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**Datasheet for the decision
of 5 March 2010**

Case Number: T 1032/08 - 3.3.06

Application Number: 02750899.3

Publication Number: 1387668

IPC: A61K 7/50

Language of the proceedings: EN

Title of invention:
Damp cleansing wipe

Patentee:
Unilever PLC, et al

Opponent:
Henkel AG & Co. KGaA

Headword:
Damp cleansing product/UNILEVER

Relevant legal provisions:
EPC Art. 54, 56

Relevant legal provisions (EPC 1973):

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Keyword:

"Novelty (yes): experimental evidence on a composition not comparable with the prior art"

"Inventive step (yes): teaching of the prior art leading away from the invention"

Decisions cited:

-

Catchword:

-



Case Number: T 1032/08 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 5 March 2010

Appellant: Henkel AG & Co. KGaA
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Representative: Semrau, Markus
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Respondents: Unilever PLC
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and

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 4 April 2008
rejecting the opposition filed against European
patent No. 1387668 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P.-P. Bracke
Members: L. Li Voti
U. Tronser

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division to reject the opposition against the European patent no. 1 387 668 concerning a damp cleansing product.

II. In its notice of opposition the Opponent sought revocation of the patent on the grounds of Article 100(a) EPC because of lack of novelty and inventive step of the claimed subject-matter.

The Opponent referred during the opposition proceedings to the following documents:

(1): WO98/18442;

(2): EP-A-763341;

(3): WO96/24329;

(4): WO95/17175;

(5): W.Umbach (ed.): Kosmetik-Entwicklung, Herstellung und Anwendung kosmetischer Mittel, 2nd edition (1995), pages 106 to 113, 220 to 223, 226 to 229, 238 to 239.

III. The Opposition Division found in its decision *inter alia* that

- document (1) did not disclose explicitly or implicitly the viscosity of the compositions disclosed therein, when measured as indicated in claim 1; therefore, the claimed subject-matter was novel over the disclosure of document (1);
- starting from document (1) the skilled person, even considering the teaching of the other cited

documents, would not have had any motivation to modify the dry products of document (1) in order to provide a damp cleansing product as claimed;

- therefore, the claimed subject-matter involved also an inventive step.

IV. An appeal was filed against this decision by the Opponent (Appellant).

The Respondents (Patent Proprietors) submitted with the letter of 30 December 2009 five auxiliary requests and communicated that they would not attend the oral proceedings.

Oral proceedings were held before the Board on 05 March 2010 in the absence of the duly summoned Respondents.

V. Claim 1 of the set of claims according to the **main request**, corresponding to the set of claims as granted, reads as follows:

"1. A substantially damp cleansing product comprising: (i) a water insoluble substrate; and (ii) a cleansing composition impregnated onto the substrate comprising: (a) at least one lathering surfactant present in an amount sufficient to foam which ranges from 1 to 60% by weight of the composition; (b) water; and wherein the water is present at greater than 15% by weight of the product, but no higher than 35%, and the composition having a viscosity as measured on a Haake CV 20 Rheometer with 30 mm profiled parallel plates at 23°C ranging from 50 to 300,000 mPa.s (1mPa.s = 1cp)."

Dependent claims 2 to 9 relate to particular embodiments of the claimed cleansing product.

VI. The Appellant submitted in writing and orally *inter alia* that

- claim 1 did not specify the shear rate to be applied in measuring the viscosity of the impregnating composition of claim 1; therefore, the viscosity indicated in claim 1 was meaningless and had to be disregarded;
- in any case, example 4 of document (1) disclosed an impregnated wipe containing before drying an amount of water as claimed, wherein the impregnating composition had a viscosity within the range of claim 1 as shown in the experimental report submitted with the statement of the grounds of appeal;
- even though said experimental report had been carried out by using a composition containing sucrose distearate instead of the sucrose ester fatty acid cottonate contained in the composition of example 4, this modification of the composition disclosed in document (1) would not have any effect on the viscosity measured because of the structural similarity of these compounds;
- therefore, example 4 of document (1) detracted from the novelty of claims 1 to 8;
- the alleged improved foaming behaviour of the claimed cleansing product had not been credibly

shown by the Respondents; in particular, the tests contained in example 3 of the patent in suit related to cleansing products containing an amount of water lower than 15% by weight, which products did not fall under the wording of claim 1; moreover, even admitting that these tests could contain an error and were intended to represent the invention, they contained an error which could not be obviously corrected; therefore, they had to be disregarded;

- the remaining examples of the patent in suit just showed that the claimed cleansing product could have a good foaming behaviour;
- consequently, the technical problem underlying the invention had to be formulated as the provision of an alternative cleansing wipe containing lathering surfactants and having a good foaming behaviour on use;
- starting from the teaching of document (1), it would have been obvious for the skilled person to prepare, as an alternative to the dry products disclosed in this document, a cleansing product requiring less drying in order to save energy; therefore, it was obvious to prepare a cleansing product having a content of water exceeding the upper limit indicated in document (1) of 10% by weight of water or even the upper limit of the water content of the known dry cleansing products acknowledged in the patent in suit of 15% by weight; moreover, it would have been obvious to adjust the viscosity of the impregnating cleansing

composition within the limits of claim 1 since documents (2) to (5) already suggested such a viscosity for other impregnating compositions or for readily foaming cleansing compositions;

- furthermore, considering the teaching of document (5) that a readily foaming shower gel having a viscosity in accordance with the patent in suit could be applied onto a washing cloth before use, it would have been obvious for the skilled person to prepare as alternative a wet wipe containing such a composition impregnated therein in combination with some water in order to help foaming;
- therefore, the claimed subject-matter would not involve an inventive step.

VII. The Respondents submitted in writing *inter alia* that

- the claimed subject-matter was novel over example 4 of document (1) since, for example, the experimental report submitted by the Appellant, by testing a composition containing sucrose distearate instead of the sucrose ester fatty acid cottonate of example 4, would not be apt to show the viscosity of the impregnating composition of said example 4;
- starting from the dry products of document (1), the skilled person would not have found any suggestion in the prior art that an intermediate water content or level of dampness would be beneficial for attaining improved lathering;

- such an improved foaming behaviour was shown in the tests contained in the patent in suit; in particular, even though the tests of example 3 contained a typographical error in one value of the size of the impregnated substrate, by using the correct value, it would have been clear that the tested products were in accordance with the requirements of claim 1;

- the cited prior art did not suggest the use of a cleansing product containing an impregnating composition of the required viscosity and a water content as claimed;

- therefore, the claimed subject-matter would be novel and inventive over the teaching of the prior art.

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

The Respondents request in writing that the appeal be dismissed or, in the alternative, that the patent be maintained on the basis of any of the first to fifth auxiliary requests submitted with letter of 30 December 2009.

Reasons for the Decision

1. *Respondents' main request*

1.1 Novelty

- 1.1.1 Claim 1 according to the main request concerns a cleansing product comprising a water insoluble substrate impregnated with a cleansing composition which comprises 1 to 60% by weight of a lathering surfactant; moreover, the cleansing product must contain more than 15% by weight and no more than 35% by weight of water.

Claim 1 requires also that the impregnated composition has a viscosity as measured on a Haake CV 20 Rheometer with 30 mm profiled parallel plates at 23°C ranging from 50 to 300,000 mPa.s.

As explained by the Appellant during oral proceedings, this type of rheometer is capable of measuring viscosity at various shear rates. In fact, in the experimental report contained in the statement of the grounds of appeal, the Appellant measured the viscosity of a composition similar to that of example 4 of document (1) by means of such a rheometer at a shear rate varying from 0.11/s to 391/s. As shown in this report, the viscosity of such a composition diminishes by increasing the shear rate as expectable for this type of compositions.

The Board remarks that claim 1 does not contain any indication of the shear rate to be used in measuring the viscosity with the specifically indicated rheometer. Therefore, in the Board's view, the required viscosity

indicated in claim 1 can only be interpreted as the viscosity of the impregnating composition under any possible shear rate applicable with the rheometer specifically indicated in claim 1.

The Board thus cannot agree with the Appellant's submission that the viscosity requirement of claim 1 is meaningless in the absence of an indication of the shear rate to be used for its measurement.

- 1.1.2 It is undisputed that document (1) does not contain any explicit indication of the viscosity of the therein disclosed impregnating compositions.

The Appellant provided with the statement of the grounds of appeal an experimental report in which the viscosity of a composition similar to that of example 4 of document (1) had been measured at 23°C by means of the instrument indicated in claim 1, i.e. a Haake CV 20 Rheometer with 30 mm profiled parallel plates.

However, the sucrose ester fatty acid cottonate of example 4 was replaced in this composition with sucrose distearate.

Even though both sucrose ester fatty acid cottonate and sucrose distearate are sucrose esters of fatty acids, the sucrose distearate is an ester of stearic acid, i.e. a saturated fatty acid, whilst the sucrose ester fatty acid cottonate is the ester of a fatty acids mixture derived from cottonseed oil, which mixture, as well known to the skilled person, contains prevalently unsaturated fatty acids and only a minor portion of stearic acid. Consequently, the physical

characteristics of the latter ester are necessarily different from those of the sucrose distearate and they must have a different influence on the viscosity of the composition containing the ester.

Therefore, the experimental report submitted by the Appellant cannot be considered to be convincing evidence that the composition of example 4 of document (1) has a viscosity as required in claim 1 and that it detracts from the novelty of the claimed subject-matter.

The Board thus concludes that the claimed subject-matter is novel.

1.2 Inventive step

1.2.1 As explained in the patent in suit, personal cleansing and conditioning products have traditionally been marketed in a variety of forms and have attempted to satisfy a number of criteria to be acceptable to consumers, *inter alia* lather volume (paragraph 2 of the patent in suit).

Moreover, there existed in the prior art commercially available cleansing products in the form of substantially dry articles containing no more than 10% or 15% by weight of water, which articles consisted of a woven or non-woven cloth having a cleansing composition deposited thereon (paragraph 3).

However, these products had a slow foamability and the used manufacturing processes had various drawbacks (see paragraphs 5 and 8).

Accordingly, the technical problem underlying the invention is formulated in the patent in suit as the provision of a disposable cleansing product which upon contact with water rapidly lathers and generates rich long lasting foam, which product has also improved manufacturability and better aesthetics (see paragraphs 8 and 10).

- 1.2.2 Both parties as well as the Opposition Division chose document (1) as the closest prior art since it is representative for the substantially dry cleansing products cited in the discussion of the prior art in the patent in suit, which the invention attempts to improve.

Therefore, this document represents an objectively reasonable starting point for the evaluation of inventive step.

The Board has no reason to depart from this finding and takes also document (1) as the most suitable starting point for the evaluation of inventive step.

- 1.2.3 Document (1) relates already to cleansing products showing enhanced lathering and cleansing at low surfactant levels (see page 1, line 5 and page 2, line 23 to 24).

According to the Respondents the tests of example 3 of the patent suit (tables V and VI) would show an improved lathering behaviour in dependence on the selected viscosity of the impregnating composition.

However, the Respondents admitted in writing that the value of one size of the water insoluble substrate used in this example contains an error and that by considering the figures as given in the text of the patent in suit, the tested cleansing products according to the invention would have an amount of water below 15% by weight and would not fall within the wording of the claims.

Even if the Respondents suggested in writing how this error could be corrected, the Board finds that it is not possible to state with certainty if only one of the size values indicated in the example is actually wrong and how it or they should be corrected.

Therefore, the Board concludes that it is not possible to rely on the tests of example 3.

Example 1 of the patent in suit reports a comparison of the foaming behaviour of a cleansing product in accordance with the invention explicitly containing 25% by weight of water with two substantially dry commercial products (see tables II and III and paragraph 51). However, the impregnating compositions of these dry commercial products are not indicated in the patent in suit and have not been provided by the Respondents; since it is unknown if the impregnating compositions of the commercial products are comparable with the product of the invention tested in example 1, it is not possible to draw from these comparisons any conclusion as to any possible improved foaming behaviour.

The Board remarks also that the subject-matter of claim 1 does not contain any feature relating to a particular manufacturing process or to the aesthetics of the cleansing product. Therefore, also the other alleged improvements mentioned in the patent in suit cannot be considered to have been convincingly achieved by means of the claimed subject-matter.

However, it has not been disputed by the Appellant that, in the light of example 1 and tables II and III of the patent in suit, the claimed cleansing product can provide a good foaming behaviour on use.

Therefore, in the absence of any evidence that any of the technical problems indicated in the patent in suit has been effectively solved by means of the claimed subject-matter, the Board finds that, in the light of the teaching of document (1), the technical problem underlying the invention can only be formulated as the provision of an alternative cleansing product consisting of an impregnated water-insoluble substrate capable of providing a good foaming behaviour on use.

Since the claimed products contain a lathering surfactant and example 1 of the patent in suit shows a product according to the invention having good foaming behaviour, the Board has no reason to doubt that the subject-matter of claim 1 solved the above mentioned technical problem.

- 1.2.4 Document (1) relates explicitly to substantially dry cleansing products containing a water-insoluble substrate impregnated with a cleansing composition, the product containing 0.5 to 12.5% by weight of a

lathering surfactant and no more than 10% by weight of water (page 3, lines 18 to 27; page 5, lines 4 to 6 and page 9, line 9). Moreover, this document does not contain any information as to the viscosity of the impregnating composition. Therefore, the cleansing products disclosed therein differ from the subject-matter of claim 1 insofar as they do not contain an amount of water greater than 15% by weight and not greater than 35% by weight and do not specify the viscosity of the impregnating composition.

Since this document explicitly requires that the cleansing product is substantially dry, i.e. it does not contain more than 10% by weight of water, and feels dry to the touch (page 5, line 5), this document cannot be considered to contain any hint for the skilled person to disregard this explicit teaching and to try to prepare as an alternative a damp product having a greater amount of water as required in claim 1 of the patent in suit.

Even considering that the skilled person could try to save energy in the preparation of the products of document (1), it would have been obvious for the skilled person to prepare a cleansing product having an amount of water so close as possible to the upper limit of not greater than 10% by weight indicated in this document and he would have had no reason to depart from the teaching of this document which regards only substantially dry products and to prepare products having more than 15% by weight of water. In fact, it is even admitted in the description of the patent in suit that the substantially dry products of the prior art contained at most 15% by weight of water and usually

much less (see paragraph 3 of the patent in suit). Therefore, a content of 15% by weight would have been for the skilled person the limit not to be exceeded in the preparation of substantially dry products of the type disclosed in document (1).

The skilled person thus would not have been prompted by the teaching of document (1) to provide a damp cleansing product as claimed as an alternative to the impregnated substantially dry products disclosed therein.

Since it was already unobvious to try a cleansing product having more than 15% by weight of water in the light of the teaching of document (1), it is not necessary to discuss whether the selection of an impregnating composition having a viscosity as claimed was in itself obvious in the light of the other cited documents (2) to (5) submitted by the Appellant.

- 1.2.5 Document (5) discloses readily foaming shower gels of a viscosity between 3,000 and 10,000 mPa.s and teaches that they can be applied with a wet washing cloth (see page 113, "Duschbäder").

The Board remarks that document (5) does not contain any explicit suggestion for the skilled person to prepare a substrate having impregnated therein such a foaming shower gel and a selected amount of water.

Moreover, even though the skilled person would have tried to apply the teaching of document (5) to an impregnated article, he would have turned to the available prior art in this technical field and would

have learnt, for example, from document (1) to use a substantially dry article capable of foaming upon use (see page 1, lines 1 to 4 and page 5, lines 1 to 6 of document (1) and point 1.2.4 above) but not a damp product having an amount of water as required in the patent in suit.

- 1.2.6 Therefore, the Board concludes that the cited prior art did not contain any suggestion that would have led the skilled person to prepare a wet wipe containing lathering surfactants, a water content and an impregnating composition as required in claim 1 of the patent in suit in order to provide an alternative cleansing product consisting of an impregnated water-insoluble substrate capable of providing a good foaming behaviour on use.

Therefore, the subject-matter of claim 1 involves an inventive step.

Since claims 2 to 9 are dependent on claim 1, the subject-matters of these claims also involve an inventive step for the same reasons.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke