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**Datasheet for the decision
of 10 November 2006**

Case Number: T 0742/02 - 3.3.06

Application Number: 93917739.0

Publication Number: 0658100

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:
Detergent composition

Patentee:
UNILEVER PLC, et al

Opponent:
KPSS-Kao Professional Salon Services GmbH

Headword:
Rod-Micellar composition/UNILEVER

Relevant legal provisions:
EPC Art. 100(a), 100(b)

Keyword:
"Sufficient disclosure - yes: no convincing evidence that
alleged unclarities in the claims rendered it impossible to
carry out the invention"

Decisions cited:

-

Catchword:

-



Case Number: T 0742/02 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 10 November 2006

Appellant: KPSS-Kao Professional Salon Services GmbH
(Opponent) Pfungstädterstraße 92-100
D-64297 Darmstadt (DE)

Representative: -

Respondents: UNILEVER PLC
(Patent Proprietors) Unilever House
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UNILEVER N.V.
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Representative: Newbould, Frazer Anthony
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 3 April 2002
rejecting the opposition filed against European
patent No. 0658100 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P.-P. Bracke
Members: P. Ammendola
R. Menapace

Summary of Facts and Submissions

I. This appeal has been lodged against the decision of the Opposition Division rejecting the opposition against the European patent No. 0 658 100, relating to a detergent composition.

II. The patent as granted comprised thirteen claims, claims 1 and 2 reading respectively:

"1. A detergent composition in the form of an aqueous liquid or gel, a substantial part of which is in the rod-micellar phase, containing:
5 to 50% by weight of non-soap detergent,
0.01 to 5% by weight of cationic polymer, and
2.0 to 15% by weight of silicone,
where the detergent composition has a viscosity of at least 6.0 Pa.s (6000cP) at a shear rate of 10 sec⁻¹, the composition not including more than 0.5% by weight of structuring compounds in the form of esters or alcohols incorporating two alkyl or acyl groups with more than 20 carbon atoms in total, nor more than 0.5% by weight of Scleroglucan gums."

"2. A shampoo in the form of an aqueous liquid or gel, a substantial part of which is in the rod-micellar phase, containing:
5 to 50% by weight of non-soap detergent,
0.01 to 5% by weight of cationic polymer, and
0.5 to 15% by weight of silicone,
where the detergent composition has a viscosity of at least 6.0 Pa.s (6000cP) at a shear rate of 10 sec⁻¹, the composition not including more than 0.5%

by weight of structuring compounds in the form of esters or alcohols incorporating two alkyl or acyl groups with more than 20 carbon atoms in total, nor more than 0.5% by weight of Scleroglucan gums."

The remaining claims 3 to 13 defined preferred embodiments of the compositions of claim 1 or 2.

III. The Opponent had sought revocation of the patent in suit on the grounds of insufficiency of disclosure (Article 100(b) EPC) and of lack of novelty and of inventive step (Article 100(a) EPC in combination with Articles 52(1), 54 and 56 EPC) by referring, *inter alia*, to the documents:

(1) EP-A-0 400 976,

and

(3) EP-A-0 432 951.

The objection under Article 100(b) was directed against the features of claims 1 and 2 reading "*a substantial part of which is in the rod-micellar phase*" (hereinafter "feature A") and "*the detergent composition has a viscosity of at least 6.0 Pa.s (6000cP) at a shear rate of 10 sec⁻¹*" (hereinafter "feature B").

IV. In its decision, the Opposition Division found that

- the rod-micellar phase was a known phenomenon in detergent systems and that the means for realising

feature A of the patented composition were disclosed in paragraph 44 of the patent in suit,

- the viscosity measurement temperature of 25°C used in example 1 of the patent in suit allowed to identify what was meant by the feature B,

- the claimed subject-matter was novel over the prior art disclosed in documents (1) and (3), *inter alia*, because the viscosity of the shampoos disclosed in these citations was neither described therein nor proven to be necessarily equal to or higher than 6.0 Pa.s,

and

- the claimed subject-matter was not obvious in view of the available prior art, *inter alia*, because the skilled person would not find there any suggestion that the emulsion stability could be improved by producing therein a rod-micellar phase to increase the viscosity of the composition.

V. The Opponent (hereinafter "Appellant") lodged an appeal against this decision. In the grounds of appeal it presented only arguments referring to the objections under Article 100(b) EPC because, as stated in the last paragraph of the grounds, the Appellant had considered that the other requirements for patent protection could be disregarded at that moment.

VI. During the oral proceedings held before the Board the Appellant requested to be allowed to modify its case by presenting also arguments against the findings in the

decision under appeal in respect of novelty and inventive step. This was allowed by the Board. By contrast, the Appellant's further request to refer also to documents which had not been considered during the proceedings before the Opposition Division was denied.

VII. The Appellant argued substantially as follows:

- the wording "*a substantial part*" of feature A had no understandable meaning and no generalization of the temperature used for measuring the viscosity in example 1 would be possible,

- the examples and the claims of documents (1) and (3) disclosed compositions which anticipated the claimed subject-matter.

After having been denied the possibility to introduce documents not considered in the oppositions proceedings, the Appellant stated not to have any additional argument in respect of the objections of novelty and inventive step.

VIII. The Patent Proprietors (hereinafter "Respondents") refuted the Appellant's arguments, in particular by maintaining that the given examples of the invention provided sufficient guidance for carrying out the invention. In respect of the objections under Article 100(a) EPC the Respondents referred to the reasons given by the Opposition Division for acknowledging novelty and inventiveness.

- IX. The Appellant requested that the decision under appeal be set aside and that the European patent No. 0 658 100 be revoked.
- X. The Respondents requested that the appeal be dismissed and that the patent be maintained as granted.

Reasons for the Decision

Patent as granted

1. Sufficiency of disclosure (Article 100(b) EPC)
 - 1.1 The patented invention is defined in claims 1 and 2 by making reference, *inter alia*, to the features A and B (see above sections II and III), both of which were considered by the Appellant to be unclear, so as to result in insufficiency of disclosure.
 - 1.2 In particular, the Appellant has based its objection in respect of feature A on the argument that the absence of a clear definition of the portion of the claimed composition which must be in the rod-micellar phase in order to constitute a "*substantial*" part thereof, rendered it impossible for the skilled person to carry out the invention.
 - 1.2.1 The Appellant may well be right that the absence of a specific definition for the amount corresponding to a "*substantial*" part of the patented detergent compositions or shampoos renders this feature unclear. Indeed, the only explicit disclosure in the patent in suit relevant to it is that given in paragraph 44,

which states, *inter alia*, that "Several methods can be employed to ensure that the rod micellar phase is **present**." (emphasis added by the Board), but provides nothing which could elucidate the precise amount corresponding to a "substantial" part.

1.2.2 However, such an unclarity would not, in the given circumstances, necessarily imply the impossibility to carry out the invention, because the skilled person attempting to carry out the invention would attribute to feature A in the claims 1 and 2 the same meaning as that derivable from the above-cited part of paragraph 44 - i.e. the more general requirement that such phase must be **present** - and, thus, would conclude that claims 1 and 2 encompass respectively detergent compositions or shampoos which, beside displaying the other claimed features, are **at least partially in the rod-micellar phase**.

1.2.3 Hence, a possible unclarity of feature A in the granted claims (not objectionable under Article 84 EPC in opposition or opposition appeal proceedings) would result in a lack of disclosure only if the skilled person, who is aware of the disclosure contained in the patent and of the common general knowledge, were unable to obtain detergent compositions and shampoos at least partially in the rod-micellar phase.

The Board notes that, as also observed in the decision under appeal and not contested by the Appellant, the rod-micellar phase is a known phenomenon in concentrated detergent compositions and that the patent in suit provides, in addition to the specific instructions in examples 1 and 2 as to how to rework

some of the claimed compositions, in paragraph 44 of the description a teaching of the means for ensuring that this phase is present, and the Appellant has not even alleged that the skilled reader of the patent in suit would be unable to realize further detergent compositions or shampoos at least partially in the form of a rod-micellar phase.

The Board, therefore, concurs with the findings in the decision under appeal (see above section IV) in respect of feature A and, thus, concludes that the impossibility to carry out the patented invention due to a possible unclarity of this feature has not been shown.

1.3 In respect of feature B the Appellant has argued in particular that its lack of clarity, which could not be remedied by generalising the teaching in example 1 as to the viscosity measurement temperature, would render it impossible to carry out the invention.

1.3.1 Again, the Appellant may rightly maintain that the absence of this temperature renders this feature of the granted claims unclear. This has not been disputed by the Respondents either.

However, the Board sees no reason why the skilled reader of the patent in suit would disregard the explicit teaching in example 1 that the viscosity of the compositions disclosed therein has been measured at 25°C, in particular when taking into account that no other viscosity measurement temperature is mentioned throughout the patent. Nor has the Appellant presented any evidence rendering it plausible that the skilled

reader of the patent in suit would see reasons for performing the measure of the viscosity in question at temperatures different from 25°C.

Hence, the Board concurs with the findings of the Opposition Division that the skilled reader of the patent in suit would understand that the viscosity mentioned in the claims is that measured at 25°C (see above section IV) and, thus, concludes that the impossibility to carry out the patented invention due to a possible unclarity of feature B has not been shown.

- 1.4 In view of the above the Appellant has failed in convincing the Board that the grounds of opposition of Article 100(b) EPC justified the revocation of the patent in suit.

2. Novelty and inventive step (Article 100(a) EPC in combination with Articles 52(1), 54 and 56 EPC)
 - 2.1 The Appellant has addressed these grounds of opposition by merely referring to the chemical composition of the shampoos disclosed in documents (1) and (3) as allegedly displaying all the features of present claim 2. However, as eventually conceded by it, none of these two citations mention the viscosity of the shampoos disclosed therein.

Hence, these documents provide no direct and unambiguous disclosure of the patented shampoos. Accordingly, the Board concurs with the decision under appeal (see above section IV) as to the novelty of the subject-matter claimed in the patent in the suit.

2.2 In the absence of any argument of the Appellant as to the obviousness of the claimed subject-matter vis-à-vis the available prior art, the Board has also no reasons for departing from the findings in the decision under appeal as to the presence of an inventive step underlying the patented subject-matter (see above section IV).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke