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**Datasheet for the decision
of 8 December 2014**

Case Number: T 1746/12 - 3.3.06

Application Number: 05018161.9

Publication Number: 1630288

IPC: D21H17/36, D21H17/37,
D21H17/20, D21H17/66,
D21H17/43, D21H27/02, B31F1/07,
A47K10/16

Language of the proceedings: EN

Title of invention:
BULKY WATER-DISINTEGRATABLE CLEANING ARTICLE AND PROCESS OF
PRODUCING WATER-DISINTEGRATABLE PAPER

Patent Proprietor:
KAO CORPORATION

Opponents:
Kimberly-Clark Worldwide, Inc.
SCA Hygiene Products AB

Headword:
Water-disintegratable cleaning paper/KAO

Relevant legal provisions:
EPC Art. 83, 100(b), 100(c), 111(1), 114(2), 123(2)
RPBA Art. 12(4)

Keyword:

Amended claims -

Added matter (yes: main and first auxiliary requests; no: second auxiliary request)

Sufficiency of disclosure - second auxiliary request (yes) - undue burden (no) - shift of burden of proof (no)

Remittal to the department of first instance (yes)

Decisions cited:

Catchword:



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Chambres de recours**

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Case Number: T 1746/12 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 8 December 2014

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 May 2012 concerning maintenance of the
European Patent No. 1630288 in amended form.**

Composition of the Board:

Chairman B. Czech
Members: E. Bendl
 J. Geschwind

Summary of Facts and Submissions

- I. The appeal by the patent proprietor lies from the interlocutory decision of the opposition division concerning maintenance of the European patent No. 1 630 288 in amended form.
- II. Independent claim 1 of the patent as granted reads as follows:

"1. A bulky, water-disintegratable cleaning article which comprises:

water-disintegratable paper having a basis weight of 30 to 150 g/m² and comprising a substantially water dispersible fibrous sheet which contains at least one of a water soluble binder and a water swellable binder, and has a number of protrusions and depressions formed by embossing; and

an aqueous agent which is impregnated in the water-disintegratable paper at an amount of 100% to 500% by weight, based on the dry weight of the water-disintegratable paper,

the cleaning article having a thickness T_1 of 1.0 to 3.0 mm under a load of 0.3 kPa and a thickness T_2 of at least 0.9 mm under a load of 1.0 kPa,

wherein the water soluble binder includes natural polysaccharides, polysaccharide derivatives, synthetic polymers, gelatin, casein, or albumin

wherein the water swellable binder includes a fibrous carboxyl-containing cellulose derivative, a fibrous starch derivative, a fibrous hydroxyl-containing polyvinyl alcohol or a fibrous hydroxyl-containing polyvinyl alcohol derivative

wherein the aqueous agent is a composition containing a

binder insolubilizing component including water soluble organic solvents, acids or electrolytes dissolved in a water medium."

III. In its decision the opposition division came to the conclusion that the invention as defined by claim 1 as granted (main request) was not sufficiently disclosed, in particular because it was not clear how the thickness values T_1 and T_2 were to be determined. Under the given circumstances, the burden of proof shifted to the patent proprietor who had, however, not provided convincing arguments, let alone evidence, showing that the skilled person was "able to establish with certainty, whether a produced paper falls within the scope of claim 1" (decision, page 7, second paragraph). The process claims according to the then pending first auxiliary request were, however, found to meet the requirements of the EPC.

IV. In its statement setting out the grounds of appeal, the appellant (proprietor) rebutted the arguments of the opposition division and referred *inter alia* to one of the documents cited in the opposition proceedings, namely

D11 = Papier-Lexikon, Hrsg.: L. Götttsching
et al., Deutscher Betriebswirte Verlag GmbH,
Gernsbach 1999, pages 276/277.

It maintained that the claims as granted met the requirements of the EPC. It nevertheless submitted *inter alia* sets of amended claims as first to seventh auxiliary request.

V. Compared to claim 1 as granted, amended claim 1 according to of the **first auxiliary request** filed with

the statement of grounds comprises additional features (emphasised by the board) and reads:

"1. A ... cleaning article ... and has a number of protrusions and depressions formed by embossing; **using matched steel embossing rolls having elevations and recesses aligned in a regular pattern on their surfaces**, and an aqueous agent ...".

The independent claims of the **second auxiliary request** filed with the statement of grounds read as follows (amendments made to the claims as granted made apparent by the board):

"1. 1. A bulky, water-disintegratable cleaning article which comprises:

water-disintegratable paper having a basis weight of 30 to 150 g/m² and comprising a substantially water dispersible fibrous sheet which contains ~~at least one of~~ a water soluble binder ~~and a water swellable binder~~, and has a number of protrusions and depressions formed by embossing; and
an aqueous agent which is impregnated in the water-disintegratable paper at an amount of 100% to 500% by weight, based on the dry weight of the water-disintegratable paper,
the cleaning article having a thickness T_1 of 1.0 to 3.0 mm under a load of 0.3 kPa and a thickness T_2 of at least 0.9 mm under a load of 1.0 kPa,

wherein the water soluble binder includes natural polysaccharides, polysaccharide derivatives, synthetic polymers, gelatin, casein, or albumin
~~wherein the water swellable binder includes a fibrous carboxyl-containing cellulose derivative, a fibrous~~

~~starch derivative, a fibrous hydroxyl containing polyvinyl alcohol or a fibrous hydroxyl containing polyvinyl alcohol derivative~~

wherein the aqueous agent is a composition containing a binder insolubilizing component including water soluble organic solvents, acids or electrolytes dissolved in a water medium."

"5. A process of producing water-disintegratable paper comprising the steps of:

embossing a substantially water dispersible fibrous sheet containing ~~at least one of a~~ water soluble binder and ~~a water swellable binder~~, and having a basis weight of 30 to 150 g/m² in the presence of 10% to 200% by weight of water in the fibrous sheet and drying the fibrous sheet simultaneously with or immediately after the embossing,

wherein the water soluble binder includes natural polysaccharides, polysaccharide derivatives, synthetic polymers, gelatin, casein, or albumin.

~~wherein the water swellable binder includes a fibrous carboxyl containing cellulose derivative, a fibrous starch derivative, a fibrous hydroxyl containing polyvinyl alcohol or a fibrous hydroxyl containing polyvinyl alcohol derivative."~~

"10. A process of producing water-disintegratable paper comprising the steps of:

adding an aqueous solution of a water soluble binder to a sheet containing substantially water dispersible fiber and containing no water soluble binder to provide a fibrous sheet having a water soluble binder content of 1% to 30% by weight and a water content of 10% to

200% by weight based on the dry weight of the sheet, embossing the fibrous sheet, and drying the fibrous sheet simultaneously with or immediately after the embossing,

wherein the water soluble binder includes natural polysaccharides, polysaccharide derivatives, synthetic polymers, gelatin, casein, or albumin."

"11. Use of a bulky water-disintegratable cleaning article according to any of claims 1 to 4 as a cleaning article."

Dependent claims 2 to 4 and 6 to 9 refer to preferred embodiments of the article of claim 1 and of the method of claim 5, respectively.

VI. In its reply of 12 February 2013, respondent 1 (opponent 1) maintained that the invention as defined in claim 1 was insufficiently disclosed in the patent. In this connection it also referred to a further document already on file, namely

D12 = WO 01/83572 A1.

It maintained that the subject-matter of claim 1 did not find basis in the application as filed and also lacked novelty and inventive step. The arguments regarding insufficiency, lack of novelty and lack of inventive step were held to apply also to the claims of the auxiliary requests.

Furthermore, it held that the respective claims 1 according to auxiliary requests 4 to 7 found even less basis in the application as filed, and that the

respective claims 1 of auxiliary requests 1 and 3 to 7 lacked clarity.

VII. With its letter of 8 July 2014 the appellant submitted further sets of amended claims as auxiliary requests 8 to 13. In said letter, it once more rebutted the objections of respondent 1, also with regard to auxiliary requests 1 to 7.

VIII. Oral proceedings before the board were held on 8 December 2014.

The debate focused on issues of added matter and sufficiency of disclosure with regard to the main request and the first and second auxiliary request. In the course of the oral proceedings the appellant also requested for the first time the remittal of the case to the department of first instance in case the board were to conclude that one of its claim requests on file met the requirements of Articles 123(2) and 83 EPC.

IX. The appellant requested that the appealed decision be set aside and that the patent be maintained as granted (main request) or, in the alternative, on the basis of the claims according to one of auxiliary requests 1 to 7 filed with the statement of grounds of appeal, or according to one of auxiliary requests 8 to 13, submitted with letter of 8 July 2014.

Respondent 1 requested that the appeal be dismissed.

Respondent 2 (opponent 2) did not file any request.

X. The arguments of the **appellant** of relevance for the present decision can be summarised as follows:

Articles 100(c)/123(2) EPC - Main request and first auxiliary request

- Claim 1 of the application as filed disclosed a cleaning article comprising at least one of a water soluble binder and a water swellable binder in combination with an aqueous agent. The latter was a binder insolubilizing agent and, therefore, also a swell suppressing component.
- On page 7, lines 14/15 of the application as filed water soluble organic solvents, acids and electrolytes were reported as binder insolubilizing components.
- The binder insolubilizing agents used for preparing the claimed cleaning article might also be used to act as swelling inhibiting components, as apparent from the specific examples of the patent in suit in paragraphs [0021] and [0024]; see e.g. boric acid or borates also mentioned on page 8, first paragraph, and page 9, first two paragraphs of the application as filed.
- Thus, taking into account the entire content of the application as filed, an article comprising in combination a water swellable binder and a binder insolubilizing agent according to claim 1, was directly and unambiguously derivable therefrom for the skilled person.

Sufficiency of disclosure - Second auxiliary request

- The patent in suit contained sufficient guidance regarding the materials to be used, since the description comprised lists of materials suitable for use as water soluble binder and as binder insolubilizing component, respectively, as well as specific examples showing their combination.
- The skilled person knew how to determine the thickness of a paper, using a method and apparatus

of the type described in document D11, without undue burden.

- Since T₁ and T₂ were features of the cleaning article of claim 1, which contained 100 - 500% by weight of an aqueous agent, the thickness values had to be measured in the wet state. The thickness of interest was the thickness of the embossed article and not the thickness of the disintegratable paper as such.
- The respondent 1 had not discharged the burden of proof resting on it.
- Hence, the claimed subject-matter was sufficiently disclosed.

The arguments of **respondent 1** of relevance for the present decision can be summarised as follows:

Articles 100(c) and 123(2) EPC - Main request and first auxiliary request

- A cleaning article comprising in combination a water swellable binder and one of the binder insolubilizing agents referred to in claim 1, namely water soluble organic solvents, acids and electrolytes, was not disclosed in the application as filed.

Sufficiency of disclosure - Second auxiliary request

- There was a lack of guidance in the patent in suit as regards suitable combinations of water soluble binder and binder insolubilizing agent.
- Thus, the opposed patent was insufficient since the skilled person seeking to put the invention into effect was faced with an undue burden in trying to identify further combinations of binders and insolubilising agent across the whole scope of claim 1.

- No method for determining the thickness of the claimed paper was described in the patent.
- Moreover, the measuring conditions to be applied were not clear (wet or dry state of the article, location of the measuring point on the sheet).
- Hence, the skilled person could not determine whether or not a product fell within claim 1.

Respondent 2 did not submit any arguments in appeal procedure.

Reasons for the Decision

Admissibility of the requests at issue

1. The main request at issue (maintenance of the patent as granted) being dealt with in the decision under appeal, its admissibility is out of question.
2. The auxiliary claims requests 1 and 2 were filed for the first time with the statement of grounds of appeal.

The board accepts

- that auxiliary request 1 was filed in reaction to the detailed reasoning given in the decision under appeal as regards the issue of sufficiency in respect of claim 1 as granted and constitutes an attempt to overcome said particular objection; and
- that the filing of auxiliary request 2 was a reasonable precautionary measure considering an objection under Article 100(c) EPC that had been raised in the first instance proceedings but decided in favour of the patent proprietor.

Considering also that the adverse party did not object to the filing of these auxiliary requests, the board decided to admit auxiliary request 1 and 2 into the proceedings (Article 114(2) EPC and Article 12(4) RPBA).

Main request

3. Subject-matter extending beyond the content of the application as filed - Claim 1

3.1 As pointed out by Respondent 1, claim 1 as granted is, according to one alternative, directed to a cleaning article comprising in combination, at least one "**water swellable binder**" selected from a list of specific binders with an "**aqueous agent**" containing a "**binder insolubilizing component**" selected from "**water soluble organic solvents, acids or electrolytes**".

It was in dispute whether, or not, such articles were disclosed in the application as filed.

3.2 The appellant essentially held that such articles were disclosed in the application as filed, specifically in claim 1 taken in combination with the description on page 7, lines 14/15, page 8, lines 14/15, and page 9, first two paragraphs.

3.2.1 The appellant furthermore argued that the skilled person could derive from the description that the insolubilizing component and the swelling suppressing component, contained in the aqueous agent, may be the same (see letter 8 July 2014, page 4, 4th paragraph), e.g. boric acid and its salts or divalent metal cations, which may be used for both purposes (page 8, first paragraph and page 9, first two paragraphs of the

application as filed; boric acid containing composition B used in the examples with fibrous PVA binder).

3.2.2 Therefore, the skilled person, considering the whole content of the application as filed, could gather from the description the teaching that according to one embodiment of the invention, a water swellable binder may be used in combination with one of the listed binder insolubilising agents, i.e. water soluble organic solvents, acids or electrolytes, in the fabrication of the claimed cleaning article.

3.3 For the board, it is not, however, derivable from the application as filed that the insolubilising component and the swell suppressing component may be used interchangeably. Throughout the description and in the claims of the application as filed these two expressions are used to refer, respectively, to two **distinct** classes of components suitable for different purposes (see in particular claim 10, but also page 7, first full paragraph, and the paragraph bridging pages 7/8 as well as page 9, first paragraph, of the application as filed).

The board accepts that **some specific** "aqueous agents" may serve for both purposes, depending on the combination of components considered. This is, however, only disclosed in respect of boric acid (and its salts) and of divalent metal ions, which may be used to prevent solubilisation/swelling of polyvinyl alcohol and carboxy methyl/ethyl cellulose, respectively (see page 8, first paragraph, page 9, first paragraph of the application as filed).

3.3.1 For the board, a teaching that the insolubilising component and the swell suppressing component may **generally** be used interchangeably, or that a water

soluble organic solvent, acid or electrolyte may always be used as swell suppressing component, is thus not directly and unambiguously derivable from the application as filed.

3.3.2 Therefore, in the board's judgement, there is no fair basis in the application as filed for claim 1 as granted insofar as it is directed to the alternative identified under 3.1 *supra*, i.e. containing one of the water-swellaible binders listed in combination with any insolubilizing component of the three types listed in claim 1.

3.3.3 Hence, claim 1 at issue being directed to subject-matter extending beyond the content of the application as filed, the patent as granted is objectionable under Article 100(c) EPC.

3.4 Therefore, the appellant's main request is not allowable.

First auxiliary request

4. Subject-matter extending beyond the content of the application as filed

4.1 As conceded by the appellant at the oral proceedings, the features additionally comprised in claim 1 of the first auxiliary request (see V *supra*) have no bearing on considerations regarding the question addressed under points 3.1ff above.

4.2 Thus, the conclusions drawn *supra* apply *mutatis mutandis* to claim 1 of the first auxiliary request.

Claim 1 at issue is thus also directed, in one

alternative, to subject-matter extending beyond the content of the application as filed and is, therefore, objectionable under Article 123(2) EPC.

- 4.3 Therefore, the appellant's first auxiliary request is not allowable either.

Second auxiliary request

5. Allowability of the amendments

- 5.1 Claims 1, 3, 4, 5 and 8 of the second auxiliary request are no longer directed to the alternative according to which the "water dispersible fibrous sheet" may contain only a "water **swellable** binder" and no water soluble binder, since all previous references to the presence of a "water swellable binder" were deleted.

Therefore, the claims at issue are not objectionable on the ground raised by respondent 1 and addressed *supra*.

- 5.2 The board is satisfied that the claims at issue find a fair basis in the application as filed.

Claim 1 finds basis in claim 1 and on page 6, lines 19 to 22, and page 7, lines 14/15, of the application as filed.

Claim 5 finds basis in claim 5 and on page 6, lines 19 to 22 of the application as filed.

Amended Claims 3, 4 and 8 at issue find their basis in claims 3, 4 and 8 of the application as filed.

Claim 6 at issue finds basis in claim 6 and on page 7, lines 14/15, of the application as filed.

Claims 2, 7, 9,10 and 11 find basis in claims 2, 7, 9, and 12 of the application as filed.

5.3 The claims according to the second auxiliary request thus meet the requirement of Article 123(2) EPC.

6. Sufficiency of disclosure

6.1 In substantiation of its objection regarding the alleged insufficiency of disclosure, respondent 1 presented the two following lines of argument:

a) The water-soluble binder and the binder insolubilising components were only described in the patent in suit in very general terms. As no guidance was given on how to select suitable combinations of these compounds, it would require undue experimentation to prepare cleaning articles as defined by claim 1.

b) No method was disclosed for the measuring of the thicknesses T_1 and T_2 referred to in claim 1. Moreover, it was left open whether the measurement had to be carried out in a wet or a dry state of the cleaning article.

6.2 Ad argumentation a)

With regard to the amount of experimentation allegedly needed to identify a combination of ingredients suitable for putting the invention into effect across the full scope of claim 1 as granted, the board observes the following:

6.2.1 On the one hand, the description of the patent in suit comprises general indications concerning materials which may be used as suitable water dispersible fibers, water soluble binders and aqueous agents containing a binder insolubilising water soluble organic solvent, acid or electrolyte (see paragraphs [0017] to [0021]). Specific combinations are suggested in paragraphs [0021] and [0025] to [0027].

Paragraph [0021] moreover mentions "*salting-out*" and "*crosslinking*" as possible insolubilisation mechanisms, and suggests suitable combinations of water soluble binders and suitable insolubilising agents.

6.2.2 A very specific combination of a water soluble CMC binder and an aqueous agent A containing water soluble organic solvent and electrolyte (see paragraph [0064]) is described in examples 1 to 10 of the patent in suit. It was not in dispute that that these specific examples can be reproduced by the skilled person.

6.2.3 On the other hand, respondent 1 did not provide any proof in support of its allegation that, based on the disclosure of the patent in suit, the claimed cleaning article could not be prepared, or that an undue amount of experimentation was needed to identify further operable combinations of water soluble binder and insolubilising agent.

6.2.4 For the board, a shift of the burden of proof to the proprietor of the patent it is not justified in the present case considering that the patent in suit (passages quoted under point 6.2.1 *supra*) provides the skilled person with guidance on how to select, based on its knowledge of the properties of the suggested components and of chemical principles to be applied to

achieve the desired insolubilisation, further combinations of components which are suitable for being used in the preparation of the claimed water-disintegratable cleaning article.

6.2.5 By merely alleging a lack of guidance and invoking an undue burden without providing verifiable facts supporting this objection, for instance regarding the undue amount of experimentation allegedly required, respondent 1 did not discharge the burden of proof resting on it.

6.3 Regarding argumentation b)

6.3.1 The board accepts that apparatuses/methods for measuring the thickness of paper under a given load were generally known at the effective filing date if the patent and that a skilled person was thus be able to perform the required measurements.

For instance, document D11 referred to by the appellant illustrates common general knowledge regarding (dry) paper thickness measurements and mentions important factors to be considered when measuring thickness, primarily the load applied to the paper by means of the pressure plates (paragraph bridging pages 276/277).

Document D12 (page 61, last paragraph) referred to by respondent 1 in its letter of 12 February 2013 (page 2, point 10), illustrates that it was also known to perform measurements on embossed fibrous webs using pressure plates, said method giving an "average thickness" (at the macroscopic level) irrespective of a varying "local thickness".

6.3.2 The board does not accept the respondent's further argument that the skilled person would not know where to measure on the embossed sheet the thicknesses T_1 and T_2 .

Claim 1 unequivocally refers to the thickness(es) of "*bulky, water-disintegratable cleaning article*", as illustrated by Figure 1, under two different defined loads, and not to the thickness of the "*water disintegratable paper*" sheet as such or the dimensions of individual protrusions or depressions.

This understanding of T_1 and T_2 is consistent with paragraph [0012] of the patent in suit, where thickness T_1 is defined as "*the distance from the apices of protrusions 2 on the first side 1a to the apices of protrusions 2 on the second side 1b*". For the board, this definition must also apply to the thickness T_2 , since the indication of a thickness ratio T_2 to T_1 (see paragraph [0014] of the patent in suit) is technically sensible only if the measurement is carried out under identical conditions, except for the different loads.

6.3.3 Concerning the remaining question whether the thickness of the article is to be measured in its dry or wet state, the board observes the following:

i) Claim 1 refers to a bulky, water-disintegratable cleaning article containing 100% to 500% by weight of an aqueous agent, i.e. an article which is in a wetted condition and contains a specific amount of aqueous agent.

For the board, the wording of claim 1 in no way

suggests that the cleaning article should be in a dry state when measuring T_1 and T_2 .

ii) In paragraph [0013], third sentence, it is explicitly stated, in accordance with the implicit meaning of the wording of claim 1, that the measurement is done on the water-disintegratable cleaning article **impregnated with an aqueous agent**: "*When the bulky, water-disintegratable cleaning article (impregnated with an aqueous agent) has a thickness T_2 of ...*"

Likewise, according to examples 1-8 of the patent in suit, the determination of the T_1 and T_2 values is done subsequently to the impregnation of the paper (see paragraph [0060]). Moreover, as pointed out by the appellant, the references to dry thickness measurements in the patent in suit (see e.g. page 9, line 27/28) concern the disintegratable paper sheet, not the impregnated wet cleaning article.

iii) Respondent 1 relied in particular on a passage of paragraph [0015] of the description reading as follows: "*The T_1 and T_2 values are not greatly affected by the amount and the composition of the impregnating aqueous agent so that the aqueous agent content is not included in the conditions of measuring T_1 and T_2 . If the amount of the aqueous agent is to be included in the measuring conditions, double the dry weight of the water-disintegratable paper, which is typical in the present invention, would be a suitable condition.*"

For the board, paragraph [0015] merely indicates that the T_1 and T_2 values are not strongly dependent on the amount of an aqueous agent contained in the article, and can be understood to recommend, in the context of

the remaining disclosure, measuring T_1 and T_2 using a content of aqueous agent which is double the dry weight of the water-disintegratable paper.

6.3.4 The board concludes that the arguments put forward by respondent 1 in connection with the alleged lack of clear information regarding the measurement of T_1 and T_2 are not sufficient to raise doubts as regards the ability of the skilled person to carry out said measurements and, hence, to reliably provide a cleaning article with the features of claim 1. Although, therefore, the burden of proof was on respondent 1 in this respect, it did not submit proof of the contrary, let alone in the form of verifiable facts.

6.4 Hence, in the board's judgement, none of the two lines of arguments put forward by the respondent convincingly shows that the invention as claimed according to the request at issue is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

6.5 Therefore, the ground of opposition of Article 100(b) EPC does not prejudice the maintenance of the patent on the basis of the claims according to the second auxiliary request.

7. Remittal

7.1 As pointed out by the appellant, the impugned decision addresses the issues of novelty and inventive step with regard to process claims only, not with regard to the product claims of the patent which were found to be objectionable on the grounds of Article 100(b) EPC. The latter finding is not, however, confirmed by the board in the present decision.

7.2 Therefore, although the appellant has no absolute right to have each individual issue considered by two instances, and despite the late submission of its request, the board considers it justified in the present case to allow the appellant's request for remittal pursuant to Article 111(1) EPC, in particular to give the parties the possibility of defending their case at two levels of jurisdiction also with respect to the product claims.

Order

For these reasons it is decided that:

The case is remitted to the department of first instance for further prosecution of the case on the basis of the claims according to the second auxiliary request, filed with the grounds of appeal.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated