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**Datasheet for the decision
of 20 July 2010**

Case Number: T 0260/08 - 3.3.06

Application Number: 99902684.2

Publication Number: 1051477

IPC: C11D 17/00

Language of the proceedings: EN

Title of invention:
A lavatory cleansing block

Patentee:
Reckitt Benckiser France

Opponent:
Henkel AG & Co. KGaA

Headword:
Cleansing block/RECKITT

Relevant legal provisions:

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Relevant legal provisions (EPC 1973):
EPC Art. 56

Keyword:
"Inventive step - no (main and first auxiliary request)"

Decisions cited:

-

Catchword:

-



Case Number: T 0260/08 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 20 July 2010

Appellant: Henkel AG & Co. KGaA
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Representative: Stevermann, Birgit
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Respondent: Reckitt Benckiser France
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Representative: Bowers, Craig Malcolm
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 26 November 2007
rejecting the opposition filed against European
patent No. 1051477 pursuant to Article 102(2)
EPC 1973.

Composition of the Board:

Chairman: P.-P. Bracke
Members: G. Dischinger-Höppler
U. Tronser

Summary of Facts and Submissions

I. European patent No. 1 051 477 was granted on the basis of a set of 12 claims containing independent Claim 1 which reads:

"1. A lavatory cleansing block having a perceived approximately constant intensity of fragrance throughout the life of the block, which comprises an inner region comprising an inner fragrance and an outer region comprising an outer fragrance which is different from said inner fragrance, the inner fragrance being present in a concentration by weight which is less than or equal to 1.1 times the concentration of the outer fragrance."

II. A notice of opposition had been filed against the granted patent, wherein the Opponent sought revocation of the patent on the grounds of, inter alia, Article 100(a) EPC (1973) for lack of inventive step (Article 56 EPC(1973)) in the light of document

D1 WO-A-96/14392.

III. The Opposition Division rejected the opposition for the reason that the patent and the invention claimed fulfilled the requirements of the EPC. Concerning inventive step, it was not found a matter of common knowledge to replace a composition comprising in the two regions identical fragrances at different concentrations, as disclosed in document D1, by a composition comprising different fragrances at comparable concentrations because two features had to be modified.

- IV. This decision was appealed by the Opponent, now Appellant.

The Patent Proprietor, now Respondent, maintained the claims as granted as its main request and filed an amended set of claims in an auxiliary request. Claim 1 of this request differs from that of the main request in that the term "1.1 times" was deleted.

- V. Upon a request by the Appellant, oral proceedings before the Board of Appeal were held on 20 July 2010.

- VI. During the appeal proceedings the Appellant submitted in essence the following arguments:

A person skilled in the art would have chosen different fragrances at similar concentrations in the inner and outer region of the lavatory cleansing block in order to provide an alternative for the block disclosed in document D1 where different concentrations of the same fragrance in the inner and outer region give a constant intensity of fragrance throughout the life of the block. It was apparent that changing only one parameter, the fragrance or the concentration, would either not provide a constant intensity of fragrance or make the adaptation of the concentrations complicated and the product more expensive. Hence, the claimed subject-matter was trivial and not based on an inventive step.

- VII. The Respondent, orally and in writing, disputed the Appellant's objections as being based on hindsight.

In particular, it was argued that document D1 was concerned with the technical problem of uniform release

of a variety of different types of active substances from a lavatory cleansing block throughout its useful life. The active substances included perfumes, but according to example 11 no uniform release was obtained since the inner region of the block contained much less perfume than the outer region. Starting from document D1 it was, therefore, an intellectual leap to focus on and modify the fragrance such that there was still a perceived constant intensity of fragrance throughout the life of the block. Further, the technical problem solved in view of document D1 was not simply to provide an alternative but also to avoid co-extrusion problems due to different rheologies of the pastes forming the inner and outer regions of the lavatory block. However, whilst a person skilled in the art could have changed simultaneously the type and concentration of the fragrance within the inner and outer regions of the block in order to overcome those problems, there was no motivation in document D1 to do so, actually.

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

The Respondent requested that the appeal be dismissed or that patent be maintained on the basis of the auxiliary request filed with the letter dated 22 March 2010.

Reasons for the Decision

Inventive Step

1. It is acknowledged in the description of the patent in suit that lavatory cleansing blocks are known in the art, for example from document D1 which discloses a cleansing bar for flush toilets consisting of two different aggregates or regions, one enclosing the other. Both aggregates contain a same active ingredient, such as a fragrance, whereby the concentration of this ingredient in the enclosed aggregate is at least 1.3 times the concentration in the outer aggregate (see paragraphs 1 to 5 of the patent in suit and document D1, page 2, lines 6 to 18).

It is stated in the patent in suit that in the case of fragrance as the active ingredient, such lavatory blocks would not perform in the same way throughout the entire life of the block due to an increased proportion of absorbed water towards the end of the life of the block. Further, co-extrusion of the two aggregates may be difficult due to the different amounts of fragrance in the two formulations which resulted in different rheologies (paragraph 6).

Instead, the claimed lavatory block allowed the active ingredients to be released at a relatively constant rate over time. Further, it was possible to take into account the problems arising from water penetration and the different rheologies by using different fragrances in the inner and outer layer at similar concentrations (paragraph 8 of the patent).

2. It is undisputed that document D1 relates to prior art suitable as a starting point for the assessment of inventive step. In particular, document D1 discloses a lavatory cleansing block which is said to release an active material uniformly throughout the life of the block (page 2, last paragraph and Examples) and fragrance is a particularly preferred active material (Claim 6, page 1, 22 to 25, page 2, lines 2 to 4, sentence bridging pages 4 and 5, paragraph bridging pages 10 and 11, and Examples 4 to 8).

Considering that the claimed subject-matter specifically aims at a product having perceived approximately constant intensity of fragrance throughout its life, the relevant prior art is represented by those parts of document D1 which relate to fragrance as the active material.

All the other active materials disclosed in document D1 are irrelevant with respect to the patent in suit, hence also example 11 which relates to a constant release of citric acid in order to prevent formation of limescale and where the release of fragrance is not an issue.

3. The claimed subject-matter differs from those lavatory cleansing blocks disclosed in document D1 which have a constant release of fragrance in that the fragrances of the outer and inner regions are different and the concentration by weight of the fragrance in the inner region is less than or equal to 1.1 times of that in the outer region.

4. The Board notes that a constant release of a particular fragrance which is the same in both regions necessarily results in a perceived intensity of that fragrance which is approximately constant throughout the life of the lavatory block. Therefore, document D1 already proposes a solution to the technical problem of providing a lavatory block displaying a perceived constant intensity of fragrance.

The Respondent argued, however, that due to the different fragrances in the two regions the claimed subject-matter was able to further overcome co-extrusion problems which may arise if different amounts of fragrance are used in the inner and outer regions and problems of non-uniform release of fragrance due to an increasing water content towards the end of the life of the block.

However, the lavatory cleansing blocks of document D1 are preferably prepared by the same extrusion method as those of the patent in suit, even in the case where different amounts of fragrance are used (see paragraphs 46 and 47 of the patent and in document D1, page 3, lines 23 to 34 and Examples 5 to 7). Hence, no co-extrusion problems are reported in document D1 for this case and the Respondent did not give evidence to the contrary.

Nor did the Respondent provide evidence showing that any increased water content of the block would affect the uniform release of fragrances from the block.

5. Bearing in mind that the problem and solution approach applied by the Boards of Appeal for assessing inventive

step requires that the technical problem solved by the claimed invention in view of the closest prior art is derived from the technical results actually obtained over that prior art (Case Law of the Boards of Appeal of the European Patent Office, fifth edition 2006, chapter I.D.2.), the technical problem in view of document D1 can thus be seen only in the provision of an alternative solution of the problem already solved in document D1 of providing a lavatory cleansing block having approximately constant perceived intensity of fragrance throughout its life.

6. It remains to be decided whether, in view of the prior art, it was obvious for someone skilled in the art to solve this technical problem by the means claimed, namely by using different fragrances at like or similar concentrations in the inner and outer regions of the block instead of using the same fragrance at different concentrations as in document D1.

7. In the Respondent's view, the Appellant's arguments were based on an 'ex post facto' approach since there was no motivation in document D1 for a skilled person to simultaneously change the type and concentration of the fragrance in the inner and outer regions of the block so that there was still a perceived constant intensity of fragrance throughout the life of the block. Thus, while a skilled person could have done so, he had other possibilities for achieving the same goal. For example, he could have made particular changes to the layers or regions. Hence, there was no reason why a skilled person would have focussed on the fragrance and the concentrations.

8. The Board agrees with the Respondent insofar as document D1 does not give any specific instructions on how to provide an alternative solution to the technical problem already solved.

On the other hand, it is apparent from document D1 that changing the form of the layers may provide an improvement since fragrance may be released more or less uniformly depending on the configuration of the layers (see Examples 5 and 6 in combination with Figures 2 and 5). However, this is not an alternative solution of the problem solved in document D1.

Therefore, in order to provide an alternative solution, a skilled person would concentrate on those parameters which directly influence the intensity of the fragrance of the block. In the Board's opinion these parameters are clearly the concentration of the fragrance as well as the fragrance itself. Contrary to the Respondent's opinion, there is no intellectual leap required to focus on those parameters in order to provide an alternative solution to the technical problem already solved in document D1.

It is self-evident that modifying the technical solution proposed in document D1 only with respect to the concentration of the fragrance cannot result in an alternative since this would mean using in the inner region less fragrance than required to maintain the same release as from the outer region. Hence, if it is not required - as in the patent in suit - that the scent of the fragrance remains constant over the life of the lavatory block (paragraph 36 of the patent), the

skilled person would have used different fragrances in the two regions.

Further, he would have adapted the concentrations of those different fragrances according to their inherent properties since it is well-known in the art that the perceived intensity of a fragrance is dependent not only on the concentration but also on factors like the volatility (see paragraph 28 of the patent).

Hence, choosing the fragrances so that the same concentrations in both regions provide the desired constant perceived intensity of fragrance is one of those options which a skilled person would consider in the expectation to provide an alternative solution to the technical problem already solved in document D1 of providing a lavatory cleansing block having constant intensity of fragrance throughout its life.

9. The Board concludes, therefore, that for the purpose of providing an alternative solution to the problem solved in document D1, a skilled person would have used those different fragrances which are able to provide at similar concentrations in the inner and outer regions an approximately constant perceived intensity of fragrance throughout the life of the lavatory block.
10. For these reasons, the Board finds that the subject-matter of Claim 1 of the Respondent's main request does not comply with the requirements of Articles 52(1) and 56 EPC (1973).
11. The same applies to Claim 1 of the auxiliary request since its subject-matter differs from that of Claim 1

of the main requests only insofar as now the concentration of fragrance of the inner region must not exceed that of the outer region of the lavatory block.

12. Consequently, the subject-matter of Claim 1 of none of the Respondent's requests complies with the requirements of Articles 52(1) and 56 EPC (1973), so that the patent has to be revoked.

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