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**Datasheet for the decision
of 24 November 2009**

Case Number: T 1155/07 - 3.3.06

Application Number: 02717011.7

Publication Number: 1487953

IPC: C11D 3/14

Language of the proceedings: EN

Title of invention:

Scouring powder composition and process of production thereof

Applicant:

Council of Scientific and Industrial Research

Headword:

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Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 84

Keyword:

"Clarity: no"

Decisions cited:

-

Catchword:

-



Case Number: T 1155/07 - 3.3.06

DECISION
of the Technical Board of Appeal 3.3.06
of 24 November 2009

Appellant: Council of Scientific and Industrial Research
Applicant: Rafi Marg
New Delhi 110 001 (IN)

Representative: Fairbairn, Angus Chrisholm
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 31 January 2007
refusing European patent application
No. 02717011.7 pursuant to Article 97(1) EPC
1973.

Composition of the Board:

Chairman: P.-P. Bracke
Members: P. Ammendola
J. Van Moer

Summary of Facts and Submissions

- I. This appeal is from the decision of the Examining Division refusing the European patent application No. 02 717 011.7, published as WO 03/080787.
- II. This decision was based on the set of fourteen claims filed by the Applicant with letter of 10 October 2006. Claim 1 of this set read:

"1. A low foaming scouring powder composition comprising:

- (a) fly ash as an abrasive agent, in an amount between 40 and 75 wt%, wherein the fly ash is obtained from thermal power stations by burning coal or lignite;
- (b) a non-detergent anionic surfactant in an amount between 3 and 6 wt%;

and

- (c) an alkali metal carbonate in an amount between 10 and 20 wt%,

and (f) or (f)+(e) or (f)+(e)+(d), wherein:

- (d) is an alkali metal bicarbonate in an amount between 3 and 15 wt%,
- (e) is an alkali halide in an amount between 1 and 10 wt% and
- (f) is clay in an amount between 5 and 50 wt%,

and optionally

- (g) perfumes and colors in trace amounts,

and wherein said composition is free from detergent."

III. The Examining Division found that the application contained no explanation as to what was to be understood as a detergent and that anionic surfactants were generally employed as detergents in cleaning compositions. Since no clear distinction existed between anionic surfactants and detergents claim 1 was internally inconsistent in that it required, on the one hand the presence of surfactant and, on the other hand, it banned detergent. Hence, this claim 1 did not comply with Article 84 EPC 1973.

IV. The Applicant (hereinafter Appellant) lodged an appeal against this decision. In the grounds of appeal it argued that the above-cited claim only banned using anionic surfactants that were detergents, whilst requiring the presence of anionic surfactants that were not detergents. It cited the document

(1) = US-B1-6500862

as an evidence that it would be possible for a composition to contain a surfactant and be free from detergent. The Appellant also requested oral proceedings in case the Board would not cancel the decision of the Examining Division.

V. On 14 April 2009 the Board sent to the Appellant a communication enclosed to the summons to oral proceedings scheduled for 7 August 2009. Paragraph 3 of this communication reads as follows:

"3. The whole reasoning in the grounds of appeal implies the existence of a sufficiently clear distinction between the "anionic surfactants" that are

also considered "detergent" and those that are instead considered "non-detergent".

The Appellant has not maintained that the expression "non-detergent anionic surfactant" is either explicitly or implicitly defined in the patent application. Nevertheless, it has disputed the finding of the Examining Division that these expressions are too generic for the pending claim 1 to comply with Article 84 EPC, without indicating any textbook, encyclopaedias or other proofs of the common general knowledge of the contrary. In respect to the US-B-6,500,862 cited by the Appellant, the Board wishes to stress that it is established jurisprudence of the Boards (see e.g. the Case Law of the Boards of Appeal of the EPO, Fifth edition, I.C.1.5) that patent documents only by way of exception may be considered sufficient for demonstrating the existence of common general knowledge. No such exception appears justified in the present case, in particular considering that several textbooks, handbooks and dictionaries provide definitions for "surfactant" and "detergent".

Hence, and considering that also the Board could not find any definition of "surfactant" and "detergent" that allowed to unambiguously distinguish the compounds known as surfactants that are "non-detergent anionic surfactant" from those that are not, it appears that the following issues might need to be discussed at the oral proceedings:

- the definitions for "surfactant", "detergent" and/or "non-detergent" that can be found in the relevant textbooks and technical dictionaries (such as the

Römpp Lexikon, the Kirk-Othmer Encyclopaedia, the Üllmann Encyclopaedia, the handbooks in the field of surfactant/detergent, etc.);

and

whether on the basis of such definitions the skilled person is able to unambiguously identify which compounds known as surfactants are "non-detergent anionic surfactant" and which not."

- VI. The Appellant filed a letter of 15 June 2009 enclosed with a replacement set of fourteen claims. In the letter it maintained the conditional request for oral proceedings in case the Board would not allow the appeal and/or remitted the application to the Examining Division for further prosecution.

For the present decision it is sufficient to consider claim 1 of this set of claims. It differs from claim 1 considered in the decision under appeal (see above section II) only in that the term "*(b) a non-detergent anionic surfactant*" has been amended into "*(b) an anionic surfactant*".

- VII. The Board cancelled the hearing previously scheduled for 7 August 2009 and informed the Appellant with summons dated 14 July 2009 that the oral proceedings were going to be held on 24 November 2009. The Board enclosed to these final summons a communication expressing the preliminary opinion of the Board on the replacement set of claims. Paragraph 3 of this communication reads as follows:

"3. The Board notes however that present claim 1 (last line) still requires the composition to be "free from detergent". Hence, the lack of clarity objected by the Examining Division appears to be still present in such claim."

VIII. With a letter dated 29 October 2009 the Appellant withdrew its previous request for oral proceedings.

The hearing before the Board took place as scheduled on 24 November 2009 in the absence of the duly summoned Appellant. At the end of the oral proceedings the Chairman announced the decision of the Board.

IX. The submissions made by Appellant in writing that are relevant in respect of Article 84 EPC 1973 are the followings.

In the opinion of the Appellant, the finding of lack of clarity in the decision under appeal was only due to the presence of the expression "*(b) a non-detergent anionic surfactant*" and, hence, such ground for refusal no longer applied to the now pending amended claim 1 wherein "*non-detergent*" had been removed.

In respect of claim 1 as pending before the Examining Division, the Appellant has stressed that some surfactants were detergents whereas other surfactants were not detergents. Therefore, such claim was not internally inconsistent. It simply banned using anionic surfactants that were also detergents, whilst requiring the presence of anionic surfactants that were not detergents.

Document (1) showed that it was possible for a composition to include surfactants whilst being non-detergent.

Accordingly, the phrase "*non-detergent anionic surfactant*" present in claim 1 as pending before the Examining Division was clear in meaning, and would not create a lack of clarity under Article 84 EPC.

- X. The Appellant requested in writing that the decision under appeal be cancelled and that the application be remitted to the Examining Division for further prosecution on the basis of the replacement set of claims filed under cover of the letter dated 15 June 2009.

Reasons for the Decision

1. Article 84 EPC 1973: claim 1

Even though the reasoning of the Examining Division focused mostly on the expression "*(b) a non-detergent anionic surfactant*" (present in the then pending claim 1 but amended into "*(b) an anionic surfactant*" in present claim 1), still section 3.3 of the decision under appeal addresses in more general terms the lack of clarity of the then pending claim 1. Indeed, the First Instance expressly stresses the fact that it is not possible to determine any clear distinction between the overlapping terms "*anionic surfactants*" and "*detergents*" (see e.g. the last paragraph of section 3.3 of the decision under appeal).

Moreover, it is self-evident that any reasoning given in the decision under appeal in respect of the expression "*a non-detergent anionic surfactant*" in claim 1 considered by the Examining Division, must inevitably equally apply also in view of the requirement - mentioned in the last line of the same claim - that the (whole) composition must be "*free from detergent*".

The Board has expressly drawn the attention of the Appellant to the fact that the requirement that the composition must be "*free from detergent*" is still present in claim 1 of the now pending sole request (see above section VI of Facts and Submissions). The Appellant has provided no reply to such observation.

Hence, the Board concludes that the Appellant has manifestly erred in presuming that it would have been sufficient for overcoming the objection raised by the Examining Division, to delete "*non-detergent*" in the definition of ingredient "(b)", whilst still leaving unchanged the wording at the end of the claim "*wherein said composition is free from detergent*".

1.1 Accordingly, the point to be decided is to whether or not claim 1 of the sole present request lacks of clarity in view of the fact that it requires the composition to comprise "*an anionic surfactant*" and to be "*free from detergent*".

1.2 The sole argument of the Appellant relevant to this point is that, as proven by document (1), there would exist anionic surfactant that were known not to be also detergents.

However, as indicated by the Board in the communication of 14 April 2009 (see above section V of Facts and Submissions), this argument implies the existence of a sufficiently clear distinction between the "*anionic surfactants*" that are also considered "*detergent*" and those that are instead considered "*non-detergent*".

The Appellant has neither maintained that the expression "*non-detergent anionic surfactant*" is explicitly or implicitly defined in the patent application, nor indicated any textbook, encyclopaedias or other proofs of the common general knowledge allowing to identify which anionic surfactants are not considered detergents.

In respect to document (1) the Board has already indicated in the same communication that it is established jurisprudence of the Boards (see e.g. the Case Law of the Boards of Appeal of the EPO, Fifth edition, I.C.1.5) that patent documents only by way of exception may be considered sufficient for demonstrating the existence of common general knowledge and that no such exception appears justified in the present case, in particular considering that several textbooks, handbooks and dictionaries provide definitions for "*surfactant*" and "*detergent*".

Hence, and considering that also the Board could not find any definition of "*surfactant*" and "*detergent*" that allowed to unambiguously distinguish the compounds known as surfactants that are not detergent from those that are detergent, the Board can only conclude that the Examining Division was correct in finding the then

pending claim 1 contrary to Article 84 EPC and that substantially the same lack of clarity is still present in the amended version of claim 1 now on file.

- 1.3 The Board concludes therefore that claim 1 of the sole Appellant's request violates Article 84 EPC 1973. Hence, this request cannot be allowed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke