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**Datasheet for the decision
of 23 February 2016**

Case Number: T 2533/12 - 3.3.06

Application Number: 04250560.2

Publication Number: 1561806

IPC: C11D3/37, C11D3/12

Language of the proceedings: EN

Title of invention:

A composition for use in the laundering or treatment of fabrics, and a process for making the composition

Patent Proprietor:

THE PROCTER & GAMBLE COMPANY

Opponent:

Henkel AG & Co. KGaA

Headword:

Laundering composition/P&G

Relevant legal provisions:

EPC Art. 52(1), 54, 84, 111(1), 123(2), 123(3)
RPBA Art. 12(4), 13(1), 13(3)

Keyword:

Novelty - Main Request (no) - First Auxiliary Request (yes)
Late-filed request - First Auxiliary Request - admitted (yes)
Amendments - First Auxiliary Request - allowable (yes)
Remittal to the department of first instance - (yes)

Decisions cited:

G 0003/14, T 0150/82

Catchword:



Beschwerdekammern
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Case Number: T 2533/12 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 23 February 2016

Appellant: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 15 November
2012 revoking European patent No. 1561806
pursuant to Article 101(3) (b) EPC.

Composition of the Board:

Chairman B. Czech
Members: G. Santavicca
C. Vallet

Summary of Facts and Submissions

I. The appeal lies from the decision of the Opposition Division to revoke European patent n° 1 561 806.

II. Claim 1 of the patent as granted reads as follows (emphasis added):

"1. A laundry detergent composition comprising:
i) an auxiliary composition for use in the laundering or treatment of fabrics, comprising an admix of clay and a silicone, wherein the auxiliary composition is obtainable by the process comprising the steps of:
a) contacting a silicone with water, and
***optionally an emulsifier**, to form a silicone in an emulsified form; and*
b) thereafter contacting the silicone in an emulsified form with a clay to form an admix of clay and a silicone in an emulsified form; and
ii) a deterative surfactant; and
iii) optionally, a flocculating aid; and
iv) optionally, a builder,
v) optionally, a bleach; and
vi) optionally, one or more adjunct component, and wherein the laundry detergent composition is in free-flowing particulate form."

III. The patent in suit was opposed on the grounds of lack of novelty and lack of inventive step (Article 100(a) EPC). The items of evidence relied upon during the opposition proceedings include:

D1: EP 0 483 411 A1;

D2: GB 2 230 022 A;

D4: Experimental Report filed on 16 December 2008; and,

D5: W.Herman de Groot et al., The Manufacture of Modern

Detergent Powder, Herman de Groot Academic
Publisher, 1995, Pages 43-82.

- IV. In the decision under appeal, the Opposition Division found that the composition of Claim 1 as granted lacked novelty over D2, for the following reasons:
According to D4, an experimental comparison was made between clays pre-treated with silicone in emulsified and neat form, respectively. The data presented did not allow a comparison between clays pre-treated with a silicone in emulsified form and in solution form (as used in D2), respectively.
The skilled person had no reason to assume that a product obtained according to the process defined in Claim 1 as granted would be different from a product according to Claim 7 of D2, and the Patent Proprietor had not discharged the onus, resting with him, of proving this.
- V. In its statement setting out the grounds of appeal dated 12 March 2013, the Patent Proprietor/Appellant defended the patent as granted. It nevertheless submitted a set of amended Claims 1-10 as First Auxiliary Request.
- VI. In its response, the Opponent/Respondent maintained novelty objections against both pending requests.
- VII. With its letter of 22 January 2016, the Appellant maintained its Main Request but filed four sets of amended claims as First to Fourth Auxiliary Requests, also indicating reasons for their late filing. Amended Claim 1 according to this First Auxiliary Request reads as follows (amendments made to Claim 1 as granted made apparent by the Board):

"1. A laundry detergent composition comprising:

i) an auxiliary composition for use in the laundering or treatment of fabrics, comprising an admix of clay and a silicone, wherein the auxiliary composition is obtainable by the process comprising the steps of:

*a) contacting a silicone with water, and optionally an emulsifier **that is an anionic deterative surfactant**, to form a silicone in an emulsified form; and"*

b) thereafter contacting the silicone in an emulsified form with a clay to form an admix of clay and a silicone in an emulsified form; and

ii) [...]."

Dependent Claims 2 to 10 concern particular embodiments of the composition according to Claim 1.

VIII. The parties were summoned to oral proceedings. In a communication issued in preparation therefor, the Board indicated its provisional opinion regarding some of the salient issues of the case.

IX. With a further letter dated 15 February 2016, the Respondent submitted the further item of evidence D8: Excerpt from Wikipedia concerning "Colloid mill", printout of 15 February 2016, maintained its novelty objections and argued that the new auxiliary requests were neither admissible nor clearly allowable, *inter alia* under Article 123(2) EPC.

X. Oral proceedings took place on 23 February 2016. The Appellant declared that the First Auxiliary Request submitted with the statement setting out the grounds of appeal was to be considered as its Fifth Auxiliary Request. The debate first focused on novelty over D2.

The parties were then heard regarding the admissibility of the First Auxiliary Request into the proceedings and the allowability of these amended claims. The Respondent expressly withdrew its objections under Article 123(2) EPC against the claims of the First Auxiliary Request. Finally, the parties were heard regarding the novelty of the subject-matter of Claim 1 of this claim request over D2 and D1.

XI. Final requests

The **Appellant** (Patent Proprietor) requested that the decision under appeal be set aside and that the case be remitted to the Opposition Division for further prosecution on the basis of the patent as granted (Main Request) or alternatively, on the basis of the claims according to one of the First to Fourth Auxiliary Requests filed with letter dated 22 January 2016 or according to the Fifth Auxiliary Request filed with the statement setting out the grounds of appeal as "First Auxiliary Request".

The **Respondent** (Opponent) requested that the appeal be dismissed.

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

Main Request - Novelty over D2 - Claim 1

Claim 1 as granted concerned a product, which was *inter alia* defined in terms of product-by-process features. D2 disclosed such a product. The process for preparing it described in Example 3.3.1 of D2 involved the use of an organic solvent. This process was difficult to carry out on a commercial scale, as it required the removal of

all solvent (environmental concern) using high temperatures for a long time, thereby lowering the molecular weight of the silicone. The observations by the Respondent that silicones are particularly stable at high temperature were not convincing, as in the instances mentioned the silicone was not combined with clay. In the present case, clay was agglomerated with silicone, and it was known that clay was a support material which promoted hydrolysis of silicone upon heating, thus lowering the molecular weight of the silicone. Instead, in the "*auxiliary composition*" included in the composition of Claim 1 as granted, the molecular weight of the silicone was maintained, and the softening properties thereby improved. This was the novelty-imparting difference between the claimed composition and that of D2. The arguments on the lowering of the molecular weight of silicone had not been submitted in writing before, but they merely explained the improved softening effect already addressed in D4. The need to avoid high temperatures, hence the use of chloroform, was the reason why "neat" silicone had been used in D4. This was an appropriate comparison. Contrary to the findings in the decision under appeal, D4 showed the distinctive difference, in terms of softness benefit achieved, using, respectively, silicone/clay admixes according to the present invention, and a silicone solution as in D2. Hence, the fact that D2 did not disclose the use of a silicone emulsion was important, not the fact that silicone was used in neat form.

The Respondent had not discharged its burden of proving that the products according to Claim 1 as granted would be indistinguishable from the products disclosed in D2. Thus, the subject-matter of Claim 1 was novel over D2.

First Auxiliary Request - Admissibility

The new auxiliary claim requests were only filed late due to a surprising development at the oral proceedings before the Opposition Division. The amended claims according to the First Auxiliary Request were, moreover, only based on the claims as granted and did not raise any new issues. The Respondent's objections against the admissibility were not convincing, as the Respondent had already commented on the auxiliary claims requests one week before the oral proceedings. Together with this request, arguments regarding novelty were also provided since the Respondent had also considered D1 to be relevant in this respect, and despite the fact that D1 was not dealt with in the decision under appeal. Hence, procedural economy was safeguarded, and no new search was needed. Thus, the First Auxiliary Request should be admitted into the proceedings.

First Auxiliary Request - Allowability of the amendments

The amended claims were in compliance with Articles 84 and 123(2) and (3) EPC. Claim 1 was based on original Claims 2 (auxiliary composition), 16 (laundry composition), 19 (free-flowing particulate form) and 11 (anionic detergent surfactant). The "anionic detergent surfactant" was preferred, as apparent from page 9, lines 8-9, of the application as filed. The original examples illustrated embodiments of the claimed product. The new claimed subject-matter was clearly based on the combination of features of original mutually dependent claims, and actually represented preferred embodiments disclosed originally. The examples of the application as filed illustrated species thereof. The claimed subject-matter did not involve any undisclosed selection.

First Auxiliary Request - Novelty over D2 and D1

Claim 1 (feature i)a) of the First Auxiliary Request required the use of an emulsifier in the first step of preparing the "*auxiliary composition*", and further specified the nature of that emulsifier.

This was not directly and unambiguously disclosed in D2, which only generally hinted at the possibility of combining siloxane and anionic surfactants, without however specifically disclosing their joint use. Hence, the claimed subject matter was novel over D2.

D1 disclosed various alternative methods, surfactants and end-products. However, a detergent composition falling under Claim 1 at issue was not directly and unambiguously disclosed therein. The compositions of Examples I and II to XII were prepared by dry-mixing agglomerated clay/siloxane granules, prepared by agglomerating clay and siloxane with water as agglomerating aid, with the other detergent granules. The composition of Example XV was liquid. However, liquid compositions, generally disclosed on page 7 of D1, did not fall under Claim 1. Hence, none of the preparations illustrated in D1 used the "integral process" (all components mixed and dried at once, implying intimate mixing of anionic surfactants and silicone with water) disclosed by D1 and particularly invoked by the Respondent. Consequently, D1 did not anticipate the claimed subject-matter.

Remittal

If the claims of the First Auxiliary Request were found to meet the novelty requirement, the case should be remitted to the Opposition Division for the examination

of inventive step, as no conclusions had been reached in the decision under appeal in this respect.

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

Main Request - Novelty over D2 and D1 - Claim 1

D4 was not suitable to establish that the products obtainable as defined in Claim 1 (mixing clay with aqueous siloxane emulsion) were different from the products obtained according to D2 (applying a solution of siloxane solution to clay). D4 did not provide an comparative example of a clay-silicone mix obtained using a solution or an aqueous silicone-clay mixture free of LAS. D4 rather appeared to confirm that the method claimed and the method of D2 led to the same products. In any case, D2 also mentioned the objective of the patent in suit, namely to coat the clay, in order to create a barrier. The solvent only served the purpose of bringing the siloxane into solution. This solution worked in the same way as an emulsion as regards the deposition of the silicone. Also, the patent in suit (paragraph [0024] did not exclude the presence of further solvents with water, and even hydrolysed silicones still fell under Claim 1 at issue. The subject-matter of Claim 1 thus lacked novelty over D2.

The new argument regarding the high-temperature instability of the siloxane was brought forward for the first time during the oral proceedings. It could thus not be dealt with during the oral proceedings, as the Respondent's representative would have needed to contact its technical experts on this matter. It was, however, to be noted that Claim 1 at issue was open to any operating conditions, i.e. high temperatures were not

even excluded. Claim 1 only required that the "*auxiliary composition*" was "*obtainable by ...*" and thus covered the option of contacting the clays at any point during the process. Moreover, according to paragraph [0024] of the patent in suit, "*other solvents*" than water could also be used. So the Respondent's argument referring to difficulties related to a necessary removal of organic solvent was not justified considering the wording of Claim 1.

First Auxiliary Request - Admissibility

The First Auxiliary Request should not be admitted. Its late filing, only prompted by the change of representative, surprised and disadvantaged the Respondent. The new claim request should have been filed before. Instead, before the Opposition Division, the patent Proprietor withdrew its auxiliary request, thereby preventing a debate and a decision. According to case law, even the introduction of a dependent claim into the main claim might be inadmissible. The fact that Claim 10 had been previously attacked by the Respondent played no role. Since D2 did not disclose the use of a surfactant as now claimed, the Respondent had had no chance to react to this new complex issue arising due to this amendment to Claim 1, let alone without considering/searching for further prior art. Moreover, the Appellant had not argued novelty over D1 before filing this request, although D1 too was relevant. Hence, sufficient preparation for providing counter-arguments against the new claim request in the light of D1 had not been possible. The late filing of the new claim request, without any justification as to why it could not have been filed with the statement setting out the grounds of appeal, was thus a procedural abuse, not justifiable by the mere change of representative.

First Auxiliary Request - Novelty over D2 and D1

D2 disclosed (Claim 1; Page 2, lines 5-12, Sections 2.2 and 3.3.1) that the barrier material used to coat the clay might be "one or more materials" selected from *inter alia* siloxane and (alkoxylated) dialkyl citrates, the latter being anionic surfactants. The skilled person thus unequivocally gathered from D2 that siloxane and anionic surfactants could be used in combination. In particular, Example 3.3.1 illustrated that siloxane and ethoxylated dioctadecyl citrate were preferred barrier materials (A and B, respectively) which, in line with the statement on page 2, line 12, of D2 ("one or **more** materials"), could suitably be used in combination. Therefore, D2 took away the novelty of the laundry detergent composition of Claim 1 at issue.

D1 disclosed detergent compositions comprising an "intimate mixture" of softening clay and siloxane. According to an embodiment, these could be agglomerated together from a slurry, e.g. by spray-drying. According to D5, illustrating common general knowledge regarding spray-drying, such an agglomerate met any limitations imposed by product-by-product features a) and b) of Claim 1. The detergent composition of D1 also contained a deterative surfactant, in particular an anionic surfactant. Adding the latter, together with clay and siloxane and all other ingredients, in the "integral" process for making the detergent composition disclosed in D1, resulted inevitably in a composition with all the features of Claim 1 at issue. In view of such "integral" preparation, D1 too was novelty destroying. Also the compositions prepared according to Examples XIII and XV of D1 met any limitations implied by the process steps defined in Claim 1 at issue. In the course of the preparation process described in D1, an emulsion between

silicone and water was inevitably formed, as proven by D8. D1 moreover hinted at combining further components including silicones for providing aesthetic or additional product performance benefits. So the compositions of Claim 1 could not be distinguished from those of D1.

Reasons for the Decision

Main Request - Novelty - Claim 1

1. Claim 1 as granted concerns a "*laundry detergent composition*" comprising as one of its components, an "*auxiliary composition*", which is *inter alia* defined in terms of its process of preparation, as follows (emphasis added):
*"wherein the auxiliary composition is **obtainable by the process** comprising the steps of:*
 - a) *contacting a silicone with water, and optionally an emulsifier, to form a silicone in an emulsified form; and*
 - b) *thereafter contacting the silicone in an emulsified form with a clay to form an admix of clay and a silicone in an emulsified form".*

Hence, Claim 1 at issue is, at least in part, a product-by-process type claim.

2. According to established case law of the Boards of Appeal of the EPO since T 150/82 (OJ EPO 1984, 309), that the claimed product itself, defined in terms of product-by-process features, must fulfil the patentability requirements including novelty.

Novelty

3. In the decision under appeal, the subject-matter of Claim 1 as granted was found to lack novelty over D2. For the following reasons, the Board has no reason to call this finding into question:

3.1 D2 discloses (Claims 1 and 7) a detergent powder formulation (i.e. "*free-flowing particulate*" within the meaning of claim 1 at issue) comprising a surfactant and a clay. The clay is pre-treated with a siloxane (i.e. "*silicone*") as a "barrier" material, or with a siloxane containing functional groups, which (according to Claim 7 of D2) can be a poly(dialkyl)siloxane including ethoxylated/propoxylated functional groups.

As regards said pre-treatment of clay with siloxane", D2 discloses in particular that the siloxane can be spray-coated onto the clay neat or from a suitable solvent (i.e. in form of a solution), followed by evaporation of the solvent (Page 7, lines 14-18 and 22-26). Moreover, Example 3.3.1 describes *inter alia* the dissolution of a siloxane ("Product A": page 8, section 2.1), followed by the addition of bentonite clay. The solvent was evaporated from the mixture, followed by oven drying of the clay for 2 hours at 70°C. Any lumps of clay were ground to a fine powder.

3.2 The patent itself comprises no element of information permitting to conclude that a laundry detergent comprising a clay/silicone agglomerate obtained by using an emulsion of whatever stability and homogeneity, comprising only silicone and water, can actually be distinguished (in terms of at least one property) from a laundry detergent composition obtained using a clay/

silicone agglomerate obtained as disclosed in D2, i.e. using a solution of the siloxane in chloroform.

3.3 The Board also holds that there is no evidence on file as regards common general knowledge possibly making it plausible that a laundry detergent composition comprising a clay/silicone agglomerate obtained by the process defined in Claim 1 as granted would be different from a laundry detergent composition comprising an agglomerate clay/silicone according to Claim 7 and Example 3.3.1 of D2.

3.4 Considering the decision taken by the Opposition Division, the onus to prove that there are differences between the composition of claim 1 and the composition disclosed in D2, more particular as regards the auxiliary clay/silicone component, rests with the Appellant. To this end, the Appellant referred to the data presented in D4, but also put forward some further arguments at the oral proceedings.

3.5 Lack of relevance of experimental report D4

3.5.1 In experimental report D4, agglomerates ("softening composition") were prepared by mixing clay with silicone in emulsified form or silicone in neat form, followed by drying. In both cases, similar amounts of "LAS" (linear alkylbenzene sulphonate) were also incorporated.

3.5.2 D2 does not disclose the use of an emulsifier in producing the agglomerate by mixing clay with silicone in a chloroform solution (example 3.3.1 of D2). The comparative agglomerate of D4 (addition of neat silicone and of LAS) is not comparable with the agglomerate illustrated in Example 3.3.1 of D2 (siloxane dissolved in chloroform, no LAS added). Hence, in D4, no

comparison is made between the use of a silicone emulsion and of a silicone solution.

3.5.3 Hence, the Board is not convinced that the experimental data presented in D4 allow drawing the conclusion that any agglomerate of clay pre-treated with a silicone in any emulsified form whatsoever (e.g. with or without emulsifier, water-in-silicone or silicone-in-water, poor or good degree of dispersion) necessarily differs, in term of its properties, from an agglomerate obtained by contacting a clay with a silicone provided in form of a solution as illustrated in Example 3.3.1 of D2.

3.5.4 The Board thus concludes that the Appellant did not discharge the onus of proof resting with it in this respect.

3.6 New arguments not admissible

3.6.1 At the oral proceedings before the Board, for the first time ever, the Appellant brought forward further arguments regarding the products described in Example 3.3.1 of D2. It conceded that these arguments had not been submitted in writing before, but argued that they reflected the softening effect data presented in D4 and were thus only further explanation regarding evidence already submitted earlier. In particular, without presenting any corroborating evidence, it argued that since the removal of the organic solvent used in D2 required high temperatures for a long time, the silicone molecular weight was lowered in the presence of clay as a support. Thus the softening benefits achievable with such a material were reduced and hence different from those achieved according to the invention.

3.6.2 These fresh arguments took both the Respondent and the

Board by surprise. However, in this connection it is to be noted *inter alia* that D2 does not disclose that particularly high temperatures are needed to evaporate the rather volatile chloroform solvent, and that the temperature of 70°C, used in the subsequent (final) oven drying, is not particularly high either. Moreover, Claim 1 at issue does not define any limiting operating conditions (in terms of a maximum temperature) for evaporating the water used for producing the emulsion.

- 3.6.3 The Board thus accepts that the Respondent could not properly take position in this respect without prior consultation with a technical expert.
- 3.6.4 Since said fresh arguments raised issues never dealt with before that could not be dealt with without adjourning the oral proceedings, the Board decided not to admit them into the proceedings (Articles 12(4) and 13(1)(3) RPBA), and hence to disregard them all together.
- 3.6.5 As a corollary of the above, in the Board's judgement, the subject-matter of Claim 1 as granted lacks novelty (Article 52(1) and 54(1)(2) EPC).
- 3.6.6 Consequently, the Appellant's Main Request is not allowable.

First Auxiliary Request - Admissibility

4. Considering that at the oral proceeding, the Opposition Division departed from the provisional view regarding novelty as expressed in its earlier communication, the Board accepts that the filing of the request at issue can be considered as a reaction to the detailed grounds provided in the decision under appeal.

4.1 The objection, by the Respondent, that the patent Proprietor had withdrawn its auxiliary request before the Opposition Division is not convincing. Said withdrawn request differs from the First Auxiliary Request at issue. The further objection that it would be disadvantaged by this late filing is also not convincing, as it should have expected that the Appellant would defend its patent within the framework of the granted claims. In this connection the Board also notes that the Respondent, in its reply to the Appellant's brief with which the new claim request was filed, considered novelty over D1 with respect to Claim 1 of the Main Request and thus also had the opportunity to provide comments regarding Claim 1 of the new First Auxiliary Request.

4.2 The amendment to Claim 1 is, moreover, most straightforward. It renders mandatory the use of an emulsifier (expressly optional according to Claim 1 as granted). The nature of that emulsifier ("*anionic deterative surfactant*") by incorporating the features of dependent claim 10 as granted.

This amendment serves the purpose of distinguishing the claimed subject-matter from the disclosure of D2, hence to address the grounds of the decision under appeal.

4.3 Hence, the Board holds that the filing of the First Auxiliary Request does not raise any complex issues not previously addressed, and that it could thus be dealt with during the oral proceedings without disadvantaging the adverse party.

4.4 Therefore, despite its late filing, the Board decided to admit the First Auxiliary Request into the proceedings (Articles 12(4) and 13(1)(3) RPBA).

First Auxiliary Request - Allowability of the amendments

5. Nature of the amendments

5.1 In Claim 1, the presence of an emulsifier in the first step of producing the auxiliary composition is mandatory, whereas it was only optional according to Claim 1 as granted. The only feature additionally inserted into Claim 1, namely that the emulsifier is an "anionic deterative surfactant" stems from Claim 10 as granted, now deleted, which was dependent on *inter alia* Claim 1.

5.2 Claims 12 to 16 as granted are deleted, the other claims as granted (Claims 2-9 and 11) remain unchanged, except for the re-numbering of granted Claim 11 (now Claim 10).

6. In the Board's judgement, the amended claims are not objectionable under Article 84, 123(2) or 123(3) EPC.

6.1 Article 123(3) EPC

Compared to Claim 1 as granted, Claim 1 at issue is of more limited ambit and thus complies with the requirements of Article 123(3) EPC. This was not in dispute.

6.2 Article 123(2) EPC

6.2.1 Allowability of the amended claims under Article 123(2) EPC was ultimately no longer disputed at the oral proceedings. The Board is satisfied that amended Claim 1 finds basis in claims 2 (definition of the "auxiliary composition"), 16 (defining the "laundry detergent composition" including the auxiliary composition) and 19

("free-flowing particulate form" of said composition) of the application as filed.

6.2.2 Moreover, the application as filed generally discloses that the most preferred emulsifier is an anionic deterative surfactant (page 9, lines 8-9) and that the laundry detergent composition is preferably in free-flowing particulate form (page 13, lines 10-11). The combination of all the features of claim 1 at issue is also illustrated in examples 1 to 7.

6.2.3 The claimed subject-matter is thus not the result of some undisclosed, let alone multiple, selection(s) within the whole content of the application as filed.

6.3 Article 84 EPC

Since the wording of amended Claim 1 is made up of wording as granted only (Claims 1 and 10), no such objection arises (G 3/14, OJ EPO 2015, A102).

First Auxiliary Request - Novelty

7. Document D2

7.1 D2 (point 3.1 et seq., *supra*), does not disclose a laundry detergent composition comprising an agglomerate formed by contacting clay with a silicone emulsion that is made using an anionic deterative surfactant. More particularly, after the evaporation of the solvent, the agglomerate of D2 consists of clay and silicone only, whilst the agglomerate according to Claim 1, after evaporation of the non-silicone aqueous phase, is made up of clay, silicone and the emulsifier.

8. Document D1

8.1 D1 concerns (Claims 1 and 16) a laundry detergent composition comprising at least one surfactant and a fabric treatment composition, which is a fabric softening treatment composition comprising *inter alia* a softening clay and a polysiloxane. The fabric treatment (softening) composition can be in form of an aqueous dispersion (Claim 12), or in the form of granular agglomerates (Claim 14), as described in more detail on pages 7 and 8 of D1.

8.2 D1 requires "intimate" mixing of the silicone and clay (page 2, lines 25 and 29; page 11, line 1). Example I of D1 (see in particular the paragraph bridging pages 10 and 11), illustrates the preparation of a silicone/clay agglomerate, using water as agglomerating aid. The use of an emulsifier is not mentioned in this connection. Although water is used as agglomeration aid in the mixing described in D1 (Examples I to XII), a water/siloxane emulsion possibly formed during this mixing operation would thus not contain any emulsifier, let alone of the type "*anionic deterative surfactant*". Hence, the intimate mixing of silicone and clay according to Example 1 does not imply the preparation of a preformed silicone/surfactant/water emulsion, let alone the use of an anionic deterative surfactant.

8.3 The Respondent also brought forward that on Page 8, lines 26 to 31, D1 disclosed that the laundry detergent composition, which may include anionic deterative surfactants, might be prepared by bringing together the deterative compound and the fabric treatment composition in an "integral process", i.e. by agglomerating all components at once from a slurry by e.g. spray-drying (page 8, lines 12-13). In that case, the anionic

surfactant such as linear alkylbenzene sulphonate (page 8, line 37) would inevitably contact the mixture of silicone and water in the slurry and form an emulsion.

- 8.3.1 The Board notes that the passages referred to by the Respondent refer either to the liquid detergent composition or to the solid detergent composition (page 8, line 22). As regards the granular detergent composition, the "integral process" is not further detailed. Also there is no disclosure of anionic surfactants to be used in some liquid phase mixing, let alone for forming an emulsion (see page 11, line 5).
- 8.3.2 Hence, this argument of the Respondent is retrospective and, thus, not convincing.
- 8.3.3 Example XIII and, particularly, Example XV of D1, also invoked by the Respondent, mention that a "colloid mill" was used to prepare the silicone/clay "intimate mixture". However, the detergent compositions prepared are liquid and, hence, not in a "*free-flowing particulate form*" as required by Claim 1 at issue. Moreover, these Examples do not disclose either the use of an anionic surfactant for producing an aqueous silicone emulsion to be contacted with the clay. In fact, in Example XIII, only clay, water and siloxane are mixed under strong agitation, thus forming an aqueous dispersion of clay and silicone without any emulsifier. According to Example XV, an unspecified "anti-settling agent" was included in an aqueous dispersion siloxane and clay. The "anti-settling agents" mentioned in D1 do not appear to qualify as emulsifiers, but in any case are not deterative anionic surfactants (D1: page 7, lines 23-49).
- 8.3.4 Thus, in the Board's judgement, D1 does not disclose a

composition with all the features of Claim 1 either.

9. The subject-matter of claims 1 to 10 according to the First Auxiliary Request is thus novel over D1 and D2 (Articles 52(1) and 54(1)(2) EPC.

Remittal

10. Inventive step is not dealt with in the decision under appeal. The Board thus considers it appropriate to remit the case to the department of first instance for consideration of outstanding issues, such as inventive step, in accordance with the Appellant's request to this end. The Respondent raised no objection in this respect.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated