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**Datasheet for the decision
of 23 July 2010**

Case Number: T 1579/08 - 3.3.06

Application Number: 00928165.0

Publication Number: 1175481

IPC: C11D 3/12

Language of the proceedings: EN

Title of invention:
Detergent compositions

Patentee:
THE PROCTER & GAMBLE COMPANY

Opponents:
Unilever N.V.
Henkel AG & Co. KGaA

Headword:
Softening detergent tablet/PROCTER & GAMBLE

Relevant legal provisions:
EPC Art. 54(3), 88
RPBA Art. 12

Relevant legal provisions (EPC 1973):
EPC Art. 54(1)(2), 111(1)

Keyword:
"Novelty over document E4 (yes)"
"Priority date valid (no) - correction of error in the
priority document not directly and unambiguously derivable"
"Admissibility of new document cited in the statement of the
grounds of appeal (yes)"
"Remittal (yes)"

Decisions cited:

G 0002/98, T 1007/95

Catchword:

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Case Number: T 1579/08 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 23 July 2010

Appellant: Unilever N.V.
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Representative: -

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
16 June 2008 concerning maintenance of European
patent No. 1175481 in amended form.

Composition of the Board:

Chairman: E. Bendl
Members: L. Li Voti
U. Tronser

Summary of Facts and Submissions

- I. The present appeal is from the decision of the Opposition Division to maintain in amended form the European patent no. 1 175 481 concerning a softening laundry detergent tablet.
- II. In their notices of opposition both Opponents 01 and 02 sought revocation of the patent on the grounds of Article 100(a) EPC 1973 because of lack of novelty and inventive step of the claimed subject-matter.

The Opponents referred during the opposition proceedings *inter alia* to the following documents:

(E3): EP-A-466484;

(E4): US-A-4682982.

- III. The Opposition Division found in its decision that the claims according to the main request filed during oral proceedings complied with the requirements of the EPC.

As regards the novelty of the claimed subject-matter over document (E4), it found that there was no indication in this document that the particulate product described in column 16 could be used for producing detergent tablets; therefore, this document did not disclose directly and unambiguously a detergent tablet having all the features of claim 1 of the then pending main request.

- IV. An appeal was filed against this decision by Opponent 01 (Appellant).

The Appellant submitted with the statement of the grounds of appeal the following documents:

(E19): WO 00/66688;

(E19a): priority document of E19.

The Respondent (Patent Proprietor) submitted with the letter of 5 March 2009 four auxiliary requests and Mr. Gény's Statutory Declaration (hereinafter referred to as E20).

- V. Claim 1 of the set of claims according to the **main request**, which corresponds to the main request found by the Opposition Division to comply with the requirements of the EPC, reads as follows:

"1. A softening laundry detergent tablet comprising clay and laundry surfactant, wherein the clay consists of smectite clay, and wherein the tablet is a compressed mass of particles, and at least 50% by weight of the clay is present as granules which have a size of at least 100 μm , the clay granules containing at least 50% by weight of the clay."

Claims 2 to 8 relate to specific embodiments of the tablet of claim 1 whilst claim 9 relates to the process of making a tablet having the features of claim 1.

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

- the preparation of detergent tablets from a particulate material belonged to the common general knowledge of the skilled person; therefore, the skilled

person would have read implicitly that the specific particulate material disclosed in column 16 of document (E4) could be used for preparing a detergent tablet;

- moreover, the disclosure of column 16 belonged to example 6 of document (E4) and taught that the embodiment disclosed therein could be used in detergent tablets;

- therefore, the subject-matter of claim 1 lacked novelty in the light of document (E4);

- the priority document of the patent in suit related to clay granules having a size of at least 100 μm only, whilst claim 1 of the patent in suit required that such granules have a size of at least 100 μm (see point V above);

- it was not readily apparent that the value of at least 100 μm used in the priority document was erroneous; moreover, even if the skilled person would have recognised that the value of at least 100 μm had to be erroneous, a correction by the insertion of a decimal point to a value of, for example, at least 1 mm was equally possible as the replacement of μm with mm to the value contained in the patent in suit of at least 100 μm ;

- furthermore, document (E20) represented an expert's opinion only and could not be considered to represent an evidence that the skilled person would have interpreted the values of the priority document solely as corrected in the patent in suit;

- therefore, it was not possible to derive directly and unambiguously from the priority document how the value of at least 100 mm had to be corrected;

- as a consequence, the patent in suit did not benefit from the claimed priority date;

- therefore, document (E19), having a valid priority date which was earlier than the filing date of the patent in suit and disclosing tablets as claimed in claim 1, was prior art under Article 54(3) EPC; since this document was highly relevant it had to be admitted into the proceedings.

VII. The Respondent submitted in writing and orally *inter alia* that

- document (E4) did not disclose directly and unambiguously a tablet having the features of claim 1;

- as regards the priority document, it would have been at first sight clear to the skilled person that the value of at least 100 mm in claim 1 was erroneous;

- since the size of other particulate materials cited in the priority document had been expressed in micrometers and mm were used with respect to clay particles only, it was evident that the value of at least 100 mm had to be understood as relating in reality to at least 100 μm ; in fact, the size of detergent particles was conventionally expressed in μm as stated in (E20);

- furthermore, the priority document contained a reference to document (E3) wherein the particle size of the detergent particles was expressed in μm ;

- therefore, it would have been clear beyond any reasonable doubt to the skilled person that the values of clay particle size reported in mm in the priority document were erroneous and that the document intended to relate to values in μm ; the priority date thus was validly claimed;

- as regards document (E19), it was not a relevant document if the priority date would be found to be valid; moreover, this document had been submitted late since it had not been cited during the first instance proceedings and it had not to be admitted (reference being made to T 1007/95).

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

The Respondent requests that the appeal be dismissed or that the case be remitted to the department of first instance for further prosecution or that the patent be maintained on the basis of any of the auxiliary requests 1 to 4 submitted with letter of 05 March 2009.

Reasons for the Decision

1. Respondent's main request

1.1 Novelty over document (E4)

1.1.1 Claim 1 according to the main request concerns a laundry detergent tablet made of compressed particles which tablet comprises laundry surfactant and clay consisting of smectite clay, wherein at least 50% by weight of the clay is present as granules which have a size of at least 100 μm , the clay granules containing at least 50% by weight of the clay (see point V above).

1.1.2 Document (E4) discloses in example 6 a particulate agglomerate material consisting of neoalkanamide and bentonite clay, i.e. a smectite clay (see column 15, lines 1 to 50); moreover, it discloses in one of the following passages that wash cycle additive products of various types may be made, including particulate, paste, gel, liquid and solid tablet products, with the particulate material often preferably including *inter alia* agglomerate bentonite and neoalkanamide (column 16, lines 11 to 17).

Since this passage relates explicitly also to paste, gel and liquid products, it cannot concern, in the Board's view, the embodiment of example 6 relating to an agglomerate particulate product, but it describes the general applicability of the invention of document (E4), which is directed to the use of neoalkanamides and does not require the presence of smectite clay (see claim 1). This is clear also from a further passage following the previous one disclosing a liquid rinse

product which contains neoalkanamide but not bentonite (see column 16, lines 40 to 47).

Therefore, the above mentioned passages do not contain any disclosure of the use of the agglomerate of neoalkanamide and bentonite clay of example 6 in a tablet product.

1.1.3 Since the above mentioned passages relate to products having different physical form such as particulates, gel and liquids, the disclosure that particulate material often preferably includes *inter alia* agglomerate bentonite and neoalkanamide (column 16, lines 13 to 17) and the specific particulate composition described thereafter (column 16, lines 17 to 30), are teachings applicable to this specific form of the product of the invention only, i.e. to particulates and not to other physical forms such as tablets.

1.1.4 Even though, as submitted by the Appellant during oral proceedings, it was well known to the skilled person how to prepare tablets from particulate detergent compositions as mentioned in paragraph 2 of the patent in suit, it cannot be concluded, in the Board's view, that any particulate detergent material would be suitable for preparing a detergent tablet and that the specific particulate materials of document (E4) containing bentonite and neoalkanamide discussed hereinabove would be suitable for preparing a detergent tablet without any specific teaching to this effect in that document.

Moreover, as already explained above, the specific compositions mentioned above relate explicitly to particulate or liquid materials only whilst no specific composition is disclosed for a product in form of a tablet as well as for a paste or gel.

Therefore, the Board concludes that document (E4) does not disclose directly and unambiguously the subject-matter of claim 1.

1.1.5 Claims 1 to 9 according to the main request thus are novel over document (E4).

1.2 Validity of the claimed priority date

1.2.1 It is established jurisprudence of the Boards of Appeal of the EPO that the priority of a previous application in respect of a claim in a European patent application in accordance with Article 88 EPC is to be acknowledged only if the skilled person can derive the subject-matter of the claim directly and unambiguously, using common general knowledge, from the previous application as a whole (see G 2/98, OJ 2001, 413, headnote).

1.2.2 Claim 1 of the priority document of the patent in suit requires that the clay granules have a size of at least 100 μm (micrometres), whilst claim 1 of the patent in suit (see point V above) requires that such granules have a size of at least 100 μm (micrometres), i.e. a lower limit thousand times smaller than in the priority document.

It is undisputed that all the particle size values of the clay granules in the priority document are

expressed in mm and that the priority document as a whole requires that the clay granules have a size of at least 100 μm and that the amount of fines, i.e. clay particles having a size below 20 μm , is limited (see claims 4 and 10 as well as page 2, line 29; page 3, lines 5 to 29; page 16, lines 19 to 22; table 2 on pages 33 and 34 as well as page 34, line 5 to page 35, line 8).

However, since the tablets of the invention have preferably a diameter between 20 and 60 μm (page 8, lines 8 to 9) and the specific tablets made of the particulate material of table 2 have a circular shape with a diameter of 54 μm (page 30, lines 17 to 18), which diameters are smaller than the clay particle size required in claim 1 and listed in table 2 and on pages 34 and 35, it would appear highly probable that the value of particle size of the clay granules in claim 1 is erroneous and that the correct particle size value should be smaller.

It thus remains to establish if it would have been immediately evident to the skilled person that nothing else was intended in claim 1 of the priority document than the correction chosen by the Respondent in the application as filed and contained in claim 1 as granted, i.e. a particle size of at least 100 μm .

- 1.2.3 The priority document discloses also the size of other particulate materials different from clay. In fact, it discloses other coarse particles having a size typically above 1 mm (page 6, line 11); aluminosilicates with a size of 0.1 to 10 microns, i.e. 0.1 to 10 μm (page 19, lines 29 to 30); percarbonate

bleach with an average particle size from 500 to 1000 micrometers (i.e. 500 to 1000 μm) (page 22, last line to page 23, line 4); flocculants having a size of at least 100 mm (page 29, lines 5 to 8); citric acid of example B having such a particle size distribution that no more than 8% of the particles have a size greater than 1.4 mm and no more than 12% of the particles are smaller than 150 μm (page 37, table below line 10); and micronised citric acid having at least 80% of particles smaller than 150 μm (page 37, example C).

The Board thus remarks that there is not a consistent use of units of particle size in the priority document. In fact, even though the very similar values given in mm for the clay and the flocculant particle size are probably erroneous, and the units value μm used for the citric acid particles does not exist in this technical field and is erroneous as agreed by both parties during oral proceedings, the other apparently correct particle size values given are expressed in μm as regards aluminosilicates and percarbonate bleach and in mm as regards citric acid and other coarse particulate material.

Therefore, since some of particle size values are expressed in mm and other in μm , it cannot be derived from the content of the priority document that the values for the clay particles should have been expressed in μm instead of in mm.

To the contrary, the passage "...by forming the tablet from the granules of clay and other coarse particulate material, typically above 1 mm" (page 6, lines 10 to 11)

seems to associate the clay particles to such other coarse particles having a size typically above 1 mm.

Therefore, it appears that, in the light of this passage, at least the interpretation of the erroneous value of at least 100 mm as a value of at least 1 mm by inserting a decimal point (1.00 mm) is also equally possible as the correction chosen by the Respondent.

- 1.2.4 The priority document refers to document (E3) in the part of the description relating to the background of the invention (page 1, line 24 to page 2, line 2). This document expresses the size of the particles constituting the matrix of the detergent tablet disclosed therein in units of μm (see page 2, lines 42 to 46 and claim 1 of (E3)).

However, according to the established jurisprudence of the Boards of Appeal of the EPO the common general knowledge of a skilled person is normally represented by encyclopaedias, textbooks, dictionaries and handbooks on the subject in question or even patent specifications and scientific publications in the case that the field of research is so new that technical knowledge was not available from textbooks (see case law of the Boards of Appeal of the EPO, 5th edition 2006, I.C.1.5). Therefore, document (E3), which is a patent specification published about seven years before the claimed priority date of the patent in suit, cannot be considered to represent the common general knowledge of the skilled person.

Moreover, the technical terminology used in this document is sometimes very different from that used in

the priority document since in the former document particles are considered to be "fines" if their size is equal or less than 180 μm (see page 3, line 31 of (E3)) whilst according to the priority document "fines" are regarded to have a size of less than 20 mm (page 3, line 27) (according to paragraph 14 of the patent in suit less than 20 μm).

Therefore, in the absence of any specific indication to this effect in the priority document, the technical information contained in document (E3) cannot be considered to be also part of the invention disclosed in the priority document, which has to be understood on the basis of the technical information given in its description and the common general knowledge of the skilled person at the priority date.

Therefore, the fact that the particle sizes are expressed in μm in document (E3) cannot be considered to be evidence that the clay particle sizes in the priority document had also to be expressed in μm and not in mm and that the value of claim 1 had to be understood as relating in reality to a value of at least 100 μm .

- 1.2.5 According to document (E20) (points 9 to 11) it would be evident that the clay particle size in the priority document should have been expressed in μm since the particulate detergent compositions of the type referred to in the priority document are conventionally measured in units of μm and the second paragraph of page 23 refers to particulates in units of micrometers which unit is consistent with the other references to particulates throughout the priority document.

As regards the expert's opinion contained in document (E20), it cannot be considered to constitute common general knowledge for the reasons mentioned above (point 1.2.4); moreover, it is undisputed that the particle size of particulate detergent compositions can have an upper limit above 1 mm as shown, for example, in document (E3) wherein the particle size can amount up to 2000 μm , i.e. 2 mm (see page 2, lines 45 to 46) and that the priority document itself refers to the particle size of coarse particulate material and citric acid by using units of mm (see point 1.2.3 above). Therefore, this opinion cannot be considered as evidence that it was common general knowledge to express the size of clay particles in detergent compositions in units of μm .

As regards the allegation in (E20), point 11, that the second paragraph of page 23 refers to particulates in units of micrometers which unit would be consistent with the other references to particulates throughout the priority document, it has been already explained above (point 1.2.3) that the priority documents is not consistent in the use of particle size units and that it relates to the size of other particulate materials both in units of μm and mm.

Therefore, also document (E20) cannot prove that the skilled person would have understood that the clay particle size of the priority document should have been expressed in μm .

- 1.2.6 The Board concludes that, on the basis of the content of the priority document and of the common general

knowledge of the skilled person, it was not derivable that nothing else was intended in claim 1 of the priority document than the correction chosen by the Respondent in the application as filed and contained in claim 1 as granted, i.e. a particle size of at least 100 μm .

Since claim 1 of the patent in suit requires that the clay granules have a size of at least 100 μm , i.e. a lower limit thousand times smaller than the value of at least 100 mm required in claim 1 of the priority document, the patent in suit and its priority document refer to different inventions.

Consequently the claimed priority date of 30 April 1999 is not valid.

1.3 Admissibility of document (E19)

1.3.1 Document (E19) was cited by the Appellant for the first time in the statement of the grounds of appeal.

Document (E19), published on 9 November 2000, after the filing date of the patent in suit of 13 April 2000, claims an allowable earlier priority date of 30 April 1999 (document E19a), which fact was not disputed by the Respondent.

Since the claimed priority date of the patent in suit is not valid, document (E19) thus could be considered as prior art under Article 54(3) EPC.

According to the Appellant document (E19) discloses the tablets of claim 1 and thus is highly relevant.

- 1.3.2 According to Article 12 RPBA, the Board shall take into account all facts, evidence and requests submitted by the parties with the statement of the grounds of appeal and has the power to hold inadmissible facts, evidence and requests which could have been presented in the first instance proceedings.

In the present case, the Opposition Division had found that the claims filed for the first time during oral proceedings were novel and inventive over the cited prior art and had decided to maintain the patent in amended form on the basis of this set of claims (see point III above).

Consequently, the Board finds that document (E19) was submitted with the statement of the grounds of appeal as a response to the decision of the department of first instance to maintain the patent on the basis of these amended claims.

Since appeal proceedings are for the right of the losing party of providing new valid arguments against the reasoned decision, which arguments may include the filing of additional documents, especially in a case wherein a decision has been based on claims filed for the first time during oral proceedings, document (E19) is to be admitted into the proceedings.

- 1.3.3 As regards decision T 1007/95 (OJ 1999, 733), cited by the Respondent against the admissibility of (E19), the Board finds that this decision is not applicable in the present case since it concerns a very different legal situation.

In fact, in that case the appeal had been considered inadmissible since the legal frame of the original opposition was confined to lack of inventive step whilst the appeal had been based on a new ground of opposition, lack of novelty, supported by a new document cited for the first time in the statement of the grounds of appeal (see headnote as well as points 3.5 and 5 of the reasons).

In the present case, to the contrary, lack of novelty was already a ground of the original opposition and the admissibility of the appeal has not been disputed.

1.4 Remittal

The Board remarks that the validity of the claimed priority date was not decided in the decision under appeal (see page 10); moreover, the Board's decision that the claimed priority date is not valid renders document (E19) highly relevant for the present case. Since this document was not discussed before the opposition division, the Board finds that it is appropriate to exercise its powers under Article 111(1) EPC 1973 to remit the case to the department of first instance in order to enable the Respondent (Patent Proprietor) to defend its case in two instances in the light of the new facts and evidence brought about by the Appellant.

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. Rauh

E. Bendl