "Unilever" headed notepaper of Unilever N.V. and it was stated "Unilever hereby files notification of appeal ...", the appeal fee was paid simultaneously. A statement setting out the grounds of appeal was received on 27 July 2001.

1.2 The admissibility of the appeal was disputed by the respondent. In his written submission he forwarded that, since only one opposition fee was paid, only the

first named opponent, i.e. Unilever plc could be considered as having filed an opposition. The opposition filed by the second named opponent (i.e. the additional opponent: Unilever N.V.) was therefore inadmissible ab initio and thus, Unilever N.V. was not a party to the proceedings.

Because the appeal was filed however by Unilever N.V. which in the respondent's view was not a party to the proceedings, no valid notice of appeal had been filed.

Moreover, the respondent argued during the oral proceedings that the statement setting out the grounds of appeal did not fulfil the requirements of Article 108, third sentence, EPC.

1.3 However, in the meantime the Enlarged Board of Appeal clarified the problem of common opponents/appellants by its decision G 3/99 (OJ EPO 2002, 347), the Order of which reads as follows:

1. An opposition filed in common by two or more persons, which otherwise meets the requirements of Article 99 EPC and Rules 1 and 55 EPC, is admissible on payment of only one opposition fee.
2. If the opposing party consists of a plurality of persons, an appeal must be filed by the common representative under Rule 100 EPC. Where the appeal is filed by a non-entitled person, the Board of Appeal shall consider it not to be duly signed and consequently invite the common representative to sign it within a given time limit. The non-entitled person who filed the appeal shall be informed of this invitation. If

the previous common representative is no longer participating in the proceedings, a new common representative shall be determined pursuant to Rule 100 EPC.

3. In order to safeguard the rights of the patent proprietor and in the interest of procedural efficiency, it has to be clear throughout the procedure who belongs to the group of common opponent or common appellants. If either a common opponent or appellant (including the common representative) intends to withdraw from the proceedings, the EPO shall be notified accordingly by the common representative or by a new common representative determined under Rule 100(1) EPC in order for the withdrawal to take effect.

1.4 Since an opposition filed in common by two persons is admissible on payment of only one opposition fee, Unilever N.V. and Unilever plc were according to the decision G 3/99 common opponents forming one party for the opposition proceedings.

1.5 A further point is that it has to be clear in who's name the appeal was filed.

In response to a communication of the Board under Rule 65 (2) EPC the common professional representative for both Unilever N.V. and Unilever plc confirmed that the appeal was filed in the name of both Unilever N.V. and Unilever plc in accordance with the opposition filed in common.

1.6 Thus, an appeal has been filed by the common professional representative of the group of common



opponents. Consequently, the appeal complies with the requirements as to admissibility set out in Articles 106, 107, 108, first and second sentences, and Rule 64 EPC.

1.7 However, there still remains the question of whether the statement setting out the grounds of appeal can be regarded in terms of content as having met the requirement laid down in Article 108, third sentence, EPC or whether the appeal should be considered in accordance with Rule 65(1) EPC as inadmissible because this was not so.

1.8 Although, in his statement setting out the grounds of appeal, the appellant neither explicitly indicated which is the closest prior art document nor explicitly indicated where the features of claim 1 can be found in the prior art, it nevertheless seems that on proper reading of the statement, the appellant started from D7, considered suction elements to be generally known (e.g. D6) and found it obvious to combine a suction element with a toothbrush as known from D7. The requirements laid down in Article 108, third sentence, EPC therefore can be considered to be met.

1.9 Hence, the opposition and the appeal are admissible.

## 2. *Novelty*

None of the documents cited by the appellant shows in combination all of the features of claim 1 of the patent in suit. This point was not disputed by the appellant.

Thus, the subject-matter of claim 1 is novel.

3. *Closest prior art - Inventive step:*

3.1 The respondent argued that by relying during the oral proceedings mainly on D4 the appellant forwarded a new line of arguments which was not presented in the statement setting out the grounds of appeal, so that he was surprised of said new line of arguments in the appeal proceedings.

The Board considered however that although D4 was only mentioned and not discussed in the statement setting out the grounds of appeal, D4 was nevertheless considered by the Opposition Division to be one of the most relevant prior art documents and was furthermore the basis of the appealed decision. Therefore, the respondent should have been prepared to discuss D4, and would not have been surprised that it would be discussed in the oral proceedings.

3.2 In any event, the Board cannot share the opinion of the appellant (see section IV, above) with respect to D4 (the same reasoning would partly apply to D8, also cited by the appellant during the appeal proceedings).

3.3 The Board considers that at the priority date of the patent in suit, toothbrushes with angled heads were of common use and their advantages well known. In fact, due to the progress of technology in the field of toothbrushes, the art in general had already moved from straight toothbrushes towards toothbrushes with an angled head to obtain the known advantages.

Therefore, a skilled person knowing the advantages of a toothbrush with an angled head would either not have chosen a straight headed toothbrush (D4 or D8) as a

starting point for an invention which is intended to relate to angled head toothbrushes or, if nevertheless he did so, would have deliberately renounced the advantages provided by the angled head.

3.4 Indeed, a skilled person cannot be expected to renounce a feature of an object first (in the present case by choosing to start from a straight headed toothbrush (D4 or D8) thereby renouncing a toothbrush with an angled head and the corresponding advantages) in order to have the possibility to modify said object (the toothbrush) more easily in a first way (by adding a suction cup to improve stability) and to modify it afterwards in a second way in order to reintroduce the feature he renounced previously (so as to exhibit an angled head to improve the cleaning effect of toothbrush). Such a manner of proceeding would not be contemplated by a skilled person without inappropriate hindsight and is therefore to be disregarded in the assessment of inventive step.

3.5 Moreover, D5 which is a continuation of D4 discloses that the material used to manufacture the handle of the toothbrush of D4 is bone (lines 1 to 9).

The Board considers that, at the priority date of the patent in suit, a skilled person would not have considered a toothbrush dated 1903 having a straight handle made of bone to be an appropriate starting point in order to realize a new self-standing toothbrush, because bone cannot be considered to be a material that a customer would reasonably have accepted for the handle of his toothbrush at the priority date of the patent in suit.

3.6 Since the appellant has not forwarded any other line of arguments (not based on D4 or D8) during the oral proceedings and since the Board has come to the conclusion that a skilled person would not consider D4 (or D8) as an appropriate starting point for the purpose of providing a new self-standing toothbrush of the type referred to in the patent in suit, the appellant failed to demonstrate that the subject-matter of claim 1 of the patent in suit is obvious for a person skilled in the art.

3.7 Even if the appellant had chosen to base its arguments on D7 (see statement setting out the grounds of appeal), the Board would not have reached any other conclusion. The Board considers that it would not have been obvious for a skilled person to add a suction cup to the toothbrush of D7, since D7 comprises a toothpaste pump to be operated by a button provided in its base surface. Indeed, the adjunction of a suction cup would either have rendered the pump inoperable or if modifying the base structure, would have induced the risk of operating the pump each time the toothbrush is placed on its base respectively its suction cup. Therefore, a skilled person would not contemplate to combine the toothbrush according to D7 with a suction cup as known from D6.

3.8 Consequently, the subject-matter of claim 1 of the patent in suit involves an inventive step.

## **Order**

**For these reasons it is decided that:**

1. The opposition and the appeal are admissible.
2. The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries