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**Datasheet for the decision
of 8 June 2010**

Case Number: T 0820/08 - 3.3.06

Application Number: 02704752.1

Publication Number: 1368452

IPC: C11D 17/04

Language of the proceedings: EN

Title of invention:

Water soluble sachet with a dishwasher composition

Patentees:

Unilever PLC, et al

Opponent:

Reckitt Benckiser (UK) Limited

Headword:

Dishwasher in a sachet/UNILEVER

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 56

Keyword:

"Inventive step (main request): yes"

Decisions cited:

-

Catchword:

-



Case Number: T 0820/08 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 8 June 2010

Appellant: Reckitt Benckiser (UK) Limited
(Opponent) Dansom Lane
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Representative: Bowers, Craig Malcolm
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Respondents: Unilever PLC
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and

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted
15 February 2008 concerning maintenance of
European patent No. 1368452 in amended form.**

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 interlocutory decision of the Opposition Division concerning the maintenance in amended form of European patent No. 1 368 452 according to the then pending main request of the Patent Proprietors.

II. The Opponent had sought revocation of the granted patent on the grounds of, *inter alia*, lack of inventive step. It had cited in support of its arguments, *inter alia*, the documents:

(2) WO 98/30670,

(4) US 5 230 822

and

(5) US 5 336 430.

III. The main request filed by the Patent Proprietors during the opposition proceedings comprised nine claims (hereinafter **claims as maintained**).

Claims 1 and 5 as maintained read, respectively:

"1. A water soluble sachet comprising a dishwashing composition wherein the dishwashing composition comprises an encapsulated bleach and from 15% to 80% by weight of water, and wherein the dishwashing composition is a gel."

"5. A package comprising:

a water soluble sachet comprising a dishwashing composition wherein the dishwashing composition is a gel which comprises an encapsulated bleach and from 15% to 80% by weight of water."

The maintained claims 2 to 4 and 6 to 9 defined preferred embodiments of, respectively, the **water soluble sachet comprising gel dishwashing composition** (hereinafter **WSS with gel DC**) of claim 1 and of the package of claim 5 comprising such WSS.

IV. The Opposition Division decided, *inter alia*, that the DC comprising an encapsulated percarbonate bleach and packaged in a WSS disclosed e.g. in example 5 of document (2) represented the closest prior art. The subject-matter of claim 1 as maintained only differed from this prior art in that the DC of the invention was in the form of a gel and comprised 15% to 80% by weight of water. Since the technical advantages in terms of reduced spotting and scale formation on the washed tableware mentioned in the patent-in-suit and reflected in the experimental comparison of examples 11 to 14 were not caused by the features distinguishing the subject-matter of claim 1 as maintained, the Opposition Division concluded that the sole technical problem credibly solved over the whole claimed range was the provision of an alternative to the prior art.

The Opposition Division considered that document (2) only contemplated solid forms for the DCs stably packaged in WSSs, and required an apparently water soluble coating for the encapsulated bleach. On the

other hand, the substantially equivalent documents (4) and (5) only referred to liquid and gel DCs of the prior art and required a wax coating. For these reasons the Opposition Division concluded that the skilled person would consider the teaching provided by document (2) incompatible with that of document (4) or (5) and, thus, that the skilled person had no incentive to combine them.

Concerning the Opponent's alternative argument that the closest state of the art was represented by the gel DCs disclosed e.g. in example 3 of document (4) or in example 1 of document (5), the Opposition Division found that the subject-matter of claim 1 as maintained only differed therefrom in that the gel DCs of the invention were not used as such, but were contained in a WSS. The objective underlying problem was seen as providing a suitable delivery system for gel DCs, and the Opposition Division accepted that document (2) disclosed such delivery systems. Nevertheless, the Opposition Division concluded that the teaching of document (4) or (5) was incompatible with that of document (2) for substantially the same reasons which had already brought the Opposition Division to the corresponding conclusion that the teaching of document (2) was incompatible with that of document (4) or (5).

Therefore, the skilled person would not arrive in an obvious manner at the subject-matter of claim 1 as maintained even when starting from document (4) or (5).

- V. The Opponent (hereinafter Appellant) lodged an appeal against this decision.

With a letter dated 11 November 2008 the Patent Proprietors (hereinafter Respondents) submitted a set of amended claims as the (first) auxiliary request.

On 8 June 2010 oral proceedings took place before the Board in the presence of both Parties.

- VI. The Appellant contested in writing and orally only the inventiveness of the maintained claims by relying on the disclosure provided by documents (2), (4) and (5), these two latter being, in its opinion too, substantially equivalent.

This Party argued that the closest prior art was represented by the gel DCs exemplified in document (4) or (5) because each of these citations addressed the problem of spotting and filming considered in the patent-in-suit.

Nevertheless it also concurred with the decision under appeal that the subject-matter claimed was not limited to compositions credibly producing the desired reduced spotting and scale formation.

The possibility to use WSSs in order to package stably in unit doses the gel DCs of this prior art was obvious *per se*, and suggested by the combination of the teaching of document (4) or (5) with that of document (2). The possibly different solubility of the coatings used in these citations for encapsulating the bleach was no reason for concluding that the gel DC of the prior art could not be stably packaged in a WSS. Nor did the mention in document (2) of some problems possibly produced by moisture represent an instruction

to the skilled person to disregard the prior art in the field of gel DCs. Hence, neither document (2) nor document (4) or (5) contained any teaching deterring the person skilled in the art from their combination, and the skilled person would have combined their disclosures in the reasonable expectation that it was also possible to use WSS for gel DCs containing water.

For the same reasons, the skilled person had also combined the teaching of document (2) with that of document (4) or (5) when searching for an alternative to the DCs in unit doses of document (2). Hence, the claimed subject-matter was obvious even for the skilled person starting from the solid DCs in WSS of document (2).

The Appellant briefly described in the grounds of appeal some experiments allegedly demonstrating that claim 1 as maintained embraced gel DCs which could not be stably packaged in a WSS. This Party however neither replied to the Respondents' argument in the letter of 11 November 2008 that these experiments had been only vaguely and insufficiently described in the grounds of appeal, nor referred to such experiments at the oral proceedings before the Board.

VII. The Respondents replied in writing and orally by relying in essence on the reasoning of the Opposition Division that the skilled person considered the teaching of document (4) or (5) incompatible with that of document (2) and *vice versa*.

The fact that all these citations were silent as to the possibility for gel DCs to be stably packaged in WSSs,

was the evident consequence of there being, at the priority date of the patent-in-suit, a general prejudice against the possibility of stably packaging water rich formulations into a WSS, because of the then existing presumption that the water in these formulations could dissolve the material of the sachet, thereby causing a deterioration in the properties of this latter. A corresponding presumption also applied to the stability of the water soluble coating used for encapsulating the bleach of document (2) when exposed to water rich formulations. Moreover, this citation explicitly stressed that moisture produced stability problems in DCs packaged in WSSs, thereby leading its skilled reader away from the possibility of combining it with the prior art in the field of DCs rich in water, such as those of document (4) or (5).

Accordingly, document (2) could not be combined with document (4) or (5) or *vice versa*, and the claimed subject-matter remained inventive when starting from any of these.

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

The Respondents requested that the appeal be dismissed or in the alternative that the patent be maintained with the claims of the auxiliary request filed with letter of 11 November 2008.

Reasons for the decision

Respondents' main request

1. Inventive step (Article 56 EPC (1973)): claim 1 as maintained
 - 1.1 This claim defines a gel DC composition comprising an encapsulated bleach and 15% to 80% by weight of water in a WSS (see section III of the Facts and Submissions above).
 - 1.2 According to the established jurisprudence of the Boards of Appeal of the EPO, the starting point for the purpose of assessing inventive step is normally a prior art document disclosing subject-matter conceived for the same purpose or aiming at the same objective as the claimed invention and having the most relevant technical features in common with it.
 - 1.2.1 In the present case, the patent-in-suit focuses mostly on the technical problem of rendering available a DC that results in reduced spotting and scale formation (see e.g. paragraphs [0001] and [0009] and the experimental comparison in examples 11 to 14). However, the patent-in-suit also mentions in paragraphs [0004] to [0007] the advantages of having DCs in unit doses such as the prior art tablets, as this eliminates detergent handling and measuring, and discusses the problems associated with the use of tablets. A tablet is the sole comparative example disclosed in the patent-in-suit (see example 12).

1.2.2 The Appellant has identified the starting point for the purpose of assessing inventive step on the basis of the technical problem mentioned in the patent-in-suit of reduced spotting and scale formation.

However, as repeatedly argued by the Appellant, it is apparent to the skilled reader of the patent-in-suit that the desired reduction in spotting and scale formation is only disclosed therein as achieved by some embodiments of the claimed subject-matter comprising specific optional ingredients. This is undisputed by the Respondents, as well as implied in the findings of the decision under appeal (e.g. that the comparative examples given in the patent-in-suit do not link these effects to the features present in claim 1 as maintained). Hence, it is apparent to the Board that this technical effect cannot reasonably represent the objective aimed at by the whole range of subject-matter claimed.

1.2.3 Since claim 1 defines a DC **in a sachet**, the Boards finds it instead to be credible that the whole claimed subject-matter aims at providing a (further) solution to the well-known technical problem mentioned in paragraph [0004] of the patent-in-suit, i.e. that of eliminating the detergent handling and measuring required for dispensing DCs in the dishwasher.

1.2.4 Under such circumstances, the Board takes the view that the starting point for the purpose of assessing inventive step is to be identified in the prior art aiming at the same objective as the whole claimed subject-matter (i.e. that of providing DCs in unit doses). Therefore, the Board concurs with the

Opposition Division that the **unit dose DC** of, in particular, example 5 of document (2) represents the reasonable starting point for the assessment of inventive step.

1.3 The Board also concurs with the findings of the Opposition Division, undisputed by the Appellant, that:

- the sole distinction between the subject-matter of claim 1 as maintained and example 5 of document (2) lies in the fact that in the WSS of claim 1 the DC is in the form of a gel containing 15% to 80% by weight of water, and not a dry granulate;

and

- the technical problem credibly solved by the subject-matter of claim 1 as maintained vis-à-vis this prior art is the provision of a (further) DC in unit dose, i.e. the provision of an alternative to the prior art.

1.4 The Appellant has objected to the reasoning in the decision under appeal by arguing that the person skilled in the art starting from example 5 of document (2) would considered it obvious to solve the technical problem identified above by replacing the solid DCs in the WSSs of document (2) with the gel DCs of either of document (4) or (5). This Party has not disputed the finding of the Opposition Division that document (2) does not mention at all DCs in gel or other water containing forms and that documents (4) and (5) are totally silent as to the nature of the materials that could be used for packaging or containing gel DCs

during storage. It has however interpreted these facts as necessarily implying that these citations cannot possibly disclose any reason that could have deterred the skilled person from combining their teachings. In addition, the Appellant has considered of no relevance in this respect either the references in document (2) to problems caused by "moisture" or the fact that the material used in this citation for coating the encapsulated bleach is probably water soluble.

- 1.4.1 The Board notes as a preliminary point that, as already expressly established in the jurisprudence of the Boards in the field of biotechnology (see the Case Law of the Boards of Appeal, fifth edition 2006, I.D.7.1.3), the notional skilled person has a conservative attitude. The Board cannot see any reason why such attitude would be restricted to skilled persons working in the field of biotechnology.

Moreover, it is apparent to the Board that, in the present case, the finding of the Opposition Division is actually based on the assumption that the person skilled in the art would have at least feared as possible, if not expected, that fluid aqueous formulations could dissolve the water soluble materials used for forming WSSs. This can be deduced from the whole reasoning given in this respect in the decision under appeal, as evident, for instance, from the relevance attributed to the fact that the available prior art does not contain any suggestion "*that gel compositions with 15-80 wt % water could be **stably** contained in water soluble sachets*" (see point 5.8 of the decision, emphasis added by the Board).

Hence, even if the Board disregards in document (2) - for the sake of an argument favourable to the Appellant - the references to problems caused by moisture and the presumably water soluble nature of the encapsulated bleach, still it is immediately apparent that the assumption of the Opposition Division, if found credible, would be sufficient to deter the cautious person skilled in the art from the combination of the teaching of document (2) with that of either of document (4) or (5).

- 1.4.2 The Board takes the view that this assumption is *per se* logical and, thus, sees no reason for departing from the finding of the Opposition Division as to the incompatibility of these citations.

In particular, the facts relied upon by the Appellant are manifestly insufficient to make it credible that the skilled person would have no doubts or negative expectations as to the stability of packaging made of water soluble materials, when filled with water containing fluid formulation.

Indeed, the absence in document (2) of any mention of DCs containing water could possibly reflect (as implied by the Appellant's reasoning) the expected equivalence of any form of DCs, as well as (as argued by the Respondents) the general consensus in the technical field that it was impossible to store water rich formulations stably in a sachet that is water soluble. Similarly, the absence of explicit indications in document (4) or (5) as to whether the gel DCs may or may not be stably contained or packaged in materials that are water soluble, could as well be due to the

expectation that these water rich gels are not comparable to water in terms of their dissolving abilities (and, thus, suitable for packaging in water soluble materials too) as to the presumption that it was unnecessary to indicate expressly that only packaging materials that are not water soluble could be used for stably storing these gel DCs.

1.4.3 For this reason alone, the Board concludes that the arguments brought forward by the Appellant are insufficient to make it credible that the person skilled in the art did not fear that substantial stability problems could possibly arise from the contact between the water soluble material forming the WSS of document (2) and the water contained in the gel DCs of document (4) or (5). Hence, the cautious person skilled in the art would be deterred from combining the teachings given in these citations.

1.5 The Board notes that the Appellant's arguments fail as well in the event that, as suggested by the Appellant, the skilled person started from e.g. example 3 of document (4) (the same applies starting from e.g. example 1 of document (5)) and, thus, aimed at the provision of another method for dispensing this gel DC of the prior art.

Indeed, in this case, too, the Appellant has argued that the person skilled in the art considered the teaching of document (4) (or (5)) compatible with that of document (2) for the reasons which are indicated at point 1.4 above and found insufficient by the Board for the reasons given at point 1.4.2.

Nor has the Appellant provided any kind of evidence supporting its only remaining argument, disputed by the Respondents, that the skilled person would consider it obvious *per se* to package the gel DCs of document (4) or (5) into WSSs.

1.6 Thus, the Board concludes that the Appellant's arguments are insufficient to reverse the finding of the Opposition Division as to the compliance of the subject-matter of claim 1 as maintained with the requirements of Article 56 EPC (1973).

2. Inventive step (Article 56 EPC (1973)): Claims 2 to 9 as maintained

The Board finds that the Appellant's objections based on Article 56 EPC (1973) fail in respect to the subject-matter of claims 2 to 9 as maintained for substantially the same reasons as already considered above in respect of claim 1.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke