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**Datasheet for the decision
of 12 September 2007**

Case Number: T 0563/06 - 3.3.06

Application Number: 97906689.1

Publication Number: 0883671

IPC: C11D 3/37

Language of the proceedings: EN

Title of invention:

Laundry detergent compositions containing silicone emulsions

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

Henkel Kommanditgesellschaft auf Aktien

Headword:

Silicone emulsion/PROCTER & GAMBLE

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Added subject-matter: yes"

"Request to present new requests during oral proceedings
(refused)"

Decisions cited:

T 0153/85, T 0397/01, T 0050/02

Catchword:

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Case Number: T 0563/06 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 12 September 2007

Appellant: Henkel Kommanditgesellschaft auf Aktien
(Opponent) Henkelstrasse 67
D-40589 Düsseldorf (DE)

Representative: Stevermann, Birgit
Henkel KGaA
Patente (VTP)
D-40191 Düsseldorf (DE)

Respondent: THE PROCTER & GAMBLE COMPANY
(Patent Proprietor) One Procter & Gamble Plaza
Cincinnati, Ohio 45202 (US)

Representative: Samuels, Lucy Alice
Gill Jennings & Every LLP
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 15 February 2006
rejecting the opposition filed against European
patent No. 0883671 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P.-P. Bracke
Members: L. Li Voti
A. Pignatelli

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division to reject the opposition against European patent no. 0 883 671, concerning a laundry detergent composition containing silicone emulsions.

The European patent was granted with a set of 8 claims, claim 1 of which reading as follows:

"1. A heavy duty laundry detergent composition obtainable by combining:
a) from 0.1% to 12%, by weight of composition, of an emulsion; wherein said emulsion comprises from 1% to 90%, by weight of the emulsion, of silicone and from 0.1% to 30%, by weight of the emulsion, of emulsifier; and wherein said emulsion has an average droplet size of from 5 to 500 micrometers (microns); and
b) from 1% to 50%, by weight of said composition, of deterative surfactant."

II. In its notice of opposition the Opponent sought revocation of the patent *inter alia* on the grounds of Article 100(c) EPC.

In its decision, the Opposition Division found that the wording of claim 1 as granted complied with the requirements of Article 123(2) EPC.

In particular, it found that it was beyond any reasonable doubt, taking into account the teaching of the description and of the examples of the originally filed application, that any reference to the average droplet size of the silicone emulsion had to be

understood as relating to the silicone emulsion used as starting material for preparing the claimed heavy duty laundry detergent composition and not to a silicone emulsion possibly contained in the final detergent composition itself.

Therefore, the application had not been amended to include subject-matter extending beyond the content of the application as originally filed.

The Opposition Division found also that the granted claims complied with all the requirements of the EPC.

III. Appeal was filed against this decision by the Opponent (hereinafter Appellant).

The Respondent (Patent Proprietor) submitted with letters of 27 October 2006 and 9 August 2007 amended sets of claims according to the first to fifth auxiliary requests.

Claim 1 according to the first auxiliary request differs from claim 1 as granted insofar as the wording "A heavy duty laundry detergent composition obtainable by combining" has been replaced with the wording "A method of making a heavy duty laundry detergent composition, the method comprising combining".

Both claims 1 according to each of the second and third auxiliary requests differ from claim 1 as granted insofar as the claimed composition comprises additionally a bleaching agent.

Claim 1 according to the fourth auxiliary request differs from claim 1 according to the first auxiliary

request insofar as the prepared composition comprises additionally a bleaching agent.

Claim 1 according to the fifth auxiliary request differs from claim 1 as granted insofar as the claimed composition has to be liquid.

IV. Oral proceedings were held before the Board on 12 September 2007.

In the oral proceedings the Respondent requested the possibility of filing additional auxiliary requests in order to deal with the objections raised under Article 123(2) EPC.

The Appellant argued that the objections raised under Article 123(2) EPC had been known to the Respondent since the statement of the grounds of opposition before the department of first instance and had been repeated in the statement of the grounds of appeal. Moreover, the Respondent had already filed auxiliary requests during the written appeal proceedings and had had ample time to file requests dealing with such objections. Therefore, no further request had to be admitted at such a late stage of the proceedings.

V. The Appellant submitted in writing and orally that the original documents of the application taught that the heavy duty detergent composition claimed had to comprise a silicone emulsion having the particle size specified in claim 1 and in the application.

To the contrary, claim 1 according to the main request, which corresponded to claim 1 as granted, required only

that the heavy duty laundry detergent composition claimed be obtainable by combining such a silicone emulsion with detergent surfactants and encompassed heavy duty laundry detergent compositions not containing any longer a silicone emulsion having such a particle size or even not containing a silicone emulsion at all.

Therefore, the amendment to the original wording of claim 1 contravened the requirements of Article 123(2) EPC.

- VI. The Board noted in the oral proceedings that the objection raised by the Appellant against claim 1 according to the main request was similarly applicable to each claim 1 according to any of the auxiliary requests submitted by the Respondent.
- VII. The Respondent submitted in writing and orally that the skilled person would have considered inappropriate the wording of the passages of the original documents of the application directed to a heavy duty laundry detergent composition **comprising** an emulsion having the specified particle size and would have understood that it related only to the characteristics of the emulsion as starting material before its incorporation into the final composition.
- In fact, the original description and claims taught that a silicone emulsion having the specified particle size could be incorporated into a detergent composition and the examples illustrated the preparation of such an emulsion before incorporation into the final composition. Moreover, the application indicated also a

method for measuring the particle size of the emulsion before incorporation into the final composition.

Therefore, the wording of claim 1 as granted was supported by the original documents of the application and each claim 1 according to any of the requests submitted complied with the requirements of Article 123(2) EPC.

VIII. The Appellant requested that the decision under appeal be set aside and that the patent be revoked.

IX. The Respondent requested that the appeal be dismissed or, in the alternative, that a patent be maintained on the basis of any of the sets of claims according to the first auxiliary request submitted with letter of 9 August 2007, the second to fourth auxiliary requests, all of them submitted with letter of 27 October 2006 or the fifth auxiliary request submitted with letter of 9 August 2007.

The Respondent also requested to present new requests during oral proceedings.

Reasons for the Decision

1. *Respondent's main request*

1.1 According to Article 123(2) EPC, a European patent application or a European patent may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed.

Claim 1 according to the original documents of the application related to a heavy duty laundry detergent composition **comprising** (a) from 0.1% to 12%, by weight of composition, of an emulsion; wherein said emulsion comprises from 1% to 90%, by weight of the emulsion, of silicone and from 0.1% to 30%, by weight of the emulsion, of emulsifier; and wherein said emulsion has an average particle size of from 5 to 500 microns; and (b) from 1% to 50%, by weight of said composition, of deterative surfactant.

Claim 1 according to the main request, i.e. claim 1 as granted, relates instead to a heavy duty laundry detergent composition **obtainable by combining** said components (a) and (b) wherein the wording "average particle size" has been replaced with "average droplet size" (see point I above).

- 1.2 The Board finds that both wordings "average particle size" and "average droplet size" relate to the suspended part of the silicone emulsion and that they have the same meaning under the present circumstances.

Therefore, this amendment cannot contravene Article 123(2) EPC. Moreover, for the sake of clarity, in the following it will be made reference only to the wording "particle size" as used in the original application.

- 1.3 The Board finds that the wording of claim 1 according to the main request does not require that the end product, i.e. the heavy duty laundry detergent composition, comprises a component (a) in the form of an emulsion having the specified average particle size

but it only requires that such an emulsion may be combined in an unspecified way with a component (b) in order to obtain the heavy duty laundry detergent composition claimed.

Therefore, such a silicone emulsion having said average particle size may or may not be contained in the final product depending on the conditions adopted during combination. Moreover, the final product claimed may even not contain any emulsion at all.

The Board thus has to examine if the original documents of the application contain a support for a heavy duty laundry detergent composition not containing a silicone emulsion having said average particle size.

- 1.4 The Board notes that the original documents of the application teach how to prepare a silicone emulsion having the specified particle size (page 4, lines 20 to 28) and that such an emulsion can be combined with detergent surfactants (page 3, lines 21 to 23 and examples I to III). However, they teach also that the heavy duty laundry detergent composition **comprises** such a silicone emulsion (claims 1 and 8; page 1, lines 9 to 12; page 3, lines 6 to 15; page 3, lines 31 to page 4, line 4; page 30, lines 20 to 21; page 32, lines 2 to 3; page 33, lines 6 to 7).

In particular, they teach that such an emulsion can be stably suspended in a liquid laundry detergent composition having a relatively high viscosity or a very shear-thinning matrix (see page 3, lines 21 to 23). This implies in the Board's view that the emulsion is maintained as such in the final product.

Moreover, the examples list in the respective tables a silicone emulsion of the specified particle size as one of the components of the final composition and report that such an emulsion is comprised in the final product (see page 30, lines 20 to 21 and page 32, lines 2 to 3; page 33, lines 6 to 7).

Finally, the description does not contain any teaching that the method of measurement indicated on page 4, lines 18 to 19, i.e. the particle size measurement by means of a light scattering particle size analyzer such as a Coulter LS 230, may be applied only to a silicone emulsion before its incorporation into the final composition and that therefore any reference to the particle size of the emulsion should be interpreted as referring to the emulsion **before** preparation of the final composition.

To the contrary, the above mentioned known method is a method applicable to any liquid and therefore also to a liquid laundry detergent composition comprising such an emulsion.

- 1.5 The Board thus finds that the teaching of the original documents of the application would have been interpreted by the skilled person as being directed to the use of a silicone emulsion of the specified particle size as starting material in the preparation of a heavy duty laundry detergent composition and as requiring additionally that the heavy duty laundry detergent composition prepared **comprises** such an emulsion.

Therefore, since the wording of claim 1 according to the main request encompasses heavy duty laundry detergent compositions not comprising such an emulsion, it comprises subject-matter extending beyond the content of the application as filed.

The Board concludes that claim 1 according to the Respondent's main request contravenes the requirements of Article 123(2) EPC.

2. *Respondent's first auxiliary request*

Claim 1 according to the first auxiliary request differs from claim 1 as granted insofar as the wording "A heavy duty laundry detergent composition obtainable by combining" has been replaced with the wording "A method of making a heavy duty laundry detergent composition, the method comprising combining".

Such a method of claim 1, not containing any specific process conditions, thus encompasses methods leading to a detergent composition not containing any longer said silicone emulsion or a silicone emulsion of said particle size.

Therefore, also this claim 1 contravenes the requirements of Article 123(2) EPC for the same reasons put forward in point 1 above.

3. *Respondent's second to fifth auxiliary requests*

Both claims 1 according to the each of the second and third auxiliary requests differ from claim 1 as granted

only insofar as the claimed composition comprises additionally a bleaching agent.

Claim 1 according to the fourth auxiliary request differs from claim 1 according to the first auxiliary request only insofar as the prepared composition comprises additionally a bleaching agent.

Claim 1 according to the fifth auxiliary request differs from claim 1 as granted only insofar as the claimed composition has to be liquid.

Therefore, each of these claims 1 contravenes the requirements of Article 123(2) EPC for the same reasons put forward in points 1 and 2 above.

4. *Procedural issues*

- 4.1 The Respondent requested during the oral proceedings before the Board the possibility of submitting further auxiliary requests in order to deal with the issues raised by the Appellant under Article 123(2) EPC (see point IV above).

The Board notes that the objections raised by the Appellant under Article 123(2) EPC were known to the Respondent since the beginning of the proceedings before the department of first instance in March 2004 and had been repeated in the Appellant's statement of the grounds of appeal of 12 June 2006.

Moreover, none of the various auxiliary requests submitted by the Respondent during the written appeal proceedings dealt with the above mentioned objections and it was the first time during the oral proceedings

before the Board that the Respondent manifested its intention of submitting requests dealing with the objections mentioned above.

Therefore these requests would have to be considered, in the Board's view, very late filed.

- 4.2 The admission of very late filed requests into the proceedings is a matter for the Board's discretion. It is established case law of the Boards of appeal of the EPO that a board, in the exercise of such due discretion, should take into account as crucial criteria whether or not there is proper justification for the late filing and whether or not the amended claims of such requests are clearly allowable.

Therefore, such new requests should not be expected to modify the main point of discussion defined by the decision under appeal and by the statement of the grounds of appeal (see e.g. T 153/85, OJ 1988, 1, point 2.1 of the reasons; T 397/01, point 1 of the reasons and T 50/02, points 10.3, 10.8 and 10.9 of the reasons).

In the present case, no proper justification for the late filing was submitted by the Respondent during oral proceedings.

Moreover, the introduction at this stage of the proceedings of claims trying to overcome the objections under Article 123(2) EPC would have shifted the point of discussion to claims having a different extent from those discussed so far before the first instance and in the appeal proceedings and thus implying different problems. A shifting of the discussion to not discussed

subject-matter at this late stage of the proceedings would thus have been unfair to the other party, i.e. the Appellant, and would have been contrary to the principles of procedural economy.

Therefore, the Respondent's request to present new requests during oral proceedings is refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke