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**Datasheet for the decision  
of 29 April 2009**

**Case Number:** T 0548/06 - 3.3.06

**Application Number:** 95302732.3

**Publication Number:** 0684303

**IPC:** C11D 3/37

**Language of the proceedings:** EN

**Title of invention:**  
Detergent compositions

**Patentee:**  
Unilever PLC, et al

**Opponent:**  
The Procter & Gamble Company

**Headword:**  
Foam control granules/UNILEVER

**Relevant legal provisions:**  
-

**Relevant legal provisions (EPC 1973):**  
EPC Art. 54

**Keyword:**  
"Novelty - yes"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0548/06 - 3.3.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.06  
of 29 April 2009

**Appellants:**  
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and

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**Respondent:**  
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**Representative:** Samuels, Lucy Alice  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 22 February 2006  
revoking European patent No. 0684303 pursuant  
to Article 102(1) EPC 1973.

**Composition of the Board:**

**Chairman:** P.-P. Bracke  
**Members:** P. Ammendola  
U. Tronser

## Summary of Facts and Submissions

I. This appeal is from the decision of the Opposition Division to revoke the European patent No. 684 303 concerning detergent compositions including foam control granules comprising a silicone foam control agent on an absorbent carrier comprising a starch.

II. The Opponent had sought revocation of the patent on the grounds of Articles 100(a) and (b) EPC 1973 relying, *inter alia*, on the documents

(1) = EP-A-0 446 484,

(3) = EP-A-0 071 481 and

(5) = EP-A-0 094 250.

The Patent Proprietors had filed under cover of the letter dated 1 February 2002 a set of claims to be considered as main request.

Claim 1 of such main request (hereinafter "claim 1 of 2002") read:

*"1. A particulate controlled foam detergent composition containing a foam controlling amount of a foam control granule comprising a silicone foam control agent on an absorbent carrier material, characterised in that*

*(a) the composition has a content of particles smaller than 180 micrometres of at least 15 wt%, and that*

*(b) an otherwise identical control powder minus the foam control granule gives a dispenser residue (as hereinbefore defined) of at least 20 wt% and that*

*(c) the absorbent carrier material of the antifoam granule comprises a starch."*

Such claim differed from the corresponding granted one, *inter alia*, due to the additional presence of the feature "(b)" relating to the dispenser residue of the control powder (hereinafter "the added DRCP feature").

- III. The Opposition Division had found that the added DRCP feature rendered the scope of the claim of 2002 unclear and was, thus, contrary to the requirements of Article 84 EPC 1973.

The Patent Proprietors had appealed this decision and this Board had decided in T 799/04 that the objection raised under Article 84 EPC was inadmissible and remitted the case to the first instance for further prosecution.

- IV. In the subsequent proceedings before the Opposition Division only the issues of sufficiency of disclosure and of novelty were considered.

The Opposition Division found that:

- the added DRCP feature of claim 1 of 2002 was unclear and, thus, did not represent a technical feature to be

considered for the evaluation of the grounds of opposition,

- the subject-matter claimed was sufficiently disclosed as required by Article 83 EPC 1973,

- it was common general knowledge, reflected in document (1), that conventional spray-dried powders showed a content of from 10 to 30 wt% of particles smaller than 180 micrometers (hereinafter the wt% of these particles is indicated as **finest content**),

- the arbitrary limitation of the finest content to at least 15 wt% contained in claim 1 of 2002 would result in an extended overlap with the prior art disclosed in examples 1 or 2 of document (3) or in example 2 of document (5), when these examples were read in combination with the above-mentioned common general knowledge,

and

- this overlap would not fulfil the criteria for novelty of selection inventions.

V. The Patent Proprietors (hereinafter Appellants) lodged an appeal against this decision.

They filed with the statement setting out the grounds of appeal one set of eight claims labelled as main request, three further sets of claims respectively labelled as 1st to 3rd auxiliary requests as well as an experimental report (hereinafter E1).

VI. Claim 1 of the **main request** differs from that of 2002 (see section II of the Facts and Submissions above) only in that the wording "*an otherwise identical control powder minus the foam control granule gives a dispenser residue (as hereinbefore defined) of at least 20 wt% and that (c)*" has been deleted, i.e. only in that the added DRCP feature is no longer present.

VII. Oral proceedings took place before the Board in the announced absence of the Appellants.

At the hearing the Respondent acknowledged not to have any objection under Article 83 EPC 1973 to the Appellants' main request.

VIII. The Appellants presented the following arguments in writing in favour of the procedural admissibility and of the novelty of the main request.

Claim 1 of the main request was admissible because it resulted from the deletion from claim 1 of 2002 of the added DRCP feature, i.e. the feature found in the decision under appeal not to represent a technical feature and, thus, was not to be considered for the evaluation of the other grounds of opposition.

The Appellants acknowledged that spray-dried components were generally known to have fines content of 10 to 30 wt%, but nevertheless disputed the finding of the Opposition Division in respect of novelty, because it would be impossible to conclude from this general knowledge that also in the relevant examples of documents (3) and (5) the final fines content would be in such range.

Indeed, the fabric washing powders of document (3) were "*prepared by conventional spray-drying and dry-dosing techniques*" i.e. by a combination of techniques rather than just by spray-drying.

The fines content was similarly unpredictable in the detergent composition of example 2 of document (5), that also resulted from the mixing of conventionally spray-dried intermediate powders with dry-dosed ingredients.

The self-evident fact that dry-dosing could significantly affect the particle size distribution initially possessed by the spray-dried components was also experimentally verified in E1, allegedly reproducing example 1 of document (3), wherein, a spray-dried intermediate composition comprising 17.9 wt% of fines resulted in a level of fines in the final dry-dosed formulation of just under 10 wt%.

Thus, the amount of fines in the spray-dried part of a composition did not equate to (or even unambiguously suggest) the amount of fines in the final composition after dry-dosing.

Hence, claim 1 of the main request was novel over documents (3) or (5).

IX. The Respondent disputed this reasoning by submitting in writing and orally the following arguments.

It would be an abuse of process for the Appellants to initially file in response to the opposition claim 1 of 2002 containing the added DRCP feature, to maintain such

claim at the first appeal stage, necessitating the expense and time involved in the first appeal proceedings leading to Decision T 799/04, and on remittal to the Opposition Division, only to abandon it altogether during the present appeal proceedings, i.e. nearly five years after the opposition was filed.

The finding of the Opposition Division that the added DRCP feature was unclear and, thus, provided no distinction from the prior art, did not imply that this feature would be deprived of any limiting function. Hence, and despite the fact that the subject-matter of claim 1 of the present main request corresponded to that of claim 2 as granted, the removal of the added DRCP feature resulted in an extension of the claimed subject-matter and, thus, could not possibly represent a reaction to the finding in the decision under appeal that already the narrower claim 1 of 2002 lacked novelty.

The main request lacked novelty over either example 1 or 2 of document (3) or example 2 of document (5). The subject-matter of claim 1 of the main request only differed from these prior art examples due to the specified fines content of 15 wt% or more. Even though not all possible ways of completing the partially disclosed teaching of these examples lead necessarily to a fine content according to such claim, still the range of fines contents possibly obtainable by operating such examples encompassed certainly the 10 to 30 wt% range acknowledged in document (1) as conventional for the direct product of the spray-drying processes. Hence, an overlap existed between the range of fines contents possibly present in the examples of documents (3) or (5) and the corresponding range claimed in the main request.



Since, as correctly observed by the Opposition Division, the portion of overlap was large and resulted from an arbitrary selection, the claimed subject-matter would not represent a novel selection vis-à-vis the prior art.

In particular, the additional data in E1 provided by the Appellants only showed that there was one way in which this example could be operated that resulted in a final product with a fines level of 9.98 wt% (i.e. just below the 10 wt%). However, the Appellant, in order to obtain a final fines content below 10 wt%, had used an unusually low level of spray-dried powder. Hence the data in E1 would rather confirm that the operation of the disclosure of the examples of document (3), when carried out in a realistic manner, would produce a level of fines in a range necessarily overlapping with the fines content range of present claim 1.

Moreover, the data of E1 were not relevant for the examples of document (5).

The claimed subject-matter would also represent a non-purposive selection within the more generic disclosure given e.g. in the claims of document (5) of detergent compositions containing antifoam granules made from silicone and starch. Since in the compositions according to such generic disclosure the unknown content of fines could only range between 0 and 100 wt%, the non-purposive selection therein of the large sub-range of 15 to 100 wt% as defined in claim 1 of the main request would also not comply with the conditions required for acknowledging the novelty of selection inventions.

X. The gist of what the Appellants requested in writing is that the decision of the first instance be set aside and the case be remitted to the Opposition Division for further prosecution on the issue of inventive step with respect to the main request or one of the three auxiliary requests, all the requests as filed with the grounds of appeal.

The Respondent requested that the appeal be dismissed.

## **Reasons for the decision**

### *Main request of the Appellants*

#### 1. Formal admissibility

The Respondent has argued that this request amounts to an abuse of the proceedings because claim 1 thereof no longer contains the added DRCP feature, i.e. the feature that the Appellants had added to claim 1 in response to the opposition and maintained therein at the first appeal stage and on remittal to the Opposition Division.

In addition, the removal of the DRCP feature resulted in an extension of the claimed subject-matter and, thus, could not possibly represent a reaction to the finding in the decision under appeal that the narrower claim 1 of 2002 already lacked novelty.

1.1 The Board notes, however, that it is only with the decision under appeal that the Opposition Division has established that the unclear DRCP feature added in claim 1 of 2002 is not a technical feature and may not

be considered for the evaluation of the grounds of opposition (see the end of section 4 of the reasons of the decision under appeal). Hence, it appears justified for the Appellants to react to this finding of the Opposition Division by deleting from claim 1 the added DRCP feature, even if such deletion could possibly imply an extension of the claimed subject-matter. Therefore, this amendment does not amount to an abuse of the proceedings.

1.2 In addition, the main request has been filed with the grounds of appeal and, as acknowledged by Respondent too, claim 1 thereof manifestly corresponds to granted claim 2 of the opposed patent. Hence, the main request of the Appellants cannot possibly have taken the Respondent by surprise.

1.3 Accordingly, the Board admits into the proceedings the main request of the Appellants.

2. Novelty (Articles 54(1) and (2) EPC 1973)

2.1 Claim 1 of the main request defines a particulate controlled foam detergent composition characterized by a fines content of at least 15 wt% and by the presence of foam control granules comprising a silicone foam control agent on a absorbent carrier material comprising a starch (see section VI of the Facts and Submissions above).

2.2 The novelty of this composition has been denied by the Respondent in view of the disclosure of examples 1 and 2 of document (3) or of example 2 of document (5), as well

as in view of the more general disclosure provided by the claims of document (5).

It is undisputed that these documents are totally silent as to the fines content of the compositions described therein and that the sole question relevant for the novelty of the claimed subject-matter is whether or not any of these citations renders available to its skilled reader a composition with the fines content of at least 15 wt% as required in present claim 1.

- 2.3 The Respondent, following in its substance the reasoning of the Opposition Division in the decision under appeal on claim 1 of 2002, has combined the above mentioned examples with the common general knowledge as to the 10 to 30 wt% content of fines normally present in conventional spray-dried compositions, arguing that, even though the final products in these examples result from a dry-dosing step, the fines contents obtainable when reasonably operating these examples of the prior art, would also lay within such normal range of 10 to 30 wt% and, thus, that the claimed subject-matter would represent a selection within the prior art. This would also be supported by the fact that the Appellants' attempt to reproduce example 1 of document (3) described in E1 - i.e. an attempt that, in the Respondent's opinion, was intentionally designed so as to minimize the final amount of fines - nevertheless resulted in a fines content just below 10 wt%.

The Respondent has also proposed at the oral proceedings a further objection on novelty based on the assumption that the claimed subject-matter would represent a selection within a more ample disclosure of the prior

art. It has argued that the content of fines in the detergent compositions described in the claims of document (5) as having all the other features of present claim 1, can only lay in the range of from more than 0 to less than 100 wt%. Hence a large overlap would exist with the range of from 15 to 100 wt% defined in such claim.

2.3.1 The Board notes that the claimed subject-matter would only represent a selection within the prior art if it may unambiguously be established that the compositions disclosed in the relevant citations display fines content **equal to or larger than "15 wt%"**.

2.3.2 It is also apparent to the Board that the knowledge that the fines contents of the compositions disclosed in document (3) or (5) are possibly encompassed in ranges also extending to values lower than 15 wt% does **not** necessarily imply that these unknown contents are actually equal to or larger than "15 wt%".

As a matter of fact, even if one would accept for the sake of an argument in favour of the Respondent,

a) that the common general knowledge as to the 10 to 30 wt% range conventional for spray-dried powder is applicable also for the compositions disclosed in the relevant examples of document (3) or (5),

or

b) that one might equate the silence of documents (3) or (5) as to the fine contents to a general teaching that

these latter can only possibly range from more than 0 wt% to less than 100 wt%,

still it could not be excluded that the fines contents actually observable in the compositions rendered available to the skilled reader of these citations, rather than being equal to or larger than 15 wt%, cover only a portion of the relevant larger ranges e.g. only the portion between 10 and 14 wt%.

In other words, in the absence of any supporting evidence, it cannot be concluded that at least some of the ways for carrying out the direct and unambiguous teachings contained in document (3) or (5) would **necessarily** possess a fines content of 15 wt% or more.

2.3.3 Moreover, as observed by the Appellants, in the relevant examples of document (3) and (5) the spray-dried powders are only intermediate products that are further combined with the remaining ingredients in a dry-dosing step. The Respondent has not disputed that the final dry-dosing step may render the content in fines of the final compositions of these examples different from that of the intermediate powders prepared by spray-drying. Therefore, the dry-dosing step may at least in theory render the fines content range actually obtainable in all reasonable ways of operating the incomplete disclosure of the relevant examples, even more different from the 10 to 30 wt% range normally present in powders obtained by spray-drying only.

These considerations remain valid even when assuming, for the sake of an argument in favour of the Respondent, that the conditions selected by the Appellant in E1 for

operating example 1 of document (3) had intentionally been designed for minimizing the final content in fines. As a matter of fact, no evidence has been filed demonstrating that by using other more reasonable conditions for operating the incomplete disclosure of the prior art examples, one would actually obtain a content of fines of 15 wt% or more. In other words, even accepting the Respondent's evaluation of E1, it cannot be excluded that also the allegedly existing more reasonable ways for operating the spray-drying and dry-dosing steps of these prior art examples could nevertheless only result in fines contents between e.g. 10 and 14 wt%.

2.3.4 The Board concludes, accordingly, that **neither** the combination of the general definitions contained in the claims of document (5) with the broadest possible range of possibilities for their fines content, **nor** the combination of the incompletely disclosed examples of documents (3) or (5) with common general knowledge as to the possible fines content of spray-dried powders provides directly and unambiguously the alleged disclosure of a group of compositions of the prior art whose fines content would necessarily also be equal to or larger than 15 wt% and, thus, overlap with that defined in present claim 1.

2.3.5 Under such circumstances, the discussion on the requirements for selection inventions contained in the decision under appeal and in the Respondent's submissions needs not to be considered.

2.4 Accordingly, the Board finds that the subject-matter of claim 1 of the main request of the Appellants is not

directly and unambiguously disclosed in the prior art and, thus, complies with Article 54(1) and (2) EPC 1973. The same applies to the subject-matter of the remaining claims 2 to 8 of the main request, as these latter define preferred embodiments of the detergent composition of claim 1.

3. The Appellants have requested the possibility of discussing inventive step before the Opposition Division. Since the Respondent has not objected to such request, the Board finds it appropriate, in order not to deprive the Appellants of the opportunity to argue the remaining issue at two instances, to make use of its powers under Article 111(1) EPC to remit the case to the department of first instance for further prosecution.

## **Order**

### **For these reasons it is decided that:**

1. The decision is set aside
2. The case is remitted to the Opposition Division for further prosecution on the issue of inventive step of the main request submitted with the grounds of appeal.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke