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**Datasheet for the decision
of 9 May 2012**

Case Number: T 0523/10 - 3.3.06

Application Number: 98948560.2

Publication Number: 1115835

IPC: C11D 17/06, C11D 17/00,
C11D 11/00

Language of the proceedings: EN

Title of invention:
Solid detergent compositions

Proprietor:
THE PROCTER & GAMBLE COMPANY

Opponent:
Henkel AG & Co. KGaA

Headword:
Detergent composition with defined Residues Index/P&G

Relevant legal provisions (EPC 1973):
EPC Art. 83

Keyword:
"Admissibility of late filed data and documents (yes)"
"Sufficiency of disclosure (yes)"
"Remittal to the first instance (yes)"

Decisions cited:
-

Catchword:
-



Case Number: T 0523/10 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 9 May 2012

Appellant: Henkel AG & Co. KGaA
(Opponent) Henkelstrasse 67
D-40589 Düsseldorf (DE)

Representative: Henkel AG & Co. KGaA
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D-40191 Düsseldorf (DE)

Respondent: THE PROCTER & GAMBLE COMPANY
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Cincinnati
OH 45202 (US)

Representative: Samuels, Lucy Alice
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
3 February 2010 concerning maintenance of
European patent No. 1115835 in amended form.

Composition of the Board:

Chairman: P.-P. Bracke
Members: E. Bendl
U. Tronser

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Opposition Division to maintain the European patent No. 1 115 835 in amended form.
- II. On 10 March 2010 the Appellant/Opponent filed an appeal against this decision and paid the appeal fee on the same day. On 27 May 2010 the grounds of appeal together with calculations of the Residue Index (RI) and the Secondary Residue Index (SRI) of prior art disclosures were filed. In addition the following documents were submitted:

D18 = WO-A-97/19165

D19 = US-A-5 108 646.

- III. In reaction to the appeal the Respondent/Proprietor filed in total six sets of claims. The **main request** contains the following two independent claims:

"1. A solid detergent composition in the form of granules, the composition comprising from 10 to 60 wt % of a surfactant system and having a maximum Residues Index of 25 and a maximum Secondary Residues Index of 15, wherein the composition is free of phosphate-containing builder material, wherein the composition comprises from 1% to 80% by weight of a water-soluble and/or partially water-soluble builder compound, wherein the composition comprises below 9 wt % aluminosilicate builder, wherein the composition comprises a highly water-soluble carboxylate- or carboxylic acid-containing compound in an intimate mixture with one or more surfactants, wherein the

surfactant comprises an anionic surfactant of which 50 to 100 wt % is an anionic sulphonate surfactant."

"8. Use of a detergent composition as defined in any preceding Claim in a washing process for soiled laundry."

The **first auxiliary request** differs from the main request in the feature "a maximum Secondary Residues Index of 5" instead of "a maximum Secondary Residues Index of 15" in Claim 1.

The **second auxiliary request** contains at the end of Claim 1 the additional feature "and wherein the highly water-soluble carboxylate- or carboxylic acid-containing compound is a copolymer of acrylate and maleic acid or anhydride having a molecular weight of from 40,000 to 80,000", compared to Claim 1 of the main request.

The **third auxiliary request** differs from Claim 1 of the second auxiliary request in the replacement of the text "a maximum Secondary Residues Index of 15" by "a maximum Secondary Residues Index of 5" in Claim 1.

The difference between the **fourth auxiliary request** and the second auxiliary request lies in the replacement in Claim 1 of the passage "below 9 wt % aluminosilicate builder" by "below 9 wt % aluminosilicate builder, wherein the composition comprises amorphous sodium silicate in amounts below 2 wt % based on the detergent composition as a whole" and the additional feature "and wherein more than 50 wt % of the total anionic

surfactant in the composition is included in the said intimate mixture" at the end of the claim.

The **fifth auxiliary request** is identical with the fourth auxiliary request, except the SRI being 5 instead of 15 in Claim 1.

IV. The main arguments of the **Appellant** were as follows:

Admissibility of the calculated RI and SRI values, D18 and D19

- The late submission of D18, D19 and the values is a reaction to the late filing of Respondent's data and the decision of the Opposition Division.
- All of those submissions are highly pertinent to patentability of the patent-in-suit and should be admitted by the Board.

Article 83 EPC 1973

- Many experiments have to be carried out to arrive at the claimed compositions. Since the patent-in-suit does not provide any guidance on how to prepare the compositions, this represents an undue burden to the skilled person.

The main arguments of the **Respondent** were as follows:

Admissibility of the calculated RI and SRI values, D18 and D19

- D18 and D19 are late filed, no reason can be seen why they have not been submitted earlier.

- Also the RI and SRI values should have been calculated earlier.

- However, the Respondent admits the pertinence of the documents and calculated values.

Article 83 EPC 1973

- The patent-in-suit discloses a general description of the invention and specific examples and thus sufficiently discloses how to prepare the claimed compositions. This has been implicitly confirmed by the Appellant by identifying pertinent prior art documents.

- V. The Appellant requested that the decision under appeal be set aside and that the European patent No. 1 115 835 be revoked.

The Respondent requested that the appeal be dismissed or that the patent be maintained on the basis of the auxiliary requests 1 to 5 submitted with the letter dated 24 April 2012.

Reasons for the Decision

1. Admissibility of documents D18, D19 and the RI and SRI values submitted with the grounds of appeal
 - 1.1 In opposition procedure the Respondent submitted the RI and SRI values of Examples 2A and 2B of the patent-in-suit only one month prior to the oral proceedings, which gave the Appellant not sufficient time to carry out further tests based on those results.

- 1.2 Additionally, in its decision the Opposition Division argued that Opponent's arguments with regard to novelty were not convincing, in particular given the lack of experiments showing the RI and SRI values (item 3.3 of the decision).
- 1.3 Thus, the additional search resulting in the retrieval of D18 and D19 and the calculation of the RI and SRI values have to be regarded as a reaction to the late submission of data by the Respondent and to the decision of the Opposition Division.
- 1.4 Taking further into account the potential relevance of those documents and data, which has also been explicitly acknowledged by the Respondent, the Board decided to admit D18, D19 and the RI and SRI values presented by the Appellant in the grounds of appeal to the appeal procedure.
2. Article 83 EPC 1973 (all requests)
 - 2.1 The Appellant in essence argued, that the structural features concerning the composition, like the amounts and kinds of ingredients, are not linked to the functional features RI and SRI. Meeting only the structural features does therefore not automatically mean that the functional features are also met. Since the patent-in-suit does not contain sufficient information on how to select a suitable composition possessing the required RI and SRI values, the requirement of sufficiency of disclosure is not met.

- 2.2 Article 83 EPC 1973 requires that the invention has to be disclosed sufficiently clear and complete for it to be carried out by a person skilled in the art. The patent-in-suit exemplifies a method for preparing products according to the invention and gives inter alia details on their chemical composition and the necessary amounts. Furthermore, the patent-in-suit gives detailed information how the RI and SRI values may be calculated.
- 2.3 Based on this information the Appellant determined the RI and SRI values of prior art composition. Thus, as has been confirmed by the Appellant, the skilled person is **per se** in a position to prepare compositions as claimed with the required structural and functional characteristics.
- 2.4 According to the Appellant the obstacle is the **high number** of tests that has to be carried out by the skilled person to arrive at compositions according to the invention due to lack of guidance in the patent-in-suit.
- 2.5 In the Board's view the requirement of Article 83 EPC 1973 is met. The examples and the description, which point towards preferred embodiments of the patent-in-suit, give guidance on how to obtain the claimed compositions. No proof of the contrary has been submitted by the Appellant.
- 2.6 In particular by identifying **allegedly novelty-destroying** prior art documents and calculating the RI and SRI values, the Appellant himself showed, that the skilled person is capable of reworking compositions

potentially claimed in the main request and consequently, to carry out the invention without undue burden.

2.7 Since the Appellant did not present arguments with regard to the features additionally being present in the auxiliary requests, the considerations above apply to all requests on file.

3. Remittal to the department of first instance

Taking into account that

- (a) additional documents and data, which potentially seem to be relevant, were presented by the Appellant only in appeal procedure,
- (b) even the Respondent acknowledged the relevance of those documents and data,
- (c) amended claims were filed and
- (d) the Respondent agreed with the remittal of the case to the department of first instance,

the Board, not wishing to deprive the parties of a first instance consideration on the question whether the patent meets the requirements of the EPC and remits the case to the department of first instance for further prosecution.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division for further prosecution.

The Registrar

The Chairman

D. Magliano

P.-P. Bracke