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Datasheet for the decision of 28 April 2015

Case Number: T 2362/12 - 3.3.06

Application Number: 08167033.3

Publication Number: 2009088

IPC: C11D3/40

Language of the proceedings: EN

Title of invention:
Laundry treatment compositions

Patent Proprietors:
Unilever PLC
Unilever N.V.

Opponent:
Henkel AG & Co. KGaA

Headword:
Hydrophobic dye containing laundry treatment composition / UNILEVER

Relevant legal provisions:
EPC Art. 52(1), 56, 114(2)
RPBA Art. 13(1)

Keyword:
Admissibility of late filed documents (no)
Inventive step (yes) : non-obvious alternative

Decisions cited:

Catchword:

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Case Number: T 2362/12 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 28 April 2015

Appellant: (Opponent)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA Patente (FJI) 40191 Düsseldorf (DE)
Respondents: (Patent Proprietor 1)	Unilever PLC Unilever House 100 Victoria Embankment London EC4Y 0DY (GB)
(Patent Proprietor 2)	Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	Avila, David Victor Unilever PLC Unilever Patent Group Colworth House Sharnbrook Bedford Bedfordshire MK44 1LQ (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 13 September 2012 rejecting the opposition filed against European patent No. 2009088 pursuant to Article 101(2) EPC.**

Composition of the Board:

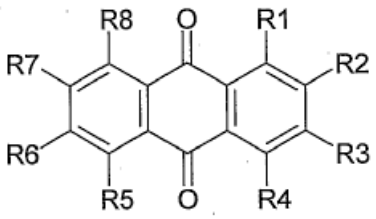
Chairman	B. Czech
Members:	L. Li Voti
	S. Fernández de Córdoba

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division rejecting the opposition against European patent no. 2009088.

II. The independent claims 1 and 8 of the patent as granted read as follows:

"*1. An isotropic liquid laundry treatment composition comprising between 0.0001 to 0.1 wt % of a hydrophobic dye, from 0.005 to 2 wt % of a fluorescer, wherein the fluorescer is selected from: sodium 2(4-styryl-3-sulfophenyl)-2H-naphthol[1,2-d]triazole, disodium 4,4'-bis{[(4-anilino-6-(N methyl-N-2 hydroxyethyl)amino 1,3, 5-triazin-2-yl)]amino} stilbene-2-2' disulfonate, disodium 4,4'-bis{[(4-anilino-5-morpholino-1,3,5-triazin-2-yl)]amino} stilbene-2-2' disulfonate, and disodium 4,4'-bis(2-sulfostyryl)biphenyl, and between 2 to 60 wt % of a surfactant, wherein the hydrophobic dye is selected from solvent violet 13 and disperse violet 27 and an anthraquinone of the following structure (I):*



(I),

wherein R1, R4, R5, and R8 are independently selected from the groups consisting of -H, -OH, $-NH_2$ and $-NO_2$, such that a maximum of only one $-NO_2$ group and a maximum of two -H are present as R1, R4, R5, and R8 substituents; and
R2, R3, R6, and R7 is selected from -H, F, Br, Cl or $-NO_2$, and -Oaryl."

"*8. A method of treating a textile, the method comprising the steps of:*

(i) treating a textile with an aqueous solution of the laundry treatment composition as defined in any one of claims 1 to 7, the aqueous solution comprising from 1 ppb to 6 ppm of the hydrophobic dye and from 0.2 g/L to 3 g/L of a surfactant; and,
(ii) rinsing and drying the textile."

Claims 2 to 7 relate to particular embodiments of the isotropic liquid laundry treatment composition according to claim 1 whilst claims 9 and 10 relate to particular embodiments of the method of treating a textile according to claim 8.

III. In its notice of opposition the Opponent had sought the revocation of the patent on the grounds of Article 100(a) EPC, alleging lack of novelty and inventive step.

In support of its arguments, the Opponent had cited *inter alia* the following documents:

D1b: English translation of JP 2004-210961 A;
D3: WO 03/093565 A2;
D5: DE 33 22 950 A1;
D6: E. Smulders, "Laundry detergents", Wiley-VCH Verlag GmbH, 2002, pages 92 to 96; and
D7: DE 199 20 784 A1.

IV. The Opposition Division found in its decision that the subject-matter of the granted claims was novel and involved an inventive step over the cited prior art.

In particular, as regards inventive step, the

Opposition Division held (point 3.2(c) of the reasons) the following:

- Document D5 represented the closest prior art.

- Even though example 3 of the patent in suit and the experimental data submitted by the Proprietor of the patent as "annex 1" on 25 May 2011 (hereinafter just the "experimental data of 2011") showed the deposition efficiency of the selected anthraquinone dyes on polyester garments, no improved performance had been shown with respect to a composition containing the anthraquinone dyes used according to document D5.

- The technical problem underlying the invention thus merely consisted in the provision of an alternative isotropic liquid laundry treatment composition exhibiting effective maintenance and enhancement of the white appearance of polyester comprising garments in a domestic laundry treatment.

- Document D3 did not relate to compositions for use in a domestic laundry treatment and would not be consulted by the skilled person.

- Therefore, in view of the cited prior art, the claimed subject-matter involved an inventive step.

V. In its statement setting out the grounds of appeal, the Appellant (Opponent) maintained that the claimed subject-matter lacked inventive step in the light of document D3, taking into account common general knowledge as represented, for example, by document D6 or D7.

VI. In their reply of 21 May 2013 the Respondents rebutted

the objections raised by the Appellant and maintained that the closest prior art was represented by document D5, and that the claimed subject-matter was inventive over the cited prior art. The Respondents also resubmitted the experimental data of 2011.

VII. By letter of 26 February 2015, the Respondents announced that one of the inventors would be attending the oral proceedings and would possibly be asked to speak with regard to experimental data and technical aspects.

VIII. With letter of 25 March 2015, the Appellant filed the following new documents:

D8: M. Bornstein, "Color and Its Measurements", *J. Soc. Cosmetic Chemists*, 1968, 19, pages 649 to 667;
D9: GB 2 332 912 A;
D10: GB 1 301 827;
D11: Excerpt regarding CAS Registry Number 6416-68-8 and
D12: Excerpt regarding CAS Registry Number 16090-02-1.

The Appellant requested the admission of these documents since they were filed in reaction to the announced Respondents' intention to let one of the inventors speak at the oral proceedings as regards technical aspects and experimental data.

The Appellant maintained that the claimed subject-matter was not inventive starting either from document D3 or document D5 and submitted additionally that it lacked inventive step also in the light of a combination of either D9 or D10 with document D1b or document D3.

IX. At the oral proceedings held on 28 April 2015, the issue of inventive step was debated in the light of documents D5, D3 and D6.

Even though the inventor accompanying the Respondents' representative was not asked to speak with regard to experimental data and other technical aspects during the oral proceedings, the Appellant still requested that documents D10 to D12 be admitted into the proceedings in view of their relevance. This request was refused by the Board.

X. Final requests:

The Appellant requested that the decision under appeal be set aside and the patent be revoked.

The Respondents requested that the appeal be dismissed.

XI. The arguments of the Appellant of relevance here can be summarised as follows:

Late filed documents

At the oral proceedings, the Appellant submitted that document D10 was at first sight more relevant than document D5 since, compared with the composition of example 8 of document D5, it disclosed explicitly a laundry treatment composition containing a fluorescer according to claim 1 at issue (cf. formulae of documents D11 and D12) as well as ultramarine blue as blueing agent. D10 to D12 were thus to be admitted despite their late filing.

Inventive step

- Document D3, though not concerning a laundry treatment composition, was a more appropriate closest prior art than document D5, since the former disclosed the use of a combination of a fluorescer with a hydrophobic anthraquinone dye of the type to be used according to the patent in suit in order to improve the whiteness of polyester fabrics, whilst the latter, though relating to laundry treatment compositions, concerned a different technical problem, namely the improvement of the cleaning power of compositions comprising cellulase enzymes.

- However, even considering document D5 as the closest prior art, the claimed subject-matter lacked an inventive step.

- The experimental data of 2011 did not show an improvement of the whitening of polyester fabrics compared to a laundry treatment with a composition according to the closest prior art represented by D3 or D5.

- Therefore, the technical problem was merely to be seen in the provision of an alternative isotropic liquid laundry treatment composition able to improve the whiteness of polyester fabrics.

- Example 8 of document D5 disclosed an isotropic liquid laundry treatment composition containing both a fluorescer and a blueing agent. Moreover, according to the description of this document, the preferred classes of fluorescers included the specific fluorescer compounds of claim 1 at issue. The preferred blueing agent was, however, an anthraquinone dye differing from those of claim 1 at issue.

- Nevertheless, it would have been obvious for the skilled person, looking for an alternative isotropic liquid laundry treatment composition, to try other anthraquinone dyes known to improve the whiteness of polyester fabrics, like those disclosed in document D3.

- Even though document D3 concerned an industrial exhaust process and not a laundry treatment, the skilled person would have taken its teaching into account since the temperatures used in the process of document D3 encompassed temperatures of 95°C encountered also during laundry washing and the amounts of fluorescer and dye suggested in document D3 overlapped with those prescribed by claim 1 at issue.

- Even though, according to D3, the anthraquinone dyes were combined with fluorescers differing from those prescribed by claim 1 at issue, it would have been obvious for the skilled person to also try such dyes in combination with the fluorescers used in the laundry compositions of document D5. In fact, as illustrated by D6, it was well known that the whitening of fabrics by means of a fluorescer was essentially a dyeing process. Hence, it would have been obvious to use a combination of dyes known to be able to provide whiteness.

- Furthermore, document D3 related more generally also to the classes of fluorescers used according to D5 and the patent in suit.

- Therefore, the combination of documents D5 and D3 would have led the skilled person in an obvious way to the subject-matter of claim 1 at issue.

The Respondents argued essentially as follows:

Late filed documents

Documents D8 to D12 were not admissible in view of their late filing and because they were used for raising new lines of arguments as regards inventive step.

Inventive step

- D5 represented the closest prior art.

- Even accepting for the sake of argument that the experimental data of 2011 did not show any technical advantage over the closest prior art, the skilled person, looking for an alternative to the composition disclosed in document D5, would not take into consideration at all document D3, since it concerned an industrial exhaust process.

- Moreover, assuming that the skilled person were to consider document D3, he would not have been motivated to choose the anthraquinone dyes disclosed therein rather than other dyes also disclosed in this document, for instance the azo dyes which had a better tinctorial strength, let alone to use them in combination with sulphonated fluorescers as prescribed by claim 1 at issue, which were different from the unsulphonated ones specifically used in the compositions of document D3.

- The skilled person would thus not have found in the prior art any teaching that would have prompted him to use a hydrophobic anthraquinone dye as prescribed by claim 1 at issue in a laundry treatment composition.

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

Reasons for the Decision

Late-filed documents D8 to D12

1. The Appellant cited and filed documents D8 to D12 for the first time with its letter dated 25 March 2015, i.e. about one month before oral proceedings.

1.1 In its letter of 25 March 2015 the Appellant indicated that documents D8 to D12 were filed in reaction to the Respondents' letter of 26 February 2015 by which the latter announced that one of the inventors would be attending the oral proceedings and possibly be asked to speak with regard to experimental data and other technical aspects (see points VII and VIII above).

In particular, the Appellant (page 2, first three lines of the letter of 25 March 2015) submitted that documents D8 to D12 should be admitted since they concerned technical aspects which could be of relevance in the evaluation of the experimental data submitted by the Proprietors of the patent ("*Sie betreffen technische Aspekte und/oder stehen in Zusammenhang mit den von den Patentinhaberin vorgelegten Experimenten*").

1.2 However, at the oral proceedings, the inventor was not asked to speak with regard to experimental data or other technical aspects (see point IX above), and no new arguments concerning experimental data were submitted by the Respondents. Under these circumstances, the Appellant no longer maintained its request for admission of D8 and D9 into the proceedings.

1.3 The Appellant nevertheless maintained its request to admit documents D10 to D12, in view of their *prima facie* relevance. In particular, it argued that D10 was more relevant than document D5, since it disclosed explicitly a laundry treatment composition containing a fluorescer according to claim 1 at issue (as shown by the accompanying documents D11 and D12) as well as ultramarine blue.

1.3.1 In this respect the Board remarks that the Appellant also submitted (point XI above) that the teaching of document D5 suggested the combined use, in a laundry treatment composition, of a fluorescer belonging to a class including the specific fluorescers of claim 1 at issue and a blueing dye of the anthraquinone class, i.e. of the same generic class to which the specific dyes of claim 1 at issue belong.

1.3.2 Hence, for the Board, the compositions disclosed in document D10, which contained ultramarine blue, i.e. not a blueing dye of the anthraquinone class, do not appear to be, *prima facie*, more relevant than the compositions disclosed in document D5, and D10 does not appear to be a more appropriate starting point for the assessment of inventive step.

Consequently, in the Board's judgement, none of the late-filed documents D10 to D12 is more relevant than the documents already on file.

1.4 Taking into account all the above aspects, the Board decided not to admit documents D10 to D12 into the proceedings (Articles 114(2) EPC and 13(1) RPBA).

1.5 The arguments as regards inventive step submitted in writing with reference to documents D8 to D12 are thus not addressed below.

Inventive step - Claims as granted

2. The invention

2.1 The present invention concerns an isotropic liquid laundry treatment composition comprising a hydrophobic dye and a fluorescer and a method of treating a textile with an aqueous solution of that composition (see claims 1 and 8; and paragraph [0001] of the patent in suit).

2.2 In the description of the patent in suit (paragraph [0003]) the following is stated: "*Bleach, fluorescers and shading agents are used in modern washing processes to maintain whiteness. The fluorescers and shading agents that are currently available, do not deposit on polyester fibres of garments to a significant degree.*"

Therefore, according to paragraph [0006], "*there* [was] *a need to provide technology that maintains and enhances the white appearance of polyester comprising garments.*"

3. Closest prior art

3.1 Documents D3 and D5 were cited by the parties as possible starting points for the evaluation of inventive step.

3.2 The closest prior art for assessing inventive step is normally a prior art document disclosing subject-matter conceived for the same purpose or aiming at the same

objective as the claimed invention.

3.3 It was common ground between the parties that document D3 (see e.g. page 9, lines 17 to 34, and page 20, lines 43 to 44) concerns industrial processes such as an exhaust process for whitening textile material like polyester. The exhaust bath may contain a fluorescer in combination with a blue or violet shading dye which is preferably an anthrachinone dye (page 20, lines 11 to 29; page 21, second paragraph). It was not in dispute that D3 does not concern the treatment of laundry.

3.4 On the other hand, document D5 concerns an enzymatic laundry treatment composition showing improved cleaning performance due to the specific cellulases used (page 3 (typed number), lines 15 to 34). Moreover, this laundry treatment composition may comprise fluorescers and blueing agents (page 22, lines 20 to 23). The latter are well-known components of laundry treatment compositions, added for the purpose of whitening the washed garments. In this connection, reference is made to D5, page 2 (typed number), lines 23 to 25, and page 3 (typed number) lines 7 to 8, as well as to document D6, page 92, chapter 3.4.5, first seven lines.

3.4.1 Hence, although document D5 does not expressly address the maintenance and enhancement of the white appearance of polyester comprising garments, it (implicitly) discloses to the skilled person a laundry treatment composition which also provides whitening of the washed garments.

3.4.2 For this reason document D5 is, in the Board's judgement, the most appropriate starting point for the evaluation of inventive step. In particular, the Board accepts that, as argued by the Appellant, the closest

prior art is then represented by the composition of example 8 (page 41) of D5. Said composition discloses an isotropic liquid laundry treatment composition comprising 45% of surfactant, 0.3% by weight of an unspecified fluorescer and 0.05% by weight of an unspecified blueing agent.

4. Technical problem

4.1 In the following assessment of inventive step the Board considers, for the sake of argument only but in favour of the Appellant, that in the light of D5/example 8 the technical problem to be solved by the invention is indeed merely to be seen in the provision of an alternative isotropic liquid laundry treatment composition suitable for maintaining and enhancing the white appearance of polyester comprising garments.

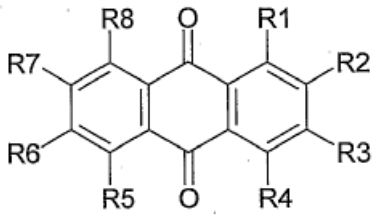
5. The solution

As the solution to this technical problem the patent in suit proposes the isotropic liquid laundry treatment composition according to claim 1, which is characterised *inter alia* in that it comprises the combination of a **fluorescer** selected from

- sodium 2 (4-styryl-3-sulfophenyl)-2H-naphthol [1,2-d]triazole,
- disodium 4,4'-bis{[(4-anilino-6-(N methyl-N-2 hydroxyethyl)amino 1,3,5-triazin-2-yl)]amino} stilbene-2-2' disulfonate,
- disodium 4,4'-bis{[(4-anilino-5-morpholino-l,3,5-triazin-2-yl)]amino} stilbene-2-2' disulfonate, and
- disodium 4,4'-bis(2-sulfostyryl)biphenyl,

and a **hydrophobic dye** selected from

- solvent violet 13,
- disperse violet 27 and
- an anthraquinone of the following structure (I):



(I),

wherein Rl, R4, R5, and R8 are independently selected from the groups consisting of -H, -OH, $-NH_2$ and $-NO_2$, such that a maximum of only one $-NO_2$ group and a maximum of two -H are present as Rl, R4, R5, and R8 substituents; and R2, R3, R6, and R7 is selected from -H, F, Br, Cl or $-NO_2$, and -Oaryl.

The Board remarks in this respect that solvent violet 13 and disperse violet 27 are both anthrachinone dyes very similar to the compounds according to formula (I) (see e.g. the formula of solvent violet 13 at the bottom of page 8 of the patent in suit: R1 = -OH, but R4 = -NH-p-methyl-phenyl). This was not in dispute.

6. Success of the solution

6.1 Reference examples 1 and 2 of the patent (paragraphs [0045] and [0046]) show that a laundry washing solution comprising the combination of one of the fluorescers according to claim 1 (listed as fluorescers to be used in paragraph [0042] of the patent), and a hydrophobic dye according to claim 1 (solvent violet 13) provides maintenance and enhancement of the white appearance of

the washed polyester garments. This is apparent from the increase of the delta E value of the polyester fabric (0.2 for the fabric washed without hydrophobic dye and from 2.2 to 8.3 for the fabric washed with the additional dye solvent violet 13).

6.2 Similar results are shown in reference example 3 with respect to a laundry washing solution containing a fluorescer (implicitly one from the list of paragraph [0042]) and various hydrophobic dyes according to claim 1 (i.e. Disperse Blue 56, second dye on page 7; solvent violet 13, last dye on page 8; Disperse Violet 26 and Disperse Violet 28, first two dyes on page 9), as shown by the increase, reported in the Table in paragraph [0050], in the values of "*Ganz*" whiteness, "*ΔE polyester*" and "*CT*" as compared to the control, which is a composition without hydrophobic dye (see also "Table - notes" on page 10, lines 7 to 15).

6.3 The Board is thus satisfied that the isotropic liquid laundry treatment compositions according to claim 1 at issue effectively solve the technical problem identified above and acknowledged by the Appellant. This was not in dispute.

6.4 Thus, it remains to be evaluated whether the skilled person, starting from the composition of example 8 of D5 and seeking to solve the technical problem posed, would arrive in an obvious way at a composition falling within the ambit of claim 1 at issue.

7. Non-obviousness of the solution

7.1 Document D5

7.1.1 Document D5 lists from page 22, line 20, to page 24,

line 28, fluorescers and blueing agents which are suitable for being used in the cleaning compositions described.

7.1.2 The skilled person, starting from the composition of D5/example 8 and seeking to solve the technical problem posed, would first of all consider trying as fluorescers and blueing agents the ones expressly listed in this document.

The Board remarks in this respect that, for example, the generic structural formula on page 23, line 15, encompasses disodium 4,4'-bis(2-sulfostyryl)biphenyl, one of the fluorescers listed in claim 1 at issue. This compound is a known fluorescer for laundry detergents (see e.g. document D6, page 94, first formula of table 19).

Therefore, the use of this known fluorescer in the composition of example 8 is certainly one option readily available to the skilled person.

7.1.3 As regards suitable blueing agents, D5 identifies two generic structural formulae. The formula on page 23, lines 30 to 35, stands for dyes which, according to the the definition of moiety D, may be (azo or) anthraquinone compounds (see page 24, lines 1 to 2) substituted with a triazinyl rest and comprising at least two sulphonic acid substituents (page 24, lines 15 to 16).

Such anthraquinone dyes differ from the dyes prescribed by claim 1 at issue in that they are substituted with an -NR-triazinyl group, which is itself substituted, for instance with hydrophilic moeities such as hydroxyl, sulfonic acid and/or carboxylic acid groups

(page 24, lines 2 to 9) and comprise at least two sulphonic acid substituents. Thus they are thus not necessarily hydrophobic.

7.1.4 The structural formula on page 24, lines 17 to 24, also stands for (azo or) anthraquinone dyes providing blue or purple colour (page 24, lines 25 to 26), substituted with a triazinyl rest substituted with two alkanolamine or hydroxyl groups (page 24, lines 26 to 28).

These dyes also differ from the ones according to claim 1 at issue in that they comprises a triazinyl rest and they are not necessarily hydrophobic.

7.1.5 Therefore, the skilled person, putting into practice example 8 of D5 by including one of the blueing agents suggested by D5 itself would not arrive at a composition according to claim 1 at issue.

7.2 Document D3

7.2.1 The Appellant submitted that the skilled person, looking for alternative anthraquinone blueing agents suitable for use within the composition of example 8 of D5, would take into the consideration the teaching of document D3.

7.2.2 However, document D3 is concerned with industrial exhaust and thermosol dyeing processes (page 20, line 43 to page 21, line 29), i.e. processes requiring other installations and process steps and conditions than a laundry treatment process. Considering these differences, and absent any pointer in this direction, the Board is not convinced that the skilled person, seeking to solve the technical problem posed, would consider the teaching of this document as a

potential reservoir of information of interest.

7.2.3 Is is thus of no particular relevance that D3 mentions

- that the exhaust process can be carried out at temperatures which overlap, at the lower end of the indicated, i.e. at 90 or 95°C (page 21, lines 1 to 2 and 16 to 17) with the range of temperatures at least theoretically applicable in a laundry washing process, and
- that the compositions disclosed in D3 may contain (see page 25, lines 19 to 23) fluorescers (1 to 40 wt-%) and blueing agents (0.001 to 0.1 wt-%) across a range of concentrations overlapping with the ones prescribed by claim 1 at issue and comparable with those of example 8 of D5 (0.3% fluorescer and 0.05% blueing agent).

7.2.4 Moreover, even though D3 discloses (page 20, lines 12 to 29) the use of a blueing agent ("Nuancierfarbstoff") for the whitening of polyester textile, which can be preferably disperse violet 28, i.e. a hydrophobic anthraquinone dye falling under formula (I) of claim 1 at issue, it requires (D3: page 1, line 6, to page 2, line 15; page 9, line 44, to page 11, line 16) the use of specific classes of fluorescers, which

- are not sulphonated and are, hence, different from those used in the laundry treatment composition of document D5 (page 23), and
- are not listed among the known fluorescers for laundry washing in D6 (pages 94 and 95).

Furthermore, the very general passage on page 9, lines 36 to 44 of D3, cited by the Appellant, apparently lists all known generic classes of fluorescers which

absorb at a wavelength of 280 to 400 nm. For the Board, this list would not incite the skilled person to even consider one of the other classes of fluorescers mentioned, let alone as a preferred class, since the use of the specific non-sulphonated fluorescers prescribed by claim 1 of D3 is clearly an essential feature of the invention disclosed in this document.

7.2.5 Therefore, the skilled person, even if he were to consider the content of D3, would not, without hindsight, be induced by the teaching of this document to envisage a combination of a hydrophobic dye and fluorescer as prescribed by claim 1 at issue in the laundry composition of example 8 of D5.

7.3 Hence, in the Board's judgement, providing a composition according to claim 1 at issue is not obvious in the light of documents D3, D5 and D6. Accordingly, there is no need to assess whether the available experimental data show a technical advantage over the closest prior art.

8. The subject-matter of claim 1 thus involves an inventive step. Consequently, the method of claim 8 which makes use of the inventive composition of claim 1, as well as the subject-matters of the dependent claims 2 to 7 and 9 to 10, also involve an inventive step (Articles 52(1) and 56 EPC).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

D. Magliano B. Czech

Decision electronically authenticated