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**Datasheet for the decision
of 13 March 2012**

Case Number: T 1811/08 - 3.3.06

Application Number: 03700353.0

Publication Number: 1478727

IPC: C11D 17/04, C11D 17/00

Language of the proceedings: EN

Title of invention:
Packaged detergent composition

Patent Proprietor:
Reckitt Benckiser N.V.

Opponent:
The Procter & Gamble Company

Headword:
Packaged detergent composition/RECKITT

Relevant legal provisions:
RPBA Art. 13(1)

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

Keyword:
"Admissibility of the Main Request filed at the oral proceedings: yes - no change of the Appellant's case"
"Inventive step - yes"

Decisions cited:
-

Catchword:
-



Case Number: T 1811/08 - 3.3.06

DECISION
of the Technical Board of Appeal 3.3.06
of 13 March 2012

Appellant: Reckitt Benckiser N.V.
(Patent Proprietor) Siriusdreef 14
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Representative: Bowers, Craig Malcolm
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Respondent: The Procter & Gamble Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 23 July 2008
revoking European patent No. 1478727 pursuant
to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman: P.-P. Bracke
Members: P. Ammendola
J. Geschwind

Summary of Facts and Submissions

- I. This appeal is from the decision of the Opposition Division to revoke European patent No. 1 478 727 relating to a packaged detergent composition.
- II. The Opponent sought revocation of the patent for insufficient disclosure (Article 100(b) EPC 1973) and lack of novelty and of inventive step (Article 100(a) EPC 1973).
- III. During the opposition proceedings reference was made, *inter alia*, to the documents:

(2) = WO 02/057402

and

(4) = GB-A-2 361 010.

At the oral proceedings before the Opposition Division the Patent Proprietor filed, *inter alia*, an amended set of claims labelled as First Auxiliary Request, wherein claims 1, 2, 15 and 16 read as follows:

"1. A packaged detergent composition comprising a container that at least partly disintegrates in an aqueous environment, the container having a compartment, the detergent composition having a first fluid phase and a solid, having a size sufficient to be retained by a 2.5 mm mesh, substantially insoluble in the first fluid phase wherein the movement of the solid within the container is restricted, and further wherein at

least one compartment of the container holds a portion of said first fluid phase, a further phase having a density different from the density of the first fluid phase and a solid which has a density comprised between the density of the first fluid phase and the density of the further phase, and further wherein

i) the further phase is another fluid phase and the first fluid phase has an interface with the further fluid phase and the density of the solid is selected to float at said interface, or

ii) wherein the further phase is a solid phase."

"2. A packaged detergent composition according to claim 1 wherein the two fluid phases are mutually immiscible."

"15. Use of packaged detergent composition according to claim 1 in an automatic dishwashing machine."

"16. Use of packaged detergent composition according to claim 1 in a laundry washing machine."

IV. In the decision subject of the present appeal, the Opposition Division found that the patented invention was sufficiently disclosed as required in Article 83 EPC 1973, but that the sets of claims forming the then pending main and auxiliary requests of the Patent Proprietor did not meet other requirements of the EPC.

In the opinion of the Opposition Division, it was clear from the original application as a whole that the word

"*fluid*" (only used in the originally filed claims) was interchangeable with "*liquid*" (used instead throughout the original description and, in particular, at page 3, lines 12 to 16).

In view of this consideration the Opposition Division found claim 1 (cited above) of the then pending First Auxiliary request to comply with Articles 123(2) and (3) EPC and its subject-matter to be novel vis-à-vis example 2 of document (2) (containing one solid, one liquid and one gaseous phase).

The Opposition Division also rebutted the Opponent's argument that the detergent composition disclosed the embodiments of Figures 6 and 7 and also described in the last but one paragraph in page 8 of document (4) represented the closest prior art in view of the subject-matter of claim 1 of the First Auxiliary request, because this prior art contained a **solid with a size sufficient to be retained by a 2.5 mm mesh** (hereinafter briefly the **2.5 solid**) press-fitted in a depression on the outer wall of the receptacle holding two liquid phases, and not in contact with the other phases (i.e. not in the same compartment, as required in the claim under consideration).

The Opposition Division then concluded that the assessment of inventive step was to be made starting from another prior art and that this latter did not render obvious claim 1 of this request.

The First Auxiliary Request was nevertheless found not allowable because of the lack of inventive step of other claims (whose subject-matter was different from

those of the claims cited above) that are not relevant for the present appeal proceedings.

- V. The Patent Proprietor (hereinafter Appellant) appealed this decision. With the statement setting out the grounds of appeal it filed, *inter alia*, an amended set of four claims labelled as Main Request.

In the grounds of appeal the Appellant stressed that the claims of this request were substantially identical to the four claims reported above in section III, renumbered. Hence, it argued that this set of claims was allowable by referring to the reasons indicated in the decision under appeal for concluding that claim 1 of the previously pending First Auxiliary Request complied with the EPC.

Hereinafter the Main Request filed with the grounds of appeal is indicated as the **initial** Main Request.

- VI. The Opponent (hereinafter Respondent) replied in writing, rejecting as incorrect the finding of the Opposition Division that the term "*fluid*" should be interpreted as "*liquid*". In the opinion of the Respondent, the disclosure of a "*liquid*" phase in paragraph [0010] of the patent-in-suit did not exclude that the term "*fluid*" in the claims of the initial Main Request could as well indicate "*gas*". For this reason, claim 1 of this request would not comply with Article 123(2) and (3) EPC and its subject-matter would be anticipated by packaged detergent composition of example 2 of document (2).

As to the issue of inventive step the Respondent considered the closest prior art to be document (4). In particular, it referred again the Figures 6 and 7 also described in last but one paragraph in page 8 of this citation.

The only difference between the subject-matter of the above-cited claim 1 and this prior art was the difference in densities of the solid and two fluid phases.

According to the opposed patent the fact that the density of the solid was comprised between that of the two fluids phases seemed to restrict the movement of the solid.

However, this technical effect was already achieved in document (4) and no other technical effect was attributed to the difference of densities.

Claim 1 of the initial Main Request was therefore obvious.

VII. The Board summoned the Parties to oral proceedings to be held on 13 March 2012.

A communication with the Board's preliminary opinion was enclosed to the summons. It comprised the following passage:

"In the decision under appeal the Opposition Division acknowledged novelty to claims corresponding to those forming the present main request, because the term "fluid" as used in the patent-in-suit could be equated

to "liquid". The Board finds however convincing the Respondent's argument that in the patent-in-suit the term "fluid" could as well indicate "gas"."

VIII. Oral proceedings took place as scheduled in the announced absence of the duly summoned Respondent.

At the hearing the Appellant filed two new sets of amended claims respectively labelled as Main Request and 1st Auxiliary Request.

It stressed that these requests only differed from those already on file in that the word "fluid" was repeatedly replaced by "liquid". The Appellant observed that its position throughout the opposition and appeal proceedings had always been that the skilled reader of the original application would only reasonably interpret the term "fluid" as also made by the Opposition Division i.e. as "liquid". Hence, the filing of this request would not represent any substantial change of its case.

IX. The four claims of the **Main Request** read as follows:

"1. *A packaged detergent composition comprising a container that at least partly disintegrates in an aqueous environment, the container having a compartment, the detergent composition having a first liquid phase and a solid, having a size sufficient to be retained by a 2.5 mm mesh, substantially insoluble in the first liquid phase wherein the movement of the solid within the container is restricted, and further wherein at least one compartment of the container holds a*

portion of said first liquid phase, a further phase having a density different from the density of the first liquid phase and a solid which has a density comprised between the density of the first liquid phase and the density of the further phase, and further wherein

i) the further phase is another liquid phase and the first liquid phase has an interface with the further fluid phase and the density of the solid is selected to float at said interface, or

ii) wherein the further phase is a solid phase."

"2. *A packaged detergent composition according to claim 1 wherein the two liquid phases are mutually immiscible."*

"3. *Use of packaged detergent composition according to either claims 1 or 2 in an automatic dishwashing machine."*

"4. *Use of packaged detergent composition according to either claims 1 or 2 in a laundry washing machine."*

X. The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the Main Request or of the 1st Auxiliary Request filed during oral proceedings.

The Respondent requested in writing that the appeal be dismissed.

Reasons for the Decision

Main Request

1. Admissibility of the Main Request filed at the oral proceedings

The Board has to decide whether the Main Request may be admitted, in particular since the Respondent, although duly summoned, was not present at the said proceedings.

The Board notes preliminarily that according to Article 15(3) RPBA (Supplement OJ EPO 1/2012, page 38), the Board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned.

The Board notes further that the sole amendment distinguishing this Main Request (see above Section IX of the Facts and Submissions) from the initial Main Request (see above Section V of the Facts and Submissions) is the repeated replacement in claim 1, and once in claim 2, of the word "*fluid*" with the word "*liquid*".

It is apparent that this amendment brings the wording of the claims in accordance with that of the disclosure of the original application at page 3, lines 12 to 16, (also present in paragraph [0010] of the granted patent), i.e. the same disclosure onto which the Opposition Division has based its finding that the term "*fluid*" (present in the originally filed claims only)

had necessarily to be considered interchangeable with "*liquid*".

The Board notes that this finding of the Opposition Division has been disputed by the Respondent in its reply to the grounds of appeal (see above sections VI of the Facts and Submissions).

Moreover, the Board has expressed in its communication enclosed to the summons to oral proceedings (see above sections VII of the Facts and Submissions) the preliminary opinion that the reasoning of the Respondent in this respect was considered convincing.

Hence, the Board concludes that the filing of the Main Request at the hearing constitutes a belated response to the Respondent's reply to the grounds of appeal (and to the Board's communication enclosed to the summons to oral proceedings) which, however, does not change in its substance the Appellant's case as given in the grounds of appeal. Moreover, the amendment carried to the wording of the claims is self-explanatory and could easily be dealt with by the Board at the hearing. Accordingly, the Board, exercising its discretion under Article 13(1) RPBA and also taking into account the provisions of Article 13(3) and 15(3) RPBA, decides to admit this request.

2. The Board is satisfied that the claims of the Main Request comply with the requirements of Articles 123(2) and (3) EPC, as well as with those of Article 54 and 83 EPC 1973.

It is not necessary to give further details in these respects because:

- the decision under appeal contains no argument to the contrary;

- the objections of the Respondent in view of Articles 123(2) and (3) EPC, as well as of Article 54 are exclusively based on the possibility of interpreting the term "*fluid*" present in the claims of the initial Main Request as also meaning "*gas*"; hence, these objections are manifestly irrelevant in respect of the claim of the Main Request wherein the term "*fluid*" has been replaced by "*liquid*"

and

- the basis in the original application for the replacement of "*fluid*" by "*liquid*" in the claims of the Main Request has already been indicated above.

3. Inventive step: claim 1

3.1 Claim 1 of the Main Request (see above Section IX of the Facts and Submissions) embraces two sorts of packaged detergent compositions:

- those according to feature "*i*", comprising two liquids and the 2.5 solid

and

- those according to feature "*ii*", comprising one liquid, the 2.5 solid and a further solid.

3.2 The Board finds unconvincing the Respondent's line of argument that the skilled person starting from document (4) would have arrived in an obvious manner to the embodiments of the subject-matter of this claim comprising two liquids and the 2.5 solid.

Indeed, even assuming, for the sake of an argument in favour to the Respondent:

a) that the closest prior art was to be found in the packaged detergent composition allegedly already containing two liquids and a 2.5 solid whose movement was restricted as disclosed in Figures 6 and 7 and last but one paragraph in page 8 of document (4)

and

b) that the additional requirement of the claimed subject-matter as to the differences in densities of the solid and two fluid phases, provided no additional technical effect,

and, thus,

c) that the claimed subject-matter just represents a further packaged detergent composition, i.e. an alternative to the prior art,

still, it remains the fact, also indicated in the decision under appeal, that the claim under consideration requires to locate all the three phases **in the same compartment.**

The Respondent has not indicated for which reasons the skilled person starting from document (4) and searching for an alternative thereto would consider obvious to modify this prior art by bringing into contact with the two liquids the same 2.5 solid that in this prior art is instead press-fitted in a depression in the outer wall of the receptacle, i.e. totally separated from the two liquids.

In the absence of any specific evidence in this respect, the Board finds unconvincing the Respondent's sole objection as to the obviousness of the presently claimed subject-matter.

3.3 Nor sees the Board any other self-evident reason for departing from the finding of the Opposition Division that the remaining prior art cited by the Respondent does not render obvious the claimed subject-matter.

3.4 Hence, the Board comes to the conclusion that claim 1 is based on an inventive step.

4. Inventive step: claims 2 to 4

Claim 2 defines a preferred embodiment of the detergent composition of claim 1. Hence, its subject matter is non-obvious for the same reasons given above for claim 1.

Claims 3 and 4 define the use of the detergent composition of claim 1 in automatic dishwashing and laundry machines. Hence, their subject matter is non-obvious for the same reasons given above for claim 1.

5. The Board concludes that the Main Request of the Proprietors also complies with the requirements of Article 56 EPC (1973).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the First Instance with the order to maintain the patent on the basis of the Main Request filed during the oral proceedings and the description to be adapted thereto.

The Registrar:

The Chairman:

D. Magliano

P.-P. Bracke