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**Datasheet for the decision
of 21 March 2007**

Case Number: T 0184/06 - 3.3.06

Application Number: 98870035.7

Publication Number: 0903403

IPC: C11D 3/395

Language of the proceedings: EN

Title of invention:

Stable bleaching compositions

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

HENKEL KGaA

Headword:

Liquid bleaching composition / PROCTER & GAMBLE

Relevant legal provisions:

EPC Art. 54(2), (3), 87(1), 88(2), (3)
RPBA Art. 10a(4), 10b(1), (3)

Keyword:

"Admissibility of documents submitted with the statement of the grounds of appeal: yes"

"Remittal to the department of first instance: no"

"Admissibility of new requests filed during the oral proceedings: yes"

"Novelty (Main Request and First to Eighth Auxiliary Requests): no - characteristics of purity of a surfactant in liquid composition not limiting"

"Priority: not valid"

"Novelty (Ninth and Tenth Auxiliary Requests): no"

Decisions cited:

G 0002/98

Case Number: T 0184/06 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 21 March 2007

Appellant 01: THE PROCTER & GAMBLE COMPANY
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Cincinnati, Ohio 45202 (US)

Representative: TER MEER - STEINMEISTER & PARTNER GbR
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Appellant 02: HENKEL KGaA
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
5 December 2005 concerning maintenance of the
European patent No. 0903403 in amended form.

Composition of the Board:

Chairman: P.-P. Bracke
Members: L. Li Voti
U. Tronser

Summary of Facts and Submissions

I. The present appeal is from the interlocutory decision of the Opposition Division to maintain in amended form European patent no. 0 903 403, concerning a liquid bleaching composition.

II. In its notice of opposition the Opponent, referring to documents

(1): EP-A-0905223;

(2): EP-A-0931829 and

(3): EP-A-0340371;

sought revocation of the patent *inter alia* on the grounds of Article 100(a) EPC, because of lack of novelty of the claimed subject-matter.

III. In its decision, the Opposition Division found *inter alia* that

- the patent in suit did not benefit from the claimed priority date;

- the subject-matter of claim 1 according to the then pending first auxiliary request (which was identical to claim 1 according to the main request, i.e. claim 1 as granted), lacked novelty over the teaching of documents (1) or (2);

- the subject-matter of claim 1 according to the then pending fourth auxiliary request lacked novelty over document (1);

- the patent as amended according to the sixth auxiliary request submitted during the oral proceedings held on 11 November 2005 complied with the requirements of the EPC.

IV. Appeals were filed against this decision by the Patent Proprietor (Appellant 01) and by the Opponent (Appellant 02).

The Patent Proprietor submitted with the grounds of appeal seven sets of claims to be considered as first to seventh auxiliary requests respectively. A new set of claims according to the eighth auxiliary request was submitted with the letter of 12 September 2006.

The Opponent cited with its statement of the grounds of appeal two additional documents:

(4): EP-A-0905224 and

(5): WO-A-95/09227.

Oral proceedings were held before the Board on 21 March 2007.

The Patent Proprietor submitted during oral proceedings two new sets of claims to be considered as ninth and tenth auxiliary requests respectively.

V. The sets of claims according to the **main request** (claims as granted) and according to the **first auxiliary request** comprise an independent claim 1 reading as follows:

"1. A liquid bleaching composition comprising a hypohalite bleach and an alkyl(alkoxy)_n sulphate, wherein n is from 0.5 to 20, characterised in that said alkyl(alkoxy)_n sulphate contains less than 10% by weight of unsulfated material on alkyl(alkoxy)_n sulphate active basis and/or less than 0.0015% by weight of metal impurities on alkyl(alkoxy)_n sulphate active basis."

The sets of claims according to the **second to sixth auxiliary requests** comprise an independent claim 1 the wording of which differs from that according to the main request only insofar as it comprises a disclaimer intended to exclude specific compositions of documents (1) and/or (2).

Claim 1 according to the **seventh auxiliary request** corresponds with claim 1 of the set of claims found by the Opposition Division to comply with the requirements of the EPC and differs from claim 1 according to the main request insofar as the composition comprises additionally a stabilizing agent or a mixture thereof, wherein said stabilizing agent is a chelating agent.

Claim 1 according to the **eighth auxiliary request** differs from claim 1 according to the seventh auxiliary request insofar as it comprises a disclaimer intended to exclude specific compositions of document (4).

Claim 1 according to the **ninth auxiliary request** differs from claim 1 according to the seventh auxiliary request insofar as the composition has to comprise 3 to 8% by weight of the total composition of said alkyl(alkoxy)_n sulphate.

Claim 1 according to the **tenth auxiliary request** differs from claim 1 according to the ninth auxiliary request insofar as the stabilizing agent has to be a mixture of a chelating agent and a radical scavenger.

VI. The Patent Proprietor submitted orally and in writing *inter alia* that

- documents (4) and (5) were late filed and not more relevant than documents (1) to (3); therefore, they should not be admitted in to the proceedings;

- neither document (3) nor document (5) disclosed a composition comprising an alkyl ether sulphate containing less than 10% by weight of unsulfated material on alkyl(alkoxy)_n sulphate active basis and/or less than 0.0015% by weight of metal impurities on alkyl(alkoxy)_n sulphate active basis; the claimed subject-matter thus was novel over documents (3) and (5);

- the claimed priority date was valid at least for compositions comprising a hypohalite bleach and the specific alkyl ether sulphate disclosed in the examples of the priority document; consequently, documents (1), (2) and (4) disclosing compositions comprising this specific alkyl ether sulphate did not detract from the novelty of the claimed subject-matter;

- moreover, if the priority were not considered to be valid since the priority document did not disclose implicitly an alkyl ether sulphate of the type required in the patent in suit, then documents (1), (2) and (4)

could not be considered to disclose unambiguously this type of surfactant and could not be novelty destroying.

VII. The Opponent submitted orally and in writing that

- documents (4) and (5) had been filed with the statement of the grounds of appeal as a response to the decision under appeal according to which the patent had been maintained as amended on the basis of a request filed for the first time during oral proceedings; therefore, they had to be admitted into the proceedings;

- the purity characteristics of the alkyl ether sulphate of claim 1 were not technical features and had to be disregarded in the assessment of novelty; therefore, documents (3) and (5), disclosing compositions comprising a hypohalite bleach and an alkyl ether sulphate having a number of alkoxy groups within the range of the patent in suit, were novelty destroying;

- since the claimed subject-matter did not relate to the same invention as disclosed in the priority document, the claimed priority date was not valid;

- therefore, documents (1), (2) and (4), disclosing compositions according to claim 1 of the patent in suit, detracted from the novelty of the claimed subject-matter.

VIII. The Appellant 01 (Patent Proprietor) requests that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, in the alternative, on the basis of the set of claims

according to any of the first to seventh auxiliary requests submitted with the statement of the grounds of appeal or according to the eighth auxiliary request submitted under cover of the letter dated 12 September 2006 or according to the ninth or tenth auxiliary requests submitted during oral proceedings, or if documents (4) and/or (5) are admitted into the proceedings the case be remitted to the department of first instance.

- IX. The Appellant 02 (Opponent) requests that the decision under appeal be set aside and that the patent be revoked.

Reasons for the Decision

1. *Admissibility of documents (4) and (5)/ Remittal to the department of first instance*

- 1.1 According to Article 10a(4) of the Rules of Procedure of the Boards of Appeal of the EPO, the Board shall take into account all facts, evidence and requests submitted by the parties with the statement of the grounds of appeal. However, the Board has the power to hold inadmissible facts, evidence and requests which could have been presented in the first instance proceedings.

The Opponent submitted with its statement of the grounds of appeal two documents (4) and (5), which had not been cited during the proceedings before the department of first instance.

As already mentioned in point III above, the Opposition Division had decided to maintain the patent in amended form on the basis of a set of claims filed for the first time during oral proceedings.

Consequently, the Board finds that the Opponent could not submit additional documents in the first instance proceedings after the filing of such an amended set of claims.

Moreover, the Board finds also that documents (4) and (5) have been submitted with the statement of the grounds of appeal as a response to the decision of the first instance to maintain the patent on the basis of these amended claims.

Since appeal proceedings are for the right of the losing party of providing new valid arguments against the reasoned decision, which arguments may include the filing of additional documents, especially in a case wherein a decision has been based on claims filed for the first time during oral proceedings, documents (4) and (5) are to be admitted into the proceedings.

- 1.2 Since both the Patent Proprietor and the Board had ample time for considering documents (4) and (5) and their evaluation did not present any difficulty, their consideration does not justify a remittal of the case to the first instance for further prosecution which would prolong unduly the proceedings.

Therefore, the request of the Patent Proprietor to remit the case to the first instance is rejected.

2. *Admissibility of the ninth and tenth auxiliary requests filed during oral proceedings*

The Appellants submitted amended sets of claims according to the ninth and tenth auxiliary requests during the oral proceedings before the Board.

Since the amended sets of claims were submitted as a response to the objections based on documents (4) and (5), filed for the first time with the statement of the grounds of appeal, and to the decision of the Board to admit these documents into the proceedings, did not modify the main point of discussion defined by the decision under appeal and by the statement of the grounds of appeal, i.e. e.g. lack of novelty, and could be easily dealt with by the other party present at the oral proceedings and by the Board, the Board concludes that these requests are admissible under the circumstances of the case (see RPBA Art. 10b(1) and (3)).

3. Main request

3.1 *Novelty*

3.1.1 Claim 1 relates to a liquid bleaching composition.

This composition comprises as essential components a hypohalite bleach and an alkyl(alkoxy)_n sulphate wherein n is from 0.5 to 20 and may comprise other additional components suitable for a liquid bleaching composition.

The wording of claim 1 requires that the mentioned alkyl(alkoxy)_n sulphate comprises less than 10% by

weight of unsulfated material and/or less than 0.0015% by weight of metal impurities on alkyl(alkoxy)_n sulphate active basis.

The above mentioned unsulfated materials and metal impurities are by-products of the method of preparation of the alkyl ether sulphate, which might be present in a commercial product. The wording of claim 1, however, relating the quantity of such impurities to the single alkyl ether sulphate, does not exclude that such impurities could derive from other components present in the compositions and that they could be present in the total composition in greater amounts than those indicated in the claim in relation to the single surfactant component.

In fact, the Board notes that the above mentioned unsulfated material is itself a nonionic surfactant which can be also present as additional component; similarly the metal impurities are metal compounds which can also be present as additional components of the claimed composition.

Since the claimed composition is a liquid one and the above mentioned unsulfated material and metal impurities are not bound to the alkyl ether sulphate, the claimed composition may contain dissolved alkyl sulphate surfactant active material as such and by-products derived from the commercial alkyl ether sulphate used and from other components possibly present in the composition.

Therefore, it would not be possible to distinguish in the end product, i.e. in the composition subject-matter

of claim 1, whether possibly present nonionic surfactants and metal compounds derive from the specific alkyl ether sulphate or from other alkyl ether sulphates or from other additional components.

Therefore, the Board finds that the feature of claim 1 that the alkyl ether sulphate specified in the claim comprises less than 10% by weight of unsulfated material and/or less than 0.0015% by weight of metal impurities on alkyl(alkoxy)_n sulphate active basis has no limiting effect on the final composition, i.e. on the composition of claim 1.

Claim 1 thus can only be interpreted in the Board's view as relating to a liquid composition comprising as essential components hypochlorite bleach and an alkyl ether sulphate surfactant having 0.5 to 20 alkoxy groups independently on the degree of purity of the commercial product used.

- 3.1.2 Compositions comprising a hypochlorite bleach and an alkyl ether sulphate surfactant having 2 to 5 alkoxy groups were known from document (5) (see claims 1 and 3 and table 1 on page 11).

Therefore, the subject-matter of claim 1 lacks novelty.

The main request thus is rejected already on these grounds.

4. First to sixth auxiliary requests

The additional limitations in the form of disclaimers introduced into each claim 1 according to the first to

sixth auxiliary requests intend to limit the scope of the claim over the disclosures of documents cited by the Opponent under Article 54(3) EPC.

These amendments do not limit the claims over the disclosure of document (5).

Therefore, the subject-matter of claim 1 according to any of these requests lacks novelty *mutatis mutandis* for the reasons submitted in point 3.1.2 above.

5. Seventh and eighth auxiliary requests

5.1 Claim 1 according to the **seventh auxiliary request** corresponds with the claim found by the Opposition Division to comply with the requirements of the EPC and differs from claim 1 according to the main request insofar as the composition comprises additionally a stabilizing agent or a mixture thereof, wherein said stabilizing agent is a chelating agent.

Since the compositions disclosed in document (5) also comprise an aminoxide phosphonic acid which is a chelating agent (see claim 1; table 1 on page 11 and page 7, lines 1 to 5), the subject-matter of claim 1 lacks novelty *mutatis mutandis* for the reasons submitted in point 3.1.2 above.

5.2 Claim 1 according to the **eighth auxiliary request** differs from claim 1 according to the seventh auxiliary request insofar as it comprises a disclaimer intended to exclude specific compositions of document (4), cited by the Opponent under Article 54(3) EPC.

This amendment does not limit claim 1 over the content of document (5).

Therefore, the subject-matter of claim 1 according to this request lacks novelty for the same reasons submitted above.

6. Ninth auxiliary request

6.1 *Priority*

6.1.1 It is the established jurisprudence of the Boards of appeal of the EPO that priority of a previous application in respect of a claim in an European patent application can be acknowledged if the previous application discloses the same invention as said claim and, in particular, if the skilled person can derive the subject-matter of the claim directly and unambiguously, using common general knowledge, from the previous application as a whole (see G 2/98, OJ EPO 2001, 413, Headnote and point 9 of the reasons for the opinion and Article 87(1) EPC).

Claim 1 according to the ninth auxiliary request relates to a liquid composition comprising as essential features a hypohalite bleach, 3 to 8% by weight of an alkyl(alkoxy)_n sulphate, wherein n is from 0.5 to 20, and a stabilising agent which is a chelating agent.

The Board notes that the invention disclosed in the previous application, the priority of which is claimed, though relating also to a liquid composition comprising a hypohalite bleach, 3 to 8% by weight of an alkyl(alkoxy)_n sulphate and a stabilising agent which is

a chelating agent, requires that the alkyl(alkoxy)sulphate has **only 2 to 4 alkoxy groups** and not 0.5 to 20 as in the present claim and requires additionally specific concentrations of **a pH buffering component** which is instead not required in the present claim (see claims 1 and 5 as well as page 2, lines 25 to 29; page 4, lines 28 to 35; page 6, lines 24 to 25; page 11, lines 27 to 28; page 12, lines 25 to 26; page 13, lines 1 to 3 of the priority document).

The Board thus concludes that the combination of features of claim 1 according to the ninth auxiliary request cannot be derived directly and unambiguously from said priority document.

6.1.2 The Patent Proprietor submitted that multiple priorities can be validly claimed and that therefore a priority claim should be acknowledged at least for the range of compositions disclosed in the priority document and which fall within the scope of the claims of the patent in suit.

The Board notes that multiple priorities can be claimed (see Article 88(2) and (3) EPC), e.g. in the case of a claim directed to specific distinct alternatives.

However, in the present case, the invention claimed in the patent in suit relates to a subject-matter, in particular a composition of matter, characterized by a combination of features which cannot be regarded isolately from each other, which subject-matter encompasses everything falling within its scope defined by its essential features and does not relate to

specific distinct alternatives having different scope for which different priorities could be claimed.

The Board concludes that the claimed priority date is not valid.

6.2 *Novelty*

Document (4) is a European patent application having a filing date of 19 September 1997, which is older than that of the patent in suit of 23 February 1998. This document was published after the filing date of the patent in suit and designates the same contracting states as the patent in suit.

Therefore, document (4) is state of the art in virtue of Article 54(3) EPC.

This document discloses compositions comprising a hypohalite bleach, 7% of an alkyl ether sulphate surfactant having 3 alkoxy groups and a chelating agent (STPP) (see example I).

Therefore, the subject-matter of claim 1 is not novel in the light of this disclosure.

7. Tenth auxiliary request

7.1 Priority

Claim 1 according to the **tenth auxiliary request** differs from claim 1 according to the ninth auxiliary request only insofar as the stabilizing agent has to be a mixture of a chelating agent and a radical scavenger.

Therefore, the claimed priority date for this invention is not valid *mutatis mutandis* for the reasons submitted in point 6.1 above.

7.2 Novelty

Since example I of document (4) discloses a composition comprising also a radical scavenger (methoxy benzoate), claim 1 according to the tenth auxiliary request lacks novelty for the same reasons submitted in point 6.2 above.

8. Since the Opponent's appeal succeeds already on the grounds submitted above there is no need to discuss the other grounds submitted by the Opponent.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke