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D E C I S I O N
of 17 December 2004

Case Number: T 0651/02 - 3.3.6

Application Number: 94300871.4

Publication Number: 0614966

IPC: C11D 3/12

Language of the proceedings: EN

Title of invention:
Use of a fabric softening clay

Patentee:
UNILEVER PLC, et al

Opponent:
The Procter & Gamble Company

Headword:
High levels/UNILEVER

Relevant legal provisions:
EPC Art. 123

Keyword:
"Main, first and second auxiliary request: amendments (not allowable) - inadmissible generalisation (here: of enzyme concentration)"

Decisions cited:

-

Catchword:

-



Case Number: T 0651/02 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 17 December 2004

Appellant:
(Opponent)

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Respondents:
(Proprietors 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 posted
3 June 2002 concerning maintenance of European
patent No. 0614966 in amended form.

Composition of the Board:

Chairman: P. Krasa
Members: G. N. C. Raths
U. J. Tronser

Summary of Facts and Submissions

I. This appeal is from the interlocutory decision of the Opposition Division relating to the maintenance of the European patent No. 614 966 in amended form on the basis of the then pending second auxiliary request.

II. Claim 1 of the patent of this request read as follows:

"1. Use of from 2 to 30% by weight of a fabric softening clay as an additive to reduce or prevent damage caused by washing wool in a fabric washing composition containing proteolytic enzyme in terms of weight loss of the fabric, shrinkage and eventual disintegration of the garment by formation of holes, wherein the fabric washing composition further comprises an anionic surfactant and a nonionic surfactant."

III. The opposition had been filed on the grounds of Article 100(a), (b), (c) EPC, in particular, for lack of insufficiency of disclosure (Article 83 EPC), for lack of novelty and inventive step (Articles 52(1), 54 (1) to (4) and 56 EPC) and for subject-matter extending beyond the content of the application as filed (Article 123(2) EPC).

Inter alia, the opposition was based on document

(1) EP-A-0 612 841.

IV. The Opposition Division found that the invention was sufficiently disclosed and, with respect to novelty, that document (1), which was to be considered under

Article 54(3) EPC, did not anticipate the claimed subject-matter because document (1) did not attribute any weight loss to the presence of proteolytic enzyme in the wash liquor.

In respect of inventive step, the Opposition Division found that the problem underlying the patent in suit was to find an alternative approach for reducing or preventing damage to woollen articles in terms of weight loss when washing them in the presence of proteolytic enzymes. The skilled person would not have inferred from the other prior art documents cited that the use of a fabric softening clay as an additive in a fabric washing composition would lead to a reduction in weight loss as evidenced by the comparative data in examples 1 and 2 of the patent in suit.

- V. The opponent (hereinafter appellant) filed an appeal against this decision.

- VI. In response to the objections raised by the appellant, the proprietors (hereinafter respondents) submitted a main request and 11 auxiliary requests under cover of the letter dated 17 November 2004.

- VII. At the oral proceedings before the Board, held on 17 December 2004, the respondents withdrew all former requests and filed three sets of amended claims labelled main request and first and second auxiliary request.

Main request

Claim 1 of the main request read:

"Use of from 2 to 30% by weight of a fabric softening clay as an additive to reduce or prevent wash damage other than pilling to wool in woollen articles, the damage being caused by a proteolytic enzyme when washing the articles in a fabric washing composition comprising the proteolytic enzyme, an anionic surfactant and a nonionic surfactant, the damage being in terms of fabric weight loss."

First auxiliary request

The first auxiliary request differed from Claim 1 of the main request in that the word "articles" was replaced by "garments".

Second auxiliary request

The second auxiliary request differed from Claim 1 of the first auxiliary request in that "shrinkage and eventual disintegration of the garments by the formation of holes" was added at the end of the claim, "shrinkage" being to be read as "shrinkage" (remark added by the Board for the purpose of understanding the sentence).

- VIII. The arguments of the respondents relevant for the present decision concern only the amendments made to Claim 1 of each request. According to the respondents, the basis for the amendments is found in the description as originally filed (page 1, lines 1 to 25).

- IX. The appellant requested that the decision under appeal be set aside and that the patent be revoked.
- The respondents requested that the appeal be dismissed and that the patent be maintained on the basis of the claims according to the main request or one of the two auxiliary requests all requests submitted at the oral proceedings.

Reasons for the Decision

1. *Main request, First and Second auxiliary request*

1.1 Article 123 EPC

Claim 1 of the application as originally filed read:

"1. Use of from 2 to 30% by weight of a fabric softening clay as an additive to reduce or prevent wash damage of woollen articles in a fabric washing composition comprising an anionic surfactant, a nonionic surfactant and a proteolytic enzyme."

Claim 1 of each of the requests submitted during oral proceedings (see above point VII) has one passage in common by which Claim 1 differs *inter alia* from Claim 1 as originally filed:

"...the damage being caused by a proteolytic enzyme...".

Actually the passage serving as a basis for the amendment of Claim 1 as originally filed reads:

"The damage caused by washing wool in a fabric washing composition containing high levels of proteolytic enzyme can be considerable in terms of weight loss of the fabric, shrinkage and eventual disintegration of the garments by formation of holes." (application as originally filed, page 1, lines 21 to 25, patent in suit, page 2, lines 18 to 20).

Even if the Board interprets in favour of the respondents that "the damage caused by washing wool in a fabric washing composition containing high levels of proteolytic enzyme" can be read as "the damage is caused by high levels of proteolytic enzymes", the concentration "high levels" is still missing in Claim 1 as amended.

To quantify the enzyme contents is essential for the following reasons:

In each Claim 1 of all three requests the damage to be reduced or prevented by the use of a softening clay is not the damage caused by high levels of a proteolytic enzyme but the damage caused by any concentration of proteolytic enzyme. Instead of preventing or reducing the damage caused by the enzyme only at high levels, the clay has - after amendment - also the property to prevent the damage caused by any levels of enzyme i.e. low levels and high levels. This possibility, however, was not disclosed in the application as originally filed.

Therefore, the claim has been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed.

It follows that Claim 1 of each request does not meet the requirements of Article 123(2) EPC.

Neither the main request nor the first nor the second auxiliary request are allowable.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:

G. Rauh

P. Krasa