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D E C I S I O N
of 15 July 2005

Case Number: T 1244/03 - 3.3.06

Application Number: 93922135.4

Publication Number: 0660873

IPC: C11D 3/12

Language of the proceedings: EN

Title of invention:

High density granular detergent composition

Patentee:

The Procter & Gamble Company

Opponents:

Unilever PLC

Henkel KGaA

Headword:

Particle size/PROCTER & GAMBLE

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Admissibility of amendment (yes) - amendment directly and unambiguously derivable from application as filed"

Decisions cited:

-

Catchword:

-



Case Number: T 1244/03 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 15 July 2005

Appellant: Unilever PLC
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Party as of right: HENKEL KGaA
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Representative: -

Respondent: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted
4 November 2003 concerning maintenance of
European patent No. 0660873 in amended form.**

Composition of the Board:

Chairman: P. Krasa
Members: G. Raths
A. Pignatelli

Summary of Facts and Submissions

I. This appeal is from the interlocutory decision of the Opposition Division concerning maintenance in amended form of European patent No. 0 660 873 relating to a high density granular detergent composition.

II. Claims 1, 2 and 7 of the application as filed read:

"1. A process in which the bulk density of a particulate detergent material is increased starting from an initial bulk density of at least 600g/l, by spraying a liquid on to the particles and dusting with a fine powder in one or more rotating drum(s) or mixer(s), characterised in that the particulate detergent material initially has a mean particle size greater than 400 micrometers, and that the increase in the mean particle size during the process is not greater than 60%.

2. A process according to claim 1 such that the final bulk density of the particulate detergent material is greater than 750g/l, preferably greater than 800g/l.

7. A detergent composition having a bulk density of at least 750g/l, preferably at least 800g/l which comprises;

a) From 5% to 20% of organic surfactant

b) From 5% to 20% of sodium aluminosilicate

characterised in that the dispensing residue is less than 30% when:

a 150g sample of the detergent composition is poured into a drawer of a Zanussi (TM) shower-type dispenser, and 4 litres of water at a temperature of 20°C is passed through the said drawer from the nozzles of the dispenser at a rate of 2 litres/minute, after which the portion of the detergent composition remaining in said dispensing drawer is weighed, and the resulting weight expressed as a percentage of the initial 150g sample and averaged over at least 5 repetitions of the test, the resulting percentage being the dispensing residue.

and in that the rate of dissolution of the detergent composition is at least 50% of the sulphate/sulphonate salts passing into solution in less than 3 minutes when a 10g sample is dissolved in 1 litre of distilled water at a temperature of 20°C in a 1 litre Sotax cup, and with a Sotax stirring propellor no. 3990-2 rotating at 200rpm about a vertical axis, the bottom of the said stirring propellor being located 33mm above the bottom of the cup."

- III. Two notices of opposition had been filed against the granted patent, wherein the Opponents had sought revocation of the patent on the grounds of Article 100(a) EPC for lack of novelty and inventive step (Articles 52(1), 54(2) and 56 EPC) and of Article 100(b) EPC for lack of sufficient disclosure (Article 83 EPC).
- IV. The decision of the Opposition Division was based on a single Claim 1 of the main request filed under cover of the letter dated 15 September 2003.

Claim 1 read:

"1. A granular detergent composition having a mean particle size greater than 400 μm and having a bulk density of at least 750g/l, preferably at least 800g/l which comprises:

a) from 5% to 20% of organic surfactant comprising mixed anionic surfactant systems having a Krafft temperature less than 40°C, the anionic surfactant systems comprising sulphate and/or sulphonate salts;

b) from 5% to 20% of sodium aluminosilicate whereby no granular components are present which are prepared by spray drying and comprise organic surfactant;

the dispensing residue being less than 30% when a 150g sample of the detergent composition is poured into drawer of a Zanussi (TM) shower-type dispenser, and 4 litres of water at a temperature of 20°C is passed through the said drawer from the nozzles of the dispenser at a rate of 2 litres/minute, after which the portion of the detergent composition remaining in said dispensing drawer is weighed, and the resulting weight expressed as a percentage of the initial 150g sample and averaged over at least 5 repetitions of the test, the resulting 25 percentage being the dispensing residue;

and the rate of dissolution of the detergent composition being at least 50% of the sulphate/sulphonate salts passing into solution in less than 3 minutes when 10g sample is dissolved in 1 litre of distilled water at a temperature of 20°C in a 1

litre Sotax cup, and with a Sotax stirring propellor no. 3990-2 rotating at 200 rpm about a vertical axis, the bottom of the said stirring propellor being located 33 mm above the bottom of the cup."

- V. In its decision the Opposition Division held that the invention as claimed according to the said main request complied with the requirements of Articles 54, 56 and 83.

In respect of Article 123 EPC the Opposition Division held

inter alia

- that the ground of opposition raised by opponent 01 under Article 100(c) EPC was introduced too late and hence there was a violation of Article 99(1) EPC;
- that opponent 01 did not submit a reason for the lateness;
- that the objection lacked relevance since there was support in the application as filed, also, in particular, in respect of the sulphates and/or sulphonates now mentioned in component (a) of the claimed compositions;
- that the amendment concerning the mean particulate size of detergent compositions being greater than 400 μm did not contravene Article 123(2) EPC since the amendment was supported by the application as filed for the following reasons:

The mean particle size concerned the end product; the initial or starting granular component material has a mean particle size of above 400 μm (pages 4 and 16 of the application as filed). The increase in the mean particle size was not greater than 60%, preferably not greater than 40%, and more preferably not greater than 20% (pages 4 and 18 of the application as filed). That means that during the manufacture, the mean particle size remained the same as the initial one or increased during the preparation of the detergent composition (reasons, point 4.2, paragraph 3, lines 3 to 11).

- VI. This decision was appealed by opponent 01 (appellant) who repeated the arguments submitted during the opposition proceedings under Article 123(2) EPC in respect of the particle size. It added that the claim would cover embodiments of particles manufactured from a starting particle size of lower than 400 μm . Such embodiments were, however, not derivable from the application as filed and therefore the amendment resulting in Claim 1 of the said main request contravened Article 123(2) EPC.
- VII. The patent proprietor (respondent) argued that the appeal was not admissible since it dealt with the objection raised under Article 123(2) EPC which was not submitted within the time limit set for filing an opposition. It refuted all the objections and arguments of the appellant relating to the amendment of Claim 1.

It filed auxiliary requests I to IV which were subsequently replaced (see point IX below).

VIII. In its letter dated 23 June 2005 the appellant explained that the objection raised against the main request and against the second auxiliary request did not concern the process but concerned the product. The starting composition for the preferred process would be irrelevant for making any assumptions about the product obtained by that process. The issue of the particle growth would be irrelevant. Claim 1 of the application as filed being directed to a process would not support Claim 1 as amended which was now directed to a product.

IX. The appellant, opponent 02 (party as of right) and the respondent attended the oral proceedings which took place on 15 July 2005 before the Board.

At the beginning of the oral proceedings the respondent replaced all its requests on file by a main request and three auxiliary requests, the main request being identical with the main request on file, i.e. the request deemed to be admissible by the Opposition Division. For understanding this decision it is not necessary to give further details of the auxiliary requests.

X. The appellant requested that the decision under appeal be set aside and the European patent No. 0 660 873 be revoked.

The respondent requested that the appeal be dismissed or that the patent be maintained on the basis of

auxiliary requests 1 to 3 as filed during oral proceedings.

Reasons for the Decision

1. *Admissibility of the appeal*

The Board is satisfied that the appeal is admissible. Since the respondent stated at the beginning of the oral proceedings that it would no longer contest the admissibility of the appeal, no further reasons have to be given in this respect.

2. *Framework of the appeal proceedings*

The appellant had stated in the grounds of appeal under cover of the letter dated 10 February 2004 that "the decision is appealed on the basis that the opposition division were incorrect to uphold the patent in opposition proceedings because the main request is in breach of Article 123(2) EPC."

No other reasons "why the decision under appeal is challenged" were given in the appellant's statement of the grounds of appeal. In particular, as regards Articles 100(a) and (b) EPC, no case has been made by the appellant.

Therefore, in the present appeal proceedings, the Board has only to investigate and to decide whether or not the arguments set out in the appellant's statement of grounds of appeal, containing its complete case, were

appropriatet to set aside the Opposition Division's decision.

3. *Article 123(2) EPC*

- 3.1 The appellant argued that the patent had been amended in a way that it contained subject-matter which extended beyond the content of the application as filed.

The objection concerned the size of the finished granular detergent composition whereas the size disclosed by the application as filed concerned the initial particle size of the particulate detergent material. In particular, the appellant contested that the wording "A granular detergent composition having a mean particle size greater than 400 µm ..." found its support in the application as filed.

It also raised the objection that the passage

"from 5% to 20% of organic surfactant comprising mixed anionic surfactant systems having a Krafft temperature less than 40°C"

would be a generalization of the preferred compositions comprising anionic surfactant systems which generalization was not admissible, and violated Article 123(2) EPC.

The party as of right argued that a decrease of the particle size was not excluded; in the application as filed the increase of the particle size during the process was linked to the latter; however, as the claim stood now, any process for manufacturing the claimed

composition was possible and, therefore, a particle size reduction was also possible. Such possibility, however, was not originally disclosed and, therefore, this amendment was not admissible under Article 123(2) EPC.

It also argued that the properties of the finished product were now independent of the process for its manufacture. One of the properties would be good dispensing properties:

"It is an essential feature of the present invention that the powder at the inlet of the rotating drums/mixers is in granular form (with little or no fines), and not pulverized as a dust. This feature gives the dispensing benefits (because the absence of fine powder/dust avoids gel formation upon contact with water)."
(application as filed, page 5, second paragraph; patent in suit, page 3, lines 27 to 30).

The appellant concluded that the liquid to be sprayed on the particles and the finely particulate flow aid with which they are dusted in order to round off the particles by filling pores and surface irregularities (patent in suit, page 3, lines 25 to 26) would cause the dissolution, independently of whatever manufacturing process was used, and thus this dissolution, i.e. the decomposition of the particle under the influence of the sprayed liquid, would lead to a particle size decrease.

- 3.2 The Board does not agree with the reasoning of the appellant.

The application as filed disclosed a process characterised in

"that the particulate detergent material initially has a mean particle size greater than 400 micrometers, and that the increase in the mean particle size during the process is not greater than 60%."

(page 4, lines 9 to 12)

Claim 1 as filed contained the passage:

"the particulate detergent material initially has a mean particle size greater than 400 micrometers"

Claim 1 of main request contained the passage:

"A granular detergent composition having a mean particle size greater than 400 μm ..."

- 3.3 The appellant pointed to the fact that now Claim 1 deemed to be maintainable was directed to a product and, therefore, the claim would cover situations where the starting material may have a particle size of less than 400 μm . It maintained in particular that a process with starting material of 200 μm and a finished product of 420 μm would fall within the scope of Claim 1

- 3.4 However, it is to be noted that the product claim 1, now at stake, comprises no features of a process for manufacturing the product but only parameters of the

product (i.e. the granular detergent composition) defining the latter (see above point IV). It is self-evident that the amendment objected to by the appellant, i.e. the incorporation of "a mean particle size greater than 400 micrometers" into the set of parameters defining the granular detergent composition, is information relating to this product. Therefore, it has to be investigated, whether or not this information tells the skilled person something about the product which is new - new in the sense that it was not comprised in the body of information on the product as disclosed explicitly or implicitly in the application as filed.

3.5 As the Opposition Division already pointed out, the application as filed gave a clear teaching that the mean particle size of the end product had to be above 400 μm (see point V). The Board cannot see any flaw in the Opposition Division's finding and, therefore, has no reason to deviate therefrom.

3.6 Any counter-argument of the party as of right relating to possible differences in the manufacturing process must fail since, as already stated, the claim in question contains no process feature.

In particular, the argument cannot be accepted by the Board that a decrease of the size is not excluded because the liquid sprayed on the particles would lead to a size reduction as result of the dissolution properties of the sprayed liquid.

First of all, this argument, which was contested by the respondent, lacks an experimental support and, thus,

has to be disregarded as a mere allegation and further it is to be noted in addition that nowhere in the application as filed was a size reduction of the granules in the course of the agglomeration process contemplated. Page 4, lines 11 to 12 and page 18, lines 6 to 7 from the bottom address "the increase in the mean particle size during the process" and "the increase in mean particle size from beginning to end of the process", respectively.

3.7 Thus, the mean particle size of greater than 400 μm is supported by the application as filed for the product now claimed.

3.8 Also the argument relating to the Krafft temperature and the conclusion that because of the indication of this temperature, there would be a non-allowable generalization in Claim 1 deemed to be maintainable does not succeed for the following reasons:

The relevant passage in Claim 1 reads:

"from 5 to 20% of organic anionic surfactant comprising mixed anionic surfactant systems having a Krafft temperature less than 40°C..."

Firstly, this passage finds its support in the application as filed:

"A particularly preferred embodiment of the present inventioncomprises

a) From 5 to 20% of organic surfactant..."

(page 19, lines 2 and 5 from the bottom)

and

"Most preferred compositions comprise mixed anionic surfactant systems having a Krafft temperature less than 40°C in order to achieve a good rate of dissolution at mean particle size of 550-750 micrometers."

(page 20, lines 23 to 26).

Since the preferred embodiment comprises both the concentration range of organic surfactant (5 to 20%) and the mixed anionic surfactant systems having a Krafft temperature of less than 40°C the above mentioned passage is supported by the description as filed.

Secondly, there is no contradiction of a finished product of a granular detergent composition having a mean particle size greater than 400 µm and the mean particle size of 550 to 750 µm. Whereas the value of 400 µm refers to the minimum size of the finished product, the values of 550 to 750 µm i.e. greater than 400 µm refer to the good dissolution property of the anionic surfactant system.

3.9 It follows that the amendment was directly and unambiguously derivable from the application as filed and that the European patent has not been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed and thus it meets the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P. Krasa