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D E C I S I O N
of 21 February 2006

Case Number: T 0937/04 - 3.3.06

Application Number: 96303793.2

Publication Number: 0745665

IPC: C11D 17/04

Language of the proceedings: EN

Title of invention:
Personal cleaning composition

Patentee:
PZ Cussons (International) Limited

Opponent:
KPSS-Kao Professional Salon Services GmbH
The Procter & Gamble Company
S.C. Johnson & Son, Inc.
HENKEL KGaA

Headword:
Aqueous skin-cleansing composition/CUSSONS

Relevant legal provisions:
EPC Art. 54, 123(2), 104(1)

Keyword:
"Main request: admissibility of amendment (no)"
"Auxiliary requests 1 to 3: novelty (no)"
"Apportionment of costs (yes)"

Decisions cited:
T 0930/92

Catchword:
-



Case Number: T 0937/04 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 21 February 2006

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 14 May 2004
revoking European patent No. 0745665 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Krasa
Members: L. Li Voti
U. Tronser

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division to revoke the European patent No. 0 745 665, concerning an aqueous personal skin cleansing composition and a package therefor.

II. In their notices of oppositions the four Opponents sought revocation of the patent on the grounds of Article 100(a) EPC, because of lack of novelty and inventive step of the claimed subject-matter.

The following document was referred to *inter alia* in support of the oppositions:

(6): GB-A-758020.

III. In its decision, which was taken in respect of the Patent Proprietor's main request filed under cover of the letter dated 4 October 2002 and its first (and only) auxiliary request filed during oral proceedings, the Opposition Division found that

- the claims according to the main request contravened the requirements of Article 123(2) EPC insofar as the application as originally filed did not contain any generic disclosure of a composition comprising a combination of a first aqueous alpha hydroxy acid with a second aqueous component and of a composition wherein said second component, capable of generating carbon dioxide gas when mixed together with the alpha hydroxy acid, is not carbonate or bicarbonate;

- the claims according to the first auxiliary request complied with the requirements of Article 123(2) EPC and were novel over the cited prior art; in particular, document (6) did not disclose the use of a single package for the first and second components as required in claim 1 of the patent in suit;

- however, the claimed subject-matter lacked an inventive step in the light of the teaching of the prior art.

IV. An appeal was filed against this decision by the Patent Proprietor (Appellant) on 20 July 2004 and the appeal fee was duly paid on the same day.

The Appellant filed with the statement of the grounds of appeal (on 23 September 2004) four sets of claims to be considered as main and as first to third auxiliary requests, respectively, the sets of claims according to the main and to the first auxiliary request corresponding to those considered by the first instance.

Claim 1 according to the main request reads as follows:

"1. An aqueous personal skin-cleansing composition and package therefor, the composition comprising a surfactant, a first aqueous alpha hydroxy acid component and a second aqueous component, wherein the first and second components are kept separate from each other until the composition is to be used and wherein when said first and second components are combined together carbon dioxide gas is generated which acts on the surfactant to create a lather and wherein as said first and second components are dispensed from the

package the two components mix together to create the carbon dioxide gas for lather formation."

Claims 2 to 12 according to the main request relate to particular embodiments of the claimed composition and package therefor.

The set of 11 claims according to the first auxiliary request differs mainly from that according to the main request insofar as claim 1 specifies that **the second component is carbonate or bicarbonate and does not require that both the first and second components are aqueous.**

The set of claims according to the second auxiliary request differs from that according to the first auxiliary request insofar as claim 1 further specifies that **the surfactant is not foamed until the composition is to be used.**

The set of claims according to the third auxiliary request differs from that according to the first auxiliary request insofar as all claims relate to **the use of a package to dispense an aqueous personal skin-cleansing composition as a lather**, the packaged composition according to claim 1 having all the features of the composition of claim 1 according to the first auxiliary request.

The Respondents 02 and 03 (Opponents 02 and 03) informed the Board by fax sent, respectively, on 10 February and on 16 February 2006, that they would not attend the oral proceedings.

The Appellant informed the Board by fax sent on Friday 17 February 2006 on 16.27 h that he would also not attend the oral proceedings. Copies of this fax were not sent by the Appellant to the other parties.

The other parties were thus informed by the Registrar of the Board on Monday 20 February 2006 that the Appellant would not attend the proceedings.

Oral proceedings were then held before the Board on 21 February 2006 in the absence of the duly summoned Appellant and Respondents 02 and 03.

V. The Appellant submitted in writing *inter alia* that

- the application as originally filed disclosed that the used composition as a whole had to be aqueous; moreover the containers depicted in the figures comprised dip tubes or suction pumps for extracting liquids which thus had to be aqueous;

- the sole example related to a composition comprising only aqueous components and there was no disclosure of solid components; moreover solid components would require more time to dissolve in water and thus were not desirable;

- the description taught that carbon dioxide gas was generated when hydroxy acid was mixed together with the second component, carbonate and bicarbonate being cited only as preferred components;

- the application as originally filed thus contained a support for the amended wording of claim 1 according to the main request;

- the claimed subject-matter was novel over the cited documents for the reasons set forth in the decision under appeal;

- furthermore, the claimed subject-matter involved an inventive step over the cited prior art.

VI. The Respondents and, in particular, Respondents 01 and 04 (Opponents 01 and 04) submitted in writing and orally *inter alia* that

- claim 1 according to the main request contravened the requirements of Articles 123(2) EPC for the reasons set forth in the decision under appeal;

- document (6) disclosed an aqueous hair shampoo composition comprising a surfactant, an alpha hydroxy acid such as citric acid and carbonate or bicarbonate; moreover, the alpha hydroxy acid component and the carbonate or bicarbonate component had to be mixed together only immediately before use of the shampoo composition and upon mixing liberated carbon dioxide gas which "aerated" the detergent composition forming immediately lather; therefore, this document disclosed implicitly that the acid and the carbonate or bicarbonate component had to be packaged in order to keep them separated and stable before use;

- moreover, claim 1 according to any of the Appellant's requests was not restricted to the use of a particular

type of package, e.g. of a single package for both components as shown in the figures of the patent in suit, but included the use of separate single containers for any of the components;

- the subject-matter of claim 1 according to each of the other requests lacked thus novelty over document (6);

- the claimed subject-matter lacked also inventive step in the light of the teaching of the prior art.

VII. Respondent 01 put forward during oral proceedings that he had been informed of the Appellant's intention not to attend the oral proceedings only the day before the scheduled date when he had already travelled to Munich and met arrangements for his staying overnight. If the Appellant's intention would have been communicated earlier, he would thus have decided not to attend the proceedings, which he regarded to be superfluous, thus saving costs.

He asked thus an apportionment of costs under Article 104(1) EPC.

VIII. The Appellant requested in writing that the decision under appeal be set aside and that the patent be maintained on the basis of either the main request or auxiliary requests 1 to 3, all filed with the grounds of appeal.

The Respondents requested that the appeal be dismissed.

Respondent 01 requested in addition apportionment of costs according to Article 104(1) EPC.

Reasons for the Decision

1. *Main request*

1.1 *Article 123(2) EPC*

Claim 1 requires that the aqueous personal skin-cleansing composition comprises a surfactant, a first aqueous alpha hydroxy acid component and a second aqueous component and that the first and second component, when combined together, generate carbon dioxide gas.

The application as originally filed discloses that

- the composition comprising a first and second component is as a whole aqueous (column 1, lines 39 to 44 of the A2 publication; all references hereinafter being also related to the A2 publication), the first component being an acid such as a alpha hydroxy acid and the second component being, for example, carbonate or bicarbonate which when mixed together with the acid produce carbon dioxide (column 2, lines 18 to 22);

- the surfactant can be comprised together with the first or with the second component or with both of them or can be present as a further separate component (column 2, lines 23 to 26);

- additional additives can be comprised and can be present in any of the components (column 2, lines 33 to 37);
- the components can be comprised in separate containers provided with a dip tube extending into each container and with means for extracting them, e.g. a pump suction spray (column 2, lines 7 to 9 and figures 1 to 3);
- for example, one compartment can comprise a concentrated component and the other one a diluted one (column 3, lines 27 to 34).

However, the description does not specify that such a concentrated component has to be aqueous.

Moreover, even though solid components are not specifically disclosed, they are not excluded and in fact the composition can consist of three separate components, the acidic one, the carbonate or bicarbonate and the surfactant and only one of them needs to be aqueous so that the resulting whole composition is aqueous too.

Therefore the Board finds that according to this teaching the acidic and the carbonate or bicarbonate components can be both present as liquids and one of them can be aqueous. The description does not contain, however, any explicit teaching that both of them can be aqueous.

The sole example contained in the description relates to a composition comprising a first component comprising an aqueous citric acid together with a

thickener and the second component comprising sodium bicarbonate together with various surfactants and water (column 2, line 49 to column 3, line 8); therefore, it relates to a composition comprising two aqueous components.

However, this combination represents in the Board's view a very specific embodiment which cannot be taken as a generic teaching that both the first and second components can be used in aqueous form in all possible combinations encompassed by the wording of claim 1.

The Board thus finds that on these grounds the subject-matter of claim 1 of the main request contravenes the requirements of Article 123(2) EPC.

2. *First auxiliary request*

2.1 *Article 123(2) EPC*

Claim 1 according to this request differs from that according to the main request insofar as it specifies that the second component is carbonate or bicarbonate and does not require that both the first and second components are aqueous.

The Board is satisfied that these claims comply with the requirements of Article 123(2) EPC as also found in the decision under appeal (see point III above).

2.2 *Novelty*

2.2.1 The subject-matter of claim 1 relates to an aqueous personal skin-cleansing composition, i.e. to a

composition suitable for cleansing the skin without being harmful to it (see e.g. page 2, lines 38 to 40 of the patent in suit), comprising a surfactant, an alpha hydroxy acid component and a carbonate or bicarbonate component and a package therefor, wherein the alpha hydroxy acid component and the carbonate or bicarbonate component are kept separated from each other until the composition is to be used and wherein as said first and second components are dispensed from the package the two components mix together to generate carbon dioxide gas which acts on the surfactant to form a lather.

Therefore the hydroxy acid and the carbonate or bicarbonate component must be comprised in the package as separate components which do not mix together till they are dispensed.

However, the Board finds, at variance with the decision under appeal, that the wording of claim 1 does not require the presence of a single package for both the first and second components.

In fact, claim 1 requires the presence of a package in generic terms and does not specify, e.g., if it consists of more than one separate containers. The Board notes e.g. that the additional feature that the package consists of separate containers is subject-matter of dependent claim 2 and that only dependent claim 3 requires that such containers form a single unit.

Therefore the Board finds that the wording of the claim encompasses any form of suitable package for the specified components and thus also the use of distinct

single containers for any of the components. This finding is moreover in agreement with the description of the patent in suit (see page 2, lines 25 to 26).

- 2.2.2 It is undisputed that the document (6) discloses an aqueous shampoo composition suitable as personal skin-cleansing composition, comprising surfactant, an alpha hydroxy acid such as citric acid and carbonate or bicarbonate, the acidic component being preferably dissolved in the aqueous surfactant component. Moreover, according to the teaching of this document the hydroxy acid component and the carbonate or bicarbonate component are to be mixed only immediately before use thereby liberating carbon dioxide and "aerating" the detergent composition to form immediately a lather which is easily spread over the palms of the hands and thence easily transferred to the scalp (page 1, lines 19 to 47; page 2, lines 45 to 58 and 84 to 86; page 2, line 125 to page 3, line 17; page 3, lines 49 to 56; page 4, lines 45 to 64 and 78 to 84).

As also found in the decision under appeal, the acidic and the carbonate or bicarbonate components disclosed in document (6) must necessarily be packaged and kept separated before use and they must be dispensed from such packages only immediately before use so that they can mix together and form a lather.

Since claim 1 is not limited to a package consisting of separate containers contained in a single unit, as explained hereinabove, but encompasses single containers for any of the components which feature has to be considered implicitly disclosed in document (6),

the Board finds that document (6) discloses all the features of the subject-matter of claim 1.

The subject-matter of claim 1 according to the first auxiliary request lacks thus novelty.

3. *Second auxiliary request*

Claim 1 according to the second auxiliary request differs from that according to the first auxiliary request insofar as it further specifies that **the surfactant is not foamed until the composition is to be used.**

However, this feature is also disclosed in document (6) according to which the acidic component and the carbonate or bicarbonate component are mixed together immediately before use thereby liberating carbon dioxide and "aerating" the surfactant to form a lather (see 2.2.2. above).

The arguments put forward as to the novelty of claim 1 according to the first auxiliary request apply thus *mutatis mutandis* to claim 1 according to the second auxiliary request.

The subject-matter of claim 1 according to the second auxiliary request lacks thus novelty over the disclosure of document (6).

4. *Third auxiliary request*

Claim 1 according to the third auxiliary request differs from that according to the first auxiliary

request insofar as it relates to **the use of a package to dispense an aqueous personal skin-cleansing composition as a lather**, the packaged composition having all the features of the composition of claim 1 according to the first auxiliary request.

Since, as explained hereinabove, document (6) implicitly discloses the use of a package for dispensing a composition having all the features of that of claim 1 according to the first auxiliary request (see point 2.2.2 above), the arguments put forward as to the novelty of claim 1 according to the first auxiliary request apply *mutatis mutandis* to claim 1 according to the third auxiliary request.

The subject-matter of claim 1 according to the third auxiliary request lacks thus novelty over the disclosure of document (6).

5. *Apportionment of costs*

5.1 Under Article 104(1) EPC each party to opposition proceedings shall meet his own costs unless the opposition division or a board of appeal orders, for reasons of equity, a different apportionment of costs incurred in oral proceedings (see Article 111(1) EPC, second sentence in conjunction with Rule 66(1) EPC).

Such a discretionary decision is justified if the conduct of one party is not in keeping with the care required, that is if costs arise from culpable actions of an irresponsible or even malicious nature (see Case Law of the Boards of Appeal of the European Patent Office, 4th edition 2001, VII.C.12.3, page 492).

For example, if a party decides only shortly before the date scheduled for oral proceedings that it is not going to attend them, its equitable obligations extend to informing any other parties to the appeal proceedings of its decision not to attend oral proceedings. However, even in this case, a party which decides at such a late stage not to attend oral proceedings runs the risk of an apportionment of costs to compensate the other parties for the unnecessary costs incurred by attending oral proceedings (see T 930/92, OJ EPO 1996, 191, point 3.2 of the reasons for the decision).

In the present case, the Appellant and Patent Proprietor informed the Board by fax sent only to the European Patent Office and not to the other parties on Friday, 17 February 2006, after business hours, at 16.27 h, that he would not attend the oral proceedings. Reasons to justify the filing of this information at such a late stage were not provided.

The other parties were thus informed by the Registrar of the Board on Monday 20 February 2006, i.e. one working day before the oral proceedings, that the Appellant would not attend them.

Even though also Opponents 02 and 03 had informed the European Patent Office within one week before oral proceedings that they will not attend them (see point IV above), they are only Respondents in these appeal proceedings as Opponents 01 and 04 too, whereas the Appellant and Patent Proprietor, acting "on the other side" of the appeal proceedings against the

Opponents, could have tried, during oral proceedings, to strengthen the arguments upon which the appeal grounds were based.

By informing solely the European Patent Office and not the other parties only one working day before the oral proceedings, the Appellant has thus failed to exercise all due care required.

- 5.2 During oral proceedings Respondent 01 explained that he had been informed of the Appellant's decision not to attend the oral proceedings only the day before the scheduled date when he had already travelled to Munich and met arrangements for his staying overnight.

Furthermore, requesting apportionment of costs, he put forward that he would have cancelled the meeting he attended in Munich on Monday, 21 February 2006, one day before oral proceedings, and would have decided not to attend them if he would have been informed in due time, e.g. on Friday, of the Appellant's intention. He would thus have requested a written decision based on the content of the file in order to save costs.

The Board finds thus that the Appellant's failure to duly notify the European Patent Office and the other parties of his intention not to attend oral proceedings has caused Respondent 01 to undergo expenses for attending oral proceedings, which otherwise he would not have incurred into.

Therefore, the Board concludes that, for reasons of equity, an apportionment of costs should be accorded in favour of Respondent 01.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The Appellant has to meet the costs, which the Opponent 01 (Respondent 01) has incurred because of attending the oral proceedings before the Board of Appeal.

The Registrar:

The Chairman:

G. Rauh

P. Krasa