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**Datasheet for the decision
of 19 May 2010**

Case Number: T 1482/09 - 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:

-

Headword:

-

Relevant legal provisions:

EPC Art. 56, 113, 116
RPBA Art. 12(1)(a), 12(3)

Keyword:

"Decision of Board without preceding communication - yes
(point 1)"
"Inventive step: no"

Decisions cited:

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Catchword:

-



Case Number: T 1482/09 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 19 May 2010

Appellant:
(Applicant)

THE PROCTER & GAMBLE COMPANY
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Representative:

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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 29 April 2009
refusing European patent 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. The examining division decided to refuse European application No. 03 728 852.9 since it considered that the subject-matter of claim 1 filed with letter of 19 June 2008 lacked an 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 the set of claims filed with the above mentioned letter of 19 June 2008. The appellant indicated that an amended description would be filed when an acceptable claim wording was agreed upon.
- IV. The present appeal proceedings is the second appeal proceedings relating to the above mentioned application. In the first appeal proceedings the present Board decided to remit the case to the examining division for further prosecution based on the same set of claims as presently on file.
- V. Claim 1 of the single request reads as follows:

"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 said propellant is carbon dioxide."

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

D1: GB-A-1 285 073,

D4: Aaron L. Brody, Kenneth S. Marsh: Encyclopedia of Packaging Technology 1997, John Wiley & Sons Inc., USA.

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

The subject-matter of claim 1 does not involve an inventive step.

The nearest prior art document is D1. This discloses all the features of claim 1 (see in particular page 3, lines 44 to 48 and lines 80 to 95 as well as claim 1) except that the antiperspirant product is explicitly defined as a low combustion product that has a chemical heat of combustion equal or less than about 30 kJ/g; the combination of the plastic package and the product has a fire hazard classification of 1 or 2; and the propellant is carbon dioxide. The provision of these features does not, however, involve an inventive step.

The feature regarding the fire hazard classification is in fact not a technical feature but the problem to be

solved as indicated on page 3, lines 10 to 12 of the application in suit. Also the feature regarding the chemical heat of combustion merely reflects the definition of the hazard categories since the combined antiperspirant product and the plastic package must have a chemical heat of combustion equal to or less than about 30 kJ/g in order to satisfy the hazard criteria. It is therefore obvious that also the antiperspirant product must satisfy the chemical heat of combustion criterion.

According to D4 carbon dioxide was one of the earliest aerosol propellants (see page 788, left-hand column). Also flammability was an important issue as indicated, for example, by references to it in tables 1, 2 and 5 of D4, as well as a statement that there is a resurgence of interest in carbon dioxide (see page 791, right-hand column). Therefore carbon dioxide would be one of the most obvious and straightforward selections the skilled person would make in order to solve the problem posed, thus arriving directly at this feature without exercising inventive skill.

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

The subject-matter of claim 1 involves an inventive step.

The closest prior art is that disclosed in the paragraph bridging pages 2 and 3 of the description of the application in suit. This prior art concerns reducing fire risk in aerosols, which is the same purpose or effect as the invention. This criterion for

selecting the closest prior art is set out in the Guidelines, C-IV, 11.7.1 (version 2009).

The examining division appears to have chosen D1 as the closest prior art, although this is not stated in its decision and no justification is given for this choice. Even if D1 is taken as the closest prior art the subject-matter of claim 1 is not obvious starting from this document.

To arrive at the invention starting from D1 the skilled person would have to go through a four-step process as follows:

- (a) select plastic as the construction material from the list of materials in D1 (see page 3, lines 46 to 48);
- (b) select a plastic that has a fire hazard classification of 1 or 2;
- (c) select a product having a chemical heat of combustion equal or less than about 30 kJ/g; and
- (d) select carbon dioxide as the propellant.

The examining division was wrong to take plastic as given, since it must first be selected from the list of materials, whereby metal is the material used for the particular embodiment (see page 3, lines 96 to 98). The analysis of the examining division is therefore incomplete in this respect.

The problem to be solved is to provide an anhydrous antiperspirant product in a plastic package which presents a low fire risk (see page 1, first three lines of the application in suit).

D1 does not discuss this problem and apart from a single mention on page 3 does not discuss plastic passages, nor the problems associated with them. Also D2, D3 and D4 do not discuss such problems. The disclosure of documents D1 to D4 is beside the point since there is no incentive to make the selections (a) to (d). The examining division has provided no reasoning as to why the skilled person would decide to look at D4.

In summary the appellant presents a new technical problem and a non-obvious solution to which there is no hint in the prior art.

Reasons for the Decision

1. *Decision taken by the Board without a preceding communication to the appellant*
 - 1.1 The examining division in its decision explained why in its opinion the subject-matter of claim 1 lacks an inventive step.
 - 1.2 In its grounds of appeal the appellant explained why it disagreed with that decision. The appellant did not file any new request. It is therefore the task of the Board to decide whether it is convinced by the arguments of the appellant that the decision was wrong.
 - 1.3 In accordance with Article 12(1)(a) Rules of Procedure of the Boards of Appeal (RPBA) the appeal proceedings is based on the notice of appeal and the grounds of

appeal. Paragraphs (b) and (c) of that article do not apply in the present case as there is only one party and the Board has not issued a communication.

- 1.4 In accordance with Article 12(3) RPBA the Board may decide the case in proceedings with only one party at any time after the statement of grounds has been filed, subject to Articles 113 and 116 EPC.

No request for oral proceedings under Article 116 has been made by the appellant.

With regard to Article 113 EPC the present decision is based on the set of claims filed by the appellant with letter of 19 June 2008 during the first appeal proceedings. The impugned decision of the examining division was also based on this set of claims. No amendments have been filed in the present appeal proceedings and the appellant expressly requested in its notice of appeal dated 29 June 2009 that a patent be granted on the basis of this set of claims.

The present decision is also based on grounds and evidence on which the appellant has had a chance to comment. No new documents or grounds have been cited during the present appeal proceedings and only the reasoning of the examining division and the appellant have been considered, as will become apparent below.

- 1.5 The Board concludes therefore that it may take the present decision without recourse to a preceding communication to the appellant.

2. *Inventive step*

2.1 The examining division considered that D1 was the nearest prior art document. The appellant disagreed with the choice arguing that the prior art disclosed in the paragraph bridging pages 2 and 3 of the application in suit is the closest prior art.

If starting from a particular piece of prior art the conclusion is reached by the examining division that the subject-matter of the claim in question lacks an inventive step then the question of whether there is an even closer piece of prior art is clearly not relevant. In the present case the examining division came to the conclusion that starting from a particular embodiment of the aerosol product disclosed in D1 the subject-matter of claim 1 lacks an inventive step. The question of whether the subject-matter of this claim would or would not lack an inventive step starting from a different prior art disclosure is clearly of only academic interest. The Board notes that the appellant nevertheless filed arguments taking D1 as the nearest prior art disclosure and discussed expressly the embodiment disclosed therein that the examining division took as its starting point.

2.2 According to the examining division (see point II.2.2 of its decision reasoning) the process of claim 1 is distinguished over the disclosure of D1 by the features that:

- (a) the product is explicitly defined as a low combustion product having chemical heat of combustion equal or less than about 30 kJ/g;

(b) the combination of the plastic package and said product has a fire hazard classification of 1 or 2; and

(c) the propellant is carbon dioxide.

The appellant also considers that these features are not disclosed in D1. In addition the appellant considers that there is a further distinguishing feature of claim 1, namely the selection of plastic as the construction material for the package from the list on page 3, left-hand column, lines 46 to 48 whereby the detailed example D1 has a metal container (see page 3, line 96 to 98). This argument was also presented to the examining division by the appellant in its letter of 19 March 2009.

The examining division in fact started from the embodiment in D1 in which the package comprises a plastic container as the nearest prior art disclosure (see point II.2.1 of decision reasoning). Whenever a particular document is considered to be the nearest prior art disclosure and it contains a set of alternative embodiments it is always necessary to select one of these alternatives as the nearest prior art disclosure. This is not a step taken after selecting the nearest prior art disclosure, rather it is a step in the process of identifying the nearest prior art disclosure itself.

The argument of the appellant that this is a selection step which is taken after selection of the nearest prior art is not convincing, since the examining

division specifically picked out this embodiment as the starting point for its inventive step argument.

2.3 The examining division argued that the problem to be solved was to provide a combination of a plastic package and an anhydrous antiperspirant product having a fire hazard classification of 1 or 2, i.e. a low fire risk (see point II.2.2a) of the decision reasoning). The appellant also identified obtaining a low fire risk as the problem to be solved (see point 3.1.2 of the appeal grounds). The Board sees no reason to deviate from the views of the examining division and the appellant that the problem to be solved was to obtain a low fire risk.

2.4 With respect to features (a) and (b) the examining division argued that these are not technical features contributing to the solution of the problem but part of the problem to be solved, i.e. to provide a package having these features (see point II.2.2a of decision reasoning).

The appellant does not discuss this argument of the examining division in its appeal grounds. Rather the appellant argues that there is no incentive to provide these features as well as feature (c) when starting from D1 (see point 3.1.3 of the appeal grounds), since D1, although mentioning plastic packages, does not discuss the problems associated with them. The appellant has not, however, explained why the skilled person starting from the embodiment of D1 of a plastic container and attempting to provide a low fire risk would not ensure that the package complies with the fire hazard levels 1 and 2, i.e. a low fire risk, which

require that the product has a chemical heat of combustion equal to or less than about 30 kJ/g (see paragraph bridging pages 1 and 2 of the description of the application in suit). The appellant has also not explained why these features are not just a definition of the problem to be solved as argued by the examining division.

2.5 With regard to feature (d) the examining division argued that D4 shows that the skilled person seeking a low fire risk product would know that carbon dioxide is a propellant for aerosol products and that it is non-flammable (see point II.2.2b), second paragraph, of the decision reasoning). The examining division thus argued that the skilled person would apply this knowledge when deciding on which propellant to use in the package known from D1, in order to solve the objective problem.

The appellant has argued that D4 does not discuss the problem of low fire risk and does not discuss plastic packages. However, as argued by the examining division, D4 discusses flammability at several points (see tables 1 to 5) so that the question of fire risk is inherently discussed. The appellant has given no arguments as to why there might be a prejudice against using carbon dioxide with a plastic container or any indication of the problems associated with such containers; even though the appellant alleges that none of the cited documents deals with the problems of plastic packages.

The appellant has further argued that the skilled person had no reason to consider D4 and that the examining division gave no reasons why he would consider it. The examining division, however, referred

to D4 as showing that carbon dioxide was well known as a propellant, i.e. known to the skilled person. Moreover, D4 is an extract from an Encyclopedia (of Packaging Technology) and hence inherently discloses the general knowledge of the skilled person in the field. This means that the skilled person does not have to decide to look at D4 as suggested by the appellant, but rather the contents of D4 are already known to the skilled person as part of his general knowledge as explained by the examining division.

2.6 Therefore, the subject-matter of claim 1 of the single request does not involve an inventive step in the sense of Article 56 EPC, for the same reasons as put forward by the examining division in the decision under appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders