

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 8 April 2011**

Case Number: T 0624/09 - 3.3.06

Application Number: 99950531.6

Publication Number: 1115822

IPC: C11D 3/00

Language of the proceedings: EN

Title of invention:

Use of cationic materials and compositions

Patentee:

Unilever PLC, et al

Opponent:

Henkel AG & Co. KGaA
The Procter & Gamble Company

Headword:

Skin irritancy/UNILEVER

Relevant legal provisions:

EPC Art. 54(1)(2), 56
EPC R. 99(1)(a), 99(1)(c)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Admissibility of the appeal (yes)"
"Novelty (main request): no - claim 1 clear as it stands; not
to be interpreted in the light of the description"
"Inventive step (auxiliary request): no - obvious to try"

Decisions cited:

T 0358/08, T 0483/90, T 0613/91, T 0867/91, J 0016/94,
T 0407/02, T 0223/05, T 1279/04, T 0681/01

Catchword:

-



Case Number: T 0624/09 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 8 April 2011

Appellants:
(Patent Proprietors) Unilever PLC
Unilever House
Blackfriars
London
Greater London EC4P 4BQ (GB)

and

Unilever N.V.
Weena 455
NL-3013 AL Rotterdam (NL)

Representative:
Elliott, Peter William
Unilever Patent Group
Colworth House
Sharnbrook
Bedford MK44 1LQ (GB)

Respondents:
(Opponent 01) Henkel AG & Co. KGaA
D-40191 Düsseldorf (DE)

Representative:
Stevermann, Birgit
Henkel AG & Co. KGaA
VTP Patente
D-40191 Düsseldorf (DE)

(Opponent 02) The Procter & Gamble Company
One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative:
Kellenberger, Jakob
NV Procter & Gamble
Services Company S.A.
Intellectual Property Department
Temselaan 100
BE-1853 Strombeek-Bever (BE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 2 February 2009
revoking European patent No. 1115822 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: P.-P. Bracke
Members: L. Li Voti
 J. Geschwind

Summary of Facts and Submissions

- I. The present appeal is from the decision of the Opposition Division to revoke the European patent no. 1 115 822, concerning the use of a cationic material to reduce skin irritancy.

The patent had been granted with the following claim 1:

"1. The use of a cationic material to reduce the skin irritancy of a material extractable from a fabric using water or an aqueous solution, wherein the cationic material is selected from:-

- (i) cationic surfactants;
- (ii) polycationic oligomers, polymers, co-polymers or mixtures thereof; or
- (iii) mixtures of (i) and (ii)

and the material extractable from a fabric comprises one or more anionic surfactants and/or one or more soap residues."

- II. In their notices of opposition both Opponents sought revocation of the patent *inter alia* on the grounds of Article 100(a), because of lack of novelty and inventive step of the claimed subject-matter.

The following documents were cited in support of the opposition:

- (1): EP-A-323395;
- (8): Information file provided by Lenor, June 1997;
- (14): US-A-5576280 and

(15): US-A-4451385.

III. With regard to the granted claims the Opposition Division found in its decision that:

- the belated ground of opposition under Article 100(b) EPC was inadmissible;

- even though the wording of claim 1 read "material extractable from a fabric", it was clear from the description of the patent in suit that the claimed use regarded material present in a fabric; therefore, claim 1 had to be interpreted as requiring that the claimed use was carried out in connection with fabrics;

- document (15) did not discuss any use in respect of a fabric;

- document (8) concerned the use of a cationic material for reducing the mechanical friction of fabrics, which might be a source of skin irritation, and not for reducing the skin irritancy of anionic surfactants and/or soaps as required in claim 1 as granted;

- therefore, the claimed subject-matter was novel over the cited prior art;

- however, it would have been obvious for the skilled person to combine the teachings of documents (1) and (15) for solving the technical problem underlying the invention; thus the subject-matter of claim 1 lacked an inventive step.

IV. An appeal was filed against this decision by the Patent Proprietors (Appellants).

The Appellants submitted with letter of 26 May 2009 an amended set of claims to be considered as auxiliary request.

Claim 1 of the amended set of claims differs from claim 1 as granted insofar as the cationic material used is selected from cationic surfactants only.

With the letter of 2 March 2011, the Appellants informed the Board that they would not attend oral proceedings.

Oral proceedings were held before the Board on 8 April 2011 in the absence of the duly summoned Appellants.

V. The Appellants submitted in writing that

- the skilled person would not have combined the teachings of documents (1) and (15) since the latter document addressed skin irritancy arising from the contact with a liquid detergent containing anionic surfactants and not that arising during the contact with washed and dried fabrics containing anionic residues as addressed to in the patent in suit and in document (1);

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

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

- the appeal was not admissible under Rules 99(1)(a) and (c) EPC since the notice of appeal did not contain the Appellants' address and a request of the subject of the appeal (see T 358/08);

- claim 1 did not require explicitly that the claimed use had to be carried out in connection with fabric; therefore, it had to be interpreted as relating to the generic reduction of the skin irritancy of anionic surfactants and/or soaps;

- claim 1 as granted lacked novelty over document (15);

- claim 1 according to the auxiliary request lacked novelty over document (8);

- the claimed subject-matter lacked an inventive step in the light of the combination of document (1) with document (14) and/or (8), since the latter documents already taught that complexes of anionic surfactants or soaps with cationic surfactants were milder to the skin and that cationic surfactants were able to reduce the skin irritancy of worn fabrics;

- moreover, the invention was not sufficiently disclosed.

VII. The Appellants requested in writing that the decision under appeal be set aside and that the oppositions be rejected or, in the alternative, that the patent be

maintained on the basis of the auxiliary request submitted with letter of 26 May 2009.

VIII. The Respondents requested that the appeal be dismissed.

Reasons for the Decision

1. Admissibility of the appeal

1.1 Rule 99(1)(a) EPC

It is standard case law of the Boards of Appeal of the EPO that the provisions of Rule 99(1)(a) EPC are satisfied if the notice of appeal contains sufficient information for identification of a party (see e.g. T 483/90, point 1 of the reasons; T 613/91, point 1.1 of the reasons and T 867/91, point 1.1 of the reasons).

In the present case, in which the notice of appeal does not contain the Appellants' address, the address of the Appellants' representative is clearly mentioned on the headed paper used for filing the appeal and this address is the same as the one on file or mentioned in the appealed decision. It should also be observed that the notice of appeal mentions the application number and the publication number of the patent in suit, so as the date of the impugned decision.

Thus, the Board is satisfied that the notice of appeal contains sufficient information to identify the Appellants and that the requirements of Rule 99(1)(a) EPC are met.

1.2 Rule 99(1)(c) EPC

It is not disputed that the Appellants stated in their notice of appeal only that an appeal was filed "against the decision of the Opposition Division".

According to the jurisprudence of the Boards of Appeal of the EPO, the notice of appeal has to express the definite intention to contest the appealed decision (see J 16/94, OI EPO 1977, 331, point 4 of the reasons).

It has also be considered that the requirements of Rule 99(1)(c) EPC are satisfied if the notice of appeal contains a request, **which may be implicit**, to set aside the decision in whole or only as a part (see T 358/08, point 5 of the reasons).

In a case in which the ruling of the Opposition Division's decision is that the patent is revoked, a statement by the Patent Proprietor that he is appealing against the decision is indubitably tantamount to a statement that he wishes and requests that the decision be set aside in its entirety (see T 407/02, point 1.1 of the reasons).

In the present case, the decision by which the Appellants (Patent Proprietors) were adversely affected ruled that the patent is revoked.

Thus, it should be considered that the Appellants' request is unambiguously that the decision revoking the patent be set aside in whole with the aim to get the patent maintained as granted or in amended form.

Therefore, the Board comes to the conclusion that the requirements of Rule 99(1)(c) EPC are met.

1.3 Consequently, the appeal is admissible.

2. Main request

2.1 Sufficiency of disclosure

The Board finds that the belated ground of opposition under Article 100(b) EPC is inadmissible.

Since the appeal fails on other grounds further details are unnecessary.

2.2 Novelty

2.2.1 Claim 1 as granted concerns the use of a cationic material selected from cationic surfactants and polycationic oligomers, polymers or copolymers to reduce the skin irritancy of a material extractable from a fabric using water or an aqueous solution, which material comprises one or more anionic surfactants and/or one or more soap residues.

Therefore, this claim concerns literally the reduction of the skin irritancy of anionic surfactants and or soap residues which can be extracted from a fabric using water or an aqueous solution, i.e. any water-soluble or dispersible anionic surfactant and soap; moreover, the claim does not require either explicitly or implicitly that the anionic surfactants and soap are extracted from a fabric during use or that the use is carried out necessarily in connection with fabric.

Since claim 1 is clear as it stands, it does not need any interpretation in the light of the description and should be interpreted giving to the terms their literal meaning (see the decisions T 223/05, point 3.5 of the reasons; T 1279/04 of the reasons, point 3; and T 681/01, point 2.1.1 of the reasons).

Therefore, even though the description relates extensively to the use of cationic materials in connection with fabrics and paragraph 15 of the patent in suit recites: "In the context of the present invention, 'use' is defined as the application of the cationic material to, and/or its contact with, the fabric", (which meaning of the word "use" cannot be translated within the text of claim 1 without rewording it), the Board finds that the wording of claim 1 has to be interpreted as it stands, i.e. as extending to the use of the selected cationic material to generically reduce the skin irritancy of one or more anionic surfactants and/or one or more soap residues without any limitation to a use in connection with fabric.

2.2.2 Document (15) discloses the use of a cationic partially hydrolyzed protein, which is a polycationic oligomer, for reducing the skin irritancy caused by soaps and anionic surfactants present in a liquid detergent composition (see column 1, lines 6 to 13 and 20 to 34; column 7, table 5 and lines 24 to 28).

Therefore, this document discloses a use having all the technical features of claim 1 as granted.

The subject-matter of claim 1 thus lacks novelty.

3. Auxiliary request

3.1 Novelty

The Board finds that the subject-matter of claim 1 according to the auxiliary request is novel over the cited prior art.

Since the appeal fails on other grounds further details are unnecessary.

3.2 Inventive step

3.2.1 Claim 1 according to the auxiliary request differs from claim 1 according to the main request only insofar as the cationic material used is a cationic surfactant.

3.2.2 According to the description the claimed invention relates to the use of cationic materials to reduce skin irritancy. In fact, it was known in the prior art that detergents used to launder fabrics can leave residues, e.g. anionic materials, on the fabrics after the wash. If left untreated, or unremoved, these residues can cause undesirable effects such as skin irritancy when the fabric is subsequently worn (see paragraphs 1 and 2 of the patent in suit).

Therefore, the technical problem underlying the invention can be formulated as the provision of a material which is able to reduce the skin irritancy caused by anionic surfactants and soaps.

- 3.2.3 All parties identified document (1) as the most reasonable starting point for the evaluation of inventive step since this document already addressed to and solved the above technical problem (see page 2, lines 14 to 28 of document (1)).

Therefore, the Board finds that the technical problem underlying the invention can be formulated in the light of the disclosure of document (1) as the provision of a further material able to reduce the skin irritancy caused by anionic surfactants and soaps.

The Board has no doubt, in the light of the examples provided in the patent in suit, that the cationic surfactants required in claim 1 effectively solved the above mentioned technical problem.

- 3.2.4 All parties agreed that the use disclosed in document (1) differs from the claimed subject-matter insofar as it requires a combination of a nonionic surfactant and a buffered organic acid (page 2, lines 28 and 29 and page 3, lines 14 to 18) instead of a cationic surfactant.

The Board remarks that it was well known that anionic surfactants and soaps irritate the skin (see document (15), table 5 on column 7).

Moreover, it was known from document (14) that cationic surfactants form a complex with anionic surfactants including soaps and that the use of such complexes in a solid personal cleansing composition brings about better skin feel in the sense of conditioning and moisturization of the washed skin, which effects imply

a reduction or inhibition of skin dryness (see column 14, lines 45 to 66; column 3, lines 18 to 20 and 36 to 40; column 5, lines 21 to 29). Furthermore, it was known to the skilled person that skin dryness is one of the factors favouring skin irritation (see document (8), page 7, first paragraph).

Therefore, it would have been obvious to the skilled person that the complexes of anionic surfactants or soaps with cationic surfactants disclosed in document (14) are milder to the skin and less irritating than the uncomplexed anionic surfactants or soaps.

Consequently, it would have been also obvious for the skilled person, aware of the technical properties of the complexes of document (14) and faced with the above mentioned technical problem, to try the cationic surfactants used in document (14) instead of the combination of compounds of document (1) with the expectation of reducing the skin irritancy caused by anionic surfactants and soaps.

- 3.2.5 Therefore, the Board concludes that the subject-matter of claim 1 according to the auxiliary request lacks an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Magliano

P.-P. Bracke