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D E C I S I O N
of 28 March 2006

Case Number: T 0447/03 - 3.3.02

Application Number: 96925008.3

Publication Number: 0840596

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:
Cleaning composition

Applicant:
Cussons (International) Limited

Opponent:

-

Headword:
Cleaning compositions/CUSSONS

Relevant legal provisions:
EPC Art. 84

Keyword:
"Article 84 (no): the viscosity value as the only
distinguishing feature amounts for an unclear limitation to the
subject-matter claimed"

Decisions cited:

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Catchword:

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Case Number: T 0447/03 - 3.3.02

D E C I S I O N
of the Technical Board of Appeal 3.3.02
of 28 March 2006

Appellant: Cussons (International) Limited
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Representative: Goodwin, Mark
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 20 November 2002
refusing European application No. 96925008.3
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: U. Oswald
Members: M. C. Ortega Plaza
J. Willems

Summary of Facts and Submissions

- I. European patent application No. 96 925 008.3 based on international patent application WO 97/03646 was filed with 10 claims. Claim 1 read as follows:
- "1. A cleaning composition for use in an aerosol container, said composition comprising (a) a base material which consists at least of a detergent and a thickener, said base material having a viscosity greater than 9,500 cps and (b) a foam forming material being maintained in suspension in the composition until after the composition is dispensed from the aerosol."
- II. The appeal lies from a decision of the examining division refusing the patent application under Article 97(1) EPC pursuant to the requirements of Article 84 EPC.
- III. The examining division considered that the subject-matter claimed in the main request did not comply with the requirements of Article 84 EPC since the temperature at which the viscosity was measured was not indicated anywhere in the application and the viscosity was the distinguishing feature of the subject-matter claimed.

The examining division considered that the same arguments applied by analogy to the first auxiliary request with the additional problem that the introduction of the word "gel" did not improve the lack of clarity caused by the absence of temperature at which the viscosity was measured.

IV. The appellant (applicant) lodged an appeal against said decision and supported it with arguments and additional technical information in its grounds of appeal.

Moreover, it filed with its notice of appeal two sets of claims as main request and first auxiliary request.

V. A communication from the board dated 1 April 2005 conveyed the board's preliminary opinion.

VI. The appellant filed with its response of 1 June 2005 a new main request, and four auxiliary requests.

VII. A communication from the board was sent as an annex to the invitation for oral proceedings in which the board raised an objection within the meaning of Article 123(2) EPC against some of the requests.

VIII. The appellant filed by fax on 22 March 2006 (four working days before the oral proceedings) a new main request and auxiliary requests 1 to 3. It filed by fax on 23 March 2006 additional technical information in order to support its arguments concerning its newly filed requests.

IX. Oral proceedings took place on 28 March 2006.

Following several attempts by the appellant to file additional requests during the oral proceedings before the board a discussion on admissibility of all the late-filed requests took place. By the end of the oral proceedings the appellant withdrew all its previous requests with the exception of its new main request (sole request) filed during the oral proceedings.

Claim 1 of the main request (sole request) reads:

"1. A cleaning composition for use in an aerosol container, said composition comprising (a) a base material which consists at least of a detergent and a thickener, said base material having a viscosity greater than 9,500 cps and (b) a foam forming material, at least a part of the foam forming material being maintained in suspension in the composition until after the composition is dispensed from the aerosol, and wherein the said thickener is selected from one or more of polyacrylic acids, natural clays, synthetic clays, alginates, collagen thickeners, cellulose thickeners, gelatine, glycerine based thickeners and guar thickeners, polyquaternium thickeners, xanthan gum, acrylate copolymers, polyethylene glycol thickeners, glycol esters."

X. The arguments submitted by the appellant may be summarised as follows:

The main request was an amended version of the main request filed with the letter of 1 June 2005 in which the option "alkanolamide" was deleted from claim 3 and claim 4 was deleted as a direct response to the comment by the board during the oral proceedings that there was a lack of consistency between these two claims and claim 1. Therefore its late-filing should be considered admissible.

Claim 1 was based on originally filed claim 1 in which dependent originally filed claim 2 had been

incorporated. Therefore, the requirements of Article 123(2) EPC had been met.

As regards the requirements of Article 84 EPC the appellant referred to its written submissions with the grounds of appeal and with the letter of 1 June 2005. The appellant's main line of argumentation concerned the following: in the absence of a reference to any temperature the skilled person would have considered room temperature, this being 20-25°C. It would have been no undue burden for the skilled person when measuring the viscosity of the base material using the method disclosed in the application within the range of temperatures of 20°-25°C for establishing whether or not a composition fell within the claim's wording.

A second line of argumentation was also developed: the definition of the nature of the thickener undertaken in claim 1 made redundant the feature concerning the viscosity value.

However, when questioned by the board as to whether all possible combinations for the components of the base material lead encompassed by the claim had viscosity values at room temperature greater than 9,500 cps, the appellant's answer was in the negative.

Example 1 was a representative example of the claimed invention and provided the details of an example of base material. The base material had a viscosity of 127,500 cps. The invention concerned a gel in an aerosol and the blend glyceryl laurate/betaine allowed the propellant to be held in place until the composition was dispensed and rubbed.

The appellant also referred to the additional examples filed with its grounds of appeal for which it had measured the viscosity at room temperature.

- XI. The appellant requested 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 (claims 1-8) filed during the oral proceedings.

Reasons for the Decision

1. *Admissibility*

- 1.1 The appeal is admissible.
- 1.2 The late-filed main request (sole request) is admitted into the proceedings since its claim 1 corresponds identically to that of the main request filed with the letter of 1 June 2005 in direct response to the board's preliminary opinion. The only amendments introduced in the set of claims relate to the deletion of the option "alkanolamide" in claim 3 and deletion of claim 4 (with renumbering of the subsequent claims). These amendments were made as an immediate and direct response to the board's comments during the oral proceedings concerning a lack of consistency among the claims.

The additional technical evidence submitted by the appellant by fax on 23 March 2006 (three working days before the oral proceedings) was not admitted into the proceedings since the appellant did not provide any

justification for its extreme lateness. Moreover, the tests performed were designed to support late-filed requests not admitted into the proceedings and which were withdrawn by the appellant near to the end of the oral proceedings.

2. *Main request*

2.1 Claim 1 of the main request meets the requirements of Article 123(2) EPC since it is based on originally filed claim 1 in which the thickener has been defined by incorporation of originally filed claim 3, which was dependent on claim 1.

2.2 As regards the requirements of Article 84 EPC, the following has been considered. Claim 1 relates to a cleaning composition for use in an aerosol container. The composition comprises (a) a base material and (b) a foam forming material. The base material is a multi-component composition which consists at least of a detergent and a thickener. These are the common components of cleaning compositions for use in an aerosol. The nature of the thickener has been defined in such a way that it includes more or less all classes of thickeners commonly used in cleaning compositions, with the exception of alkanolamides, which are not specifically mentioned in the claim. The nature of the detergent remains open-ended. Moreover, the minimum amounts for thickener and detergent have not been defined in the claim. Under such circumstances it is not possible to acknowledge the viscosity value as a redundant distinguishing feature, no longer serving to characterise the invention. Indeed, it is apparent from the reading of the application and it has been argued

by the appellant, that the viscosity value was intended to set a limit in respect of the physical characteristics of the base material, in order to distinguish the invention from prior art cleaning compositions. Additionally, the appellant has acknowledged that not all the compositions encompassed by the definitions for the base material given in the claim have a viscosity greater than 9,500 cps at room temperature. Consequently, the viscosity value is an essential feature for defining and distinguishing the claimed subject-matter over the prior art.

The appellant did not dispute that there is a dependency between the viscosity and the temperature at which it is measured and that even within a range of five degrees Centigrade the viscosity value may vary in a relevant way. Indeed, some of the experimental data submitted by the appellant with the grounds of appeal show differences of a factor of four.

Furthermore, the board is not convinced that in the absence of any mention of temperature in the application in suit the measurement necessarily takes place at room temperature since, being high viscous mixtures, the skilled person may for convenience choose to make the measurement at a higher temperature, for instance 30°C.

Therefore, claim 1 relates to an attempt to delimit the subject-matter for which protection is sought by means of a parameter (namely minimum viscosity value) which has been defined incompletely in the application as filed and for which the lack of definition cannot be

completed by the skilled person's general knowledge.
This renders the claim unclear.

Correspondingly, the board comes to the conclusion that claim 1 does not meet the requirements of Article 84 EPC.

The broadness of the claim, which incorporates almost all commonly known thickeners (and mixtures thereof) and any possible detergent (or detergent mixtures) in any conceivable absolute and relative amounts, seriously calls into question the appellant's argument in respect of the alleged burden put on the skilled person when assessing the subject-matter claimed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

A. Townend

U. Oswald