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**Datasheet for the decision
of 6 November 2008**

Case Number: T 1517/08 - 3.2.07

Application Number: 03728852.9

Publication Number: 1506123

IPC: B65D 83/14

Language of the proceedings: EN

Title of invention:

Low combustion aerosol product in plastic package having a reduced fire hazard classification

Applicant:

THE PROCTER & GAMBLE COMPANY

Opponent:

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Headword:

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Relevant legal provisions:

EPC Art. 109(1), 111(1)

Relevant legal provisions (EPC 1973):

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Keyword:

"Remittal - yes, interlocutory revision should have been granted (reasons point 2)"

Decisions cited:

-

Catchword:

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Case Number: T 1517/08 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 6 November 2008

Appellant:

THE PROCTER & GAMBLE COMPANY
One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative:

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Procter & Gamble Technical Centres Limited
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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 25 February 2008
refusing European application No. 03728852.9
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
E. Dufrasne

Summary of Facts and Submissions

- I. European application No. 03 728 852 was refused by the examining division for lack of inventive step.
- II. The appellant (applicant) filed an appeal against that decision.
- III. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 5 filed with its appeal grounds dated 19 June 2008. As an auxiliary measure oral proceedings were requested.
- IV. The Board issued a communication dated 24 September 2008 in which it indicated that the subject-matter of the claims filed with the appeal had not been specifically dealt with by the examining division in its decision. The Board indicated that it intended to remit the case to the examining division which would make an oral proceedings before the Board unnecessary.

In its response dated 3 October 2008 the appellant stated that it withdrew its request for oral proceedings in view of the envisaged remittal.

- V. The independent claim of the application as decided upon by the examining division reads as follows:

"1. A low combustion aerosol antiperspirant product in a plastic package having a reduced fire hazard classification comprising:

(a) a low combustion product, wherein said product has a chemical heat of combustion equal or less than 30 kJ/g;

(b) a plastic package, wherein said package is capable of containing and dispensing said low combustion product, wherein said package is stable when containing said product, wherein the combination of said package and said product has a fire hazard classification of 1 or 2, wherein said low combustion product is an anhydrous antiperspirant product."

The independent claim of the only request before the Board reads as follows (amendments compared to claim 1 as decided upon by the examining division are depicted in bold):

"1. A low combustion aerosol antiperspirant product in a plastic package having a reduced fire hazard classification comprising:

(a) a low combustion product, wherein said product has a chemical heat of combustion equal or less than 30 kJ/g;

(b) a plastic package, wherein said package is capable of containing and dispensing said low combustion product, wherein said package is stable when containing said product, wherein the combination of said package and said product has a fire hazard classification of 1 or 2, wherein said low combustion product is an anhydrous antiperspirant product, **and wherein said low combustion product contains a propellant, wherein the propellant is carbon dioxide.**"

VI. The documents cited in the present decision are the following:

D1: GB-A-1 285 073

D2: US-A-4 350 272

VII. The arguments of the appellant may be summarised as follows:

Claim 1 has been amended to specify carbon dioxide as the propellant. Carbon dioxide was listed as a propellant in claim 3 as originally filed. Neither D1 nor D2 mentions carbon dioxide as a propellant. Carbon dioxide has a significantly lower heat of combustion than the propellants listed in D1 and D2 as evidenced by the table of combustion enthalpies filed with the appeal grounds. The solution proposed in claim 1 to the problem of reducing fire risk in relation to anhydrous antiperspirants is therefore not obvious to the skilled person.

Reasons for the Decision

1. *Article 123(2) EPC*

Claim 1 is a combination of claims 1, 2 and an alternative contained in claim 3, all as originally filed.

The amendments therefore comply with Article 123(2) EPC.

2. *Inventive step*

2.1 The examining division refused the application for lack of inventive step in the subject-matter of a claim which was a combination of claims 1 and 2 as originally filed. The reasons of the examining division were essentially based on D1 and D2.

2.2 In its communications prior to its decision the examining division indicated that the propellants specified as alternatives in claim 3 as originally filed were either specifically known from a document or well known and commonly used in the art (see point 3 of the communication dated 18 October 2005 and point 3 of the communication dated 31 July 2006).

The decision of the examining division merely stated that the propellants listed in claim 2 (original claim 3) were well known and commonly used in the art (see point II 2.3, last paragraph, of the impugned decision).

2.3 The appellant has filed amended claims with its appeal whereby it has added to claim 1 the feature that the propellant is carbon dioxide which was one of a number of alternative propellants in claim 3 as originally filed. The alternative selected by the appellant was not one to which the examining division had made specific reference in its communications. Moreover, the appellant filed arguments in its appeal grounds as to why the subject-matter of the amended claim involved an inventive step. In particular, it argued that none of the cited prior art documents disclosed carbon dioxide as a propellant.

2.4 Therefore the only reference by the examining division to the feature which now has been added to claim 1 is an unsupported general statement that it is well known and commonly used in the art. Furthermore the appellant has filed arguments and evidence in support of an inventive step in the subject-matter of this claim.

2.5 The Board concludes that the examining division should have exercised its powers under Article 109(1) EPC and granted interlocutory revision. The case corresponds to that set out in the Guidelines for Examination E-XI, 7.1(iii) wherein rectification of the decision is indicated.

It should have been clear to the examining division that the reasons for its decision no longer apply in view of the amendment made to claim 1 as well as the accompanying arguments and evidence, and that its unverifiable statements regarding the general knowledge of the skilled person cannot be considered as sufficient reasoning in the light of the appellant's substantive counterarguments.

3 *Remittal to the department of first instance*

In view of the above conclusions the Board considers it appropriate to remit the case in accordance with Article 111(1) EPC to the examining division so as to give the appellant the possibility to argue its case before two instances.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders