Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 12 August 2015

Case Number: T 0052/13 - 3.3.06

Application Number: 05771350.5

Publication Number: 1794274

IPC: C11D3/40

Language of the proceedings: EN

Title of invention:
LAUNDRY TREATMENT COMPOSITIONS

Patent Proprietor:
Unilever PLC / Unilever N.V.

Opponent:
The Procter & Gamble Company

Headword:
Shading with hydrolysed reactive dye
/UNILEVER

Relevant legal provisions:
EPC Art. 52(1), 56, 111(1), 113(1), 123(2), 123(3), 114(2)
EPC R. 80
RPBA Art. 13(1), 13(3)

Keyword:
Late filed claim requests - admissibility (yes - main and first auxiliary requests)
Remittal to the department of first instance for further prosecution (no)
Right to be heard - violation (no)
Amendments - extension of protection conferred (yes) - added subject-matter (no - first auxiliary request)
Inventive step - (yes - first auxiliary request)

Decisions cited:
T 2017/07, T 1312/08, T 0262/13

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0052/13 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 12 August 2015

Appellant: (Opponent)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnatti, Ohio 45202 (US)
Representative:	Clarke, Lionel Paul Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)
Respondent: (Patent Proprietor)	Unilever PLC Unilever House Blackfriars London Greater London EC4P 4BQ (GB) Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	Webster, Jeremy Mark Mewburn Ellis LLP City Tower 40 Basinghall Street London EC2V 5DE (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 31 October 2012 concerning maintenance of the European Patent No. 1794274 in amended form.**

Composition of the Board:

Chairman	B. Czech
Members:	E. Bendl
	C. Heath

Summary of Facts and Submissions

I. The appeal by the opponent lies from the interlocutory decision of the opposition division concerning maintenance of the European patent No. 1 794 274 in amended form.

II. Independent claims 1 and 10 according to the then pending main request held allowable by the opposition division read as follows (features appended to claim 1 as granted highlighted by the board):

"*1. A laundry treatment composition comprising between 0.0001 to 0.1 wt% of a hydrolysed reactive dye and between 2 to 60 wt% of a surfactant*, **wherein the hydrolysed reactive dye comprises a chromophore moiety covalently bound to an anchoring group, the anchoring group for binding to cotton, the anchoring group selected from the group consisting of: a heteroaromatic ring having at least one -OH substituent covalently bound to the heteroaromatic ring, and SO2-CH2-CH2-OH.**"

"10. *A method of treating a textile, the method comprising the steps of:*
i) treating a textile with an aqueous solution of a hydrolysed reactive dye as defined in any one of the preceding claims, the aqueous solution comprising from 10 ppb to 1 ppm of the hydrolysed reactive dye and from 0.2 g/L to 3 g/L of a surfactant; and,
ii) rinsing and drying the textile."

III. The opposition division concluded that the claimed subject-matter met the requirements of the EPC. More particularly, detailed reasons were given as to the compliance of the claims with Rule 80 EPC, Articles 123(2),(3) and 83 EPC, as well as regarding novelty and

inventive step. The opposition division considered the following prior art documents having regard to the issue of inventive step:

D1: US 3 762 859 A and

D2: Industrial Dyes, K. Hunger (ed.), 2003, cover pages and pages 113-114)

IV. With its statement of grounds, the appellant (opponent) filed the following further prior art documents:

D15: Textile Chemist and Colorist, vol.28, No. 1, 1996, cover page and pages 38 - 42,

D16: Textile Chemist and Colorist, "Effects of Dye Substantivity in Dyeing Cotton with Reactive Dyes", November 1991, pages 21 - 27 and

D17: GB 2 094 826 A.

The appellant argued that the opposition division had erred in its judgement, as the claims held allowable did not meet the requirements of Rule 80 and Article 123(3) EPC. Moreover, the claimed invention was insufficiently disclosed, lacked novelty over one of the cited documents (labelled D8) and was obvious considering D17 or D1 as the closest prior art, *per se* or, when starting from the latter document, in combination with D15 or D16.

V. In its reply of 10 June 2013 the respondent (patent proprietor) rebutted the appellant's arguments and defended the patent in the version considered allowable by the opposition division (main request). It

nevertheless submitted three sets of further amended claims as auxiliary requests 1 to 3.

VI. The appellant, in its letter of 12 September 2013, presented further arguments, referring *inter alia* to the following newly cited documents:

D18: Chemistry of the Textiles Industry, 1995, First edition, C. M. Carr (ed.), cover pages and pages 169, 171 and 172) and

D19: DE 20 62 163 A.

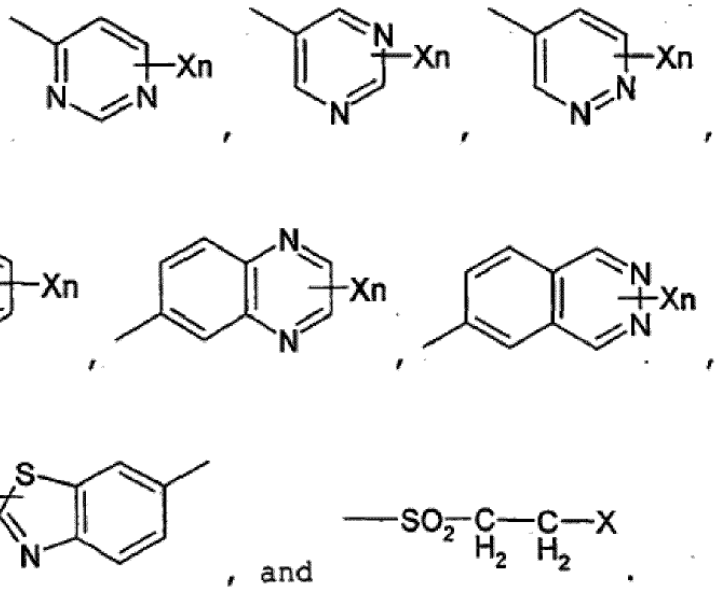
It raised *inter alia* additional novelty and inventive step objections on the basis of D19. Furthermore, it extended the objections raised with regard to the main request to the claims according to the pending auxiliary requests.

VII. The parties were summoned to oral proceedings.

VIII. With letter of 6 August 2015, the respondent filed two amended sets of claims as new main and auxiliary requests, replacing all the requests previously on file, rebutting once more the appellant's arguments.

IX. Independent claim 1 according to said new main request differs from claim 1 held allowable by the opposition division (II, *supra*) in that the definition of the anchor group was amended as follows:

"*1. A laundry treatment composition comp*rising ..., the anchoring group for binding to cotton, **wherein the anchor group is selected from**:



wherein:

n takes a value between 1 and 3;
X is selected from the group consisting of: -Cl, -F, NHR, a quaternary ammonium group, -OR and -OH;
R is selected from: an aromatic group, benzyl, a C1-C6-alkyl; and, wherein at least one X is -OH."

Except for its numbering, independent claim 8 is identical to claim 10 held allowable by the opposition division (point II, *supra*).

Dependent claims 2 to 7 and 9 are directed to more specific embodiments of the composition and method according to, respectively, claims 1 and 8.

X. In its letter of 7 August 2015 the respondent contested the admissibility of these amended claim requests. It confirmed its attendance at the oral proceedings but reserved the right to request costs.

XI. Oral proceedings took place as scheduled on

12 August 2015, attended by the representatives of both parties.

The appellant contested the admissibility of all pending claim requests into the proceedings in view of their late filing and requested that in case of their admittance the case be remitted to the first instance for further prosecution and costs be awarded against the respondent, as the oral proceedings before the board would have become pointless.

The board admitted the pending main request as well as the following document, filed by the appellant in the course of the subsequent debate on inventive step:

D20: pages 115 and 116 of document D2 (see point III, *supra*)

The parties were heard regarding compliance of the claims according to the main request with the requirements of *inter alia* Rule 80 and Article 123(3) EPC.

In reaction to the board's view regarding non-compliance of the claims according to the main request with the requirements of Article 123(3) EPC, the respondent filed a further amended set of claims as new first auxiliary request.

Despite an objection by the appellant, the board also admitted this request into the proceedings.

Regarding this request, the appellant did expressly no longer invoke Article 123(3) EPC, but raised objections under Article 123(2) EPC, and argued that the objections and arguments regarding Rule 80 EPC and

inventive step presented with regard to the main request also applied to this request. The appellant expressly stated that no objections were maintained against this request regarding novelty or sufficiency of disclosure.

XII. The claims according to the new first auxiliary request filed at the oral proceedings differ from those according to the main request at issue in that the following wordings were appended to claims 1 and 8, respectively:

Claim 1: "... *with the proviso that the composition does not comprise more than 0.1 wt% hydrolysed reactive dye*".

Claim 8: "... *with the proviso that the aqueous solution does not comprise more than 1 ppm hydrolysed reactive dye*".

XIII. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent No. 1 794 274 be revoked.

The respondent (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained based on the main request as filed with letter of 6 August, the first auxiliary request as filed during the oral proceedings, or the auxiliary request as filed with letter of 6 August 2015.

XIV. The arguments of the **appellant** of relevance here can be summarised as follows:

Main request

Admissibility

- The main request was only filed six days before the oral proceedings.
- It was thus filed very late and did not, moreover, clearly overcome the objections raised. Hence, it should not be admitted into the proceedings.

Rule 80 EPC

- The wording "*is of the form*" (see claim 4 as granted) was amended to read "*is selected from*".
- Since this amendment was not occasioned by a ground for opposition, the requirements of Rule 80 EPC were not met.

Article 123(3) EPC

- Claim 1 covered embodiments which were not covered by claim 1 as granted.
- Since claim 1 extended the protection conferred by the patent as granted, the requirements of Article 123(3) EPC were not met. In this connection, reference was made to decisions T 1312/08 of 30 April 2010 and T 2017/07 of 26 November 2009.

Inventive step

- At the oral proceedings, the following arguments were presented:
- D19 was the closest state of the art.
- The claimed subject-matter was obvious in the light of document D19, taken on its own or in combination with common general knowledge as

illustrated by documents D18, D15, D16 and/or D2/ D20.

First auxiliary request

Admissibility

- This request was filed even later than the main request and did also not clearly meet the requirements of the EPC. In particular, the subject-matter of claims 1 and 8 as amended extended beyond the content of the application as filed.
- Therefore, *a fortiori*, this request should also not be admitted.

Rule 80 EPC

- The objection raised with regard to the main request applied *mutatis mutandis*.

Article 123(2) EPC

- The wording of amended claim 1 allowed the presence of further (undefined) hydrolysed dyes in addition to the ones characterised by the listed anchoring groups. The resulting combination of features was not originally disclosed.
- Amended claim 8 was objectionable for the same reason but, in addition, the combination of the selected hydrolysed dyes listed in claim 1, to which claim 8 referred to, with the range "*10 ppb to 1 ppm*" was not disclosed in the application as filed.
- The requirements of Article 123(2) EPC were therefore not met.

Inventive step

- The reasoning concerning the lack of inventive

step presented with regard to the main request applied *mutatis mutandis*.

Right to be heard - Remittal

- Due to the submission of amended sets of claims at a very late stage of the proceedings, there had not been sufficient time to contact the in-house attorney of the appellant, the representative was thus left to "*guess on technical issues*". Assessing the necessity of, and possibly performing, further comparative tests and/or an additional prior art search had not been possible.
- If one of the pending requests were to be admitted into the proceedings, remittal of the case to the opposition division for further prosecution as well as apportionment of costs would be appropriate.
- The admission and consideration of the requests at issue was considered unfair, and the appellant's right to be heard regarding the issue of inventive step had not been respected.

The arguments of the **respondent** of relevance here can be summarised as follows:

Main request

Admissibility

- The claim request was filed late due to "internal problems" on the respondent's side. The amendments made could, however, not surprise the appellant, as they constituted a foreseeable response to the submission of late-filed document D19 and the objections based thereon.

- The amendment was straightforward and supposed to "streamline the oral proceedings".
- Claim 1 of the main request was essentially a combination of claims as granted, the features incorporated into claim 1 were not taken from the description.
- The request should thus to be admitted into the proceedings.

Article 123(3) EPC

- The expression "*of a hydrolysed reactive dye*" in claim 1 as granted encompassed all hydrolysed reactive dyes present in the laundry treatment composition.
- Nevertheless, claim 1 of the main request did not extend the protection conferred. In particular, the present situation was comparable to the one in decision T 0262/13 of 29 January 2015, where the board had decided that the requirements of Article 123(3) EPC were met.

Rule 80 EPC

- The amendments to claim 1 were occasioned by grounds for opposition, since they served to overcome the appellant's novelty objection based on D19.
- The requirements of Rule 80 EPC were therefore met.

Inventive step

- D19 was the closest state of the art.
- The problem vis-à-vis D19 was the providing of an alternative laundry treatment composition.
- The teaching of D19 explicitly discouraged the skilled person from using other dyes for shading cotton than the ones cited in this document.

"Shading" was not to be equated to "dyeing".

- Therefore, even taking into account the further documents cited by the appellant, i.e. D2/D20, D15, D16 and/or D18, which related to dyeing, the skilled person would not be directed towards the claimed invention in an obvious manner.
- The claimed subject-matter thus involved an inventive step.

First auxiliary request

Admissibility

- The first auxiliary request was admissible for essentially the same reasons as the main request.
- The additional insertion of the two provisos into claims 1 and 8 had already been proposed twice in the written procedure as an envisaged remedy to the objections under 123(3) EPC. The filing of such a request was thus foreseeable.
- This claim request should therefore also be admitted into the proceedings.

Rule 80 EPC

- The arguments presented with regard to the main request applied *mutatis mutandis*.

Article 123(2) EPC

- Claim 1: In addressing the requirements of Article 123(3) EPC (regarding the main request) the appellant argued that more than one hydrolysed dye could be present in the claimed laundry treatment composition. Therefore appellant's objections to claims 1 and 8 that the possible presence of more than one hydrolysed dye represented added matter was unfounded.
- The further objection concerning claim 8, that the

combination of the claimed concentration range with the list of anchoring groups of the hydrolysed dyes had not been originally disclosed, was also unfounded, as claim 11 of the application as filed already contained this range.

- The requirements of Article 123(2) EPC were met.

Inventive step

- The reasoning presented with regard to the main request applied *mutatis mutandis*.

Reasons for the Decision

Procedural issues

1. Admissibility of the respondent's claim requests

1.1 Main request

The set of claims according to the main request at issue was filed only six days before the date of the oral proceedings. Its admissibility into the proceedings is thus subject to the board's discretion (Article 13(3) RPBA).

1.1.1 In deciding on the admissibility of this request, the Board considered the following specific circumstances and aspects of the case:

i) In its statement of grounds of appeal of 13 February 2013, the appellant relied for the first time on three additional, newly cited documents, which it considered to be highly relevant as regards inventive step.

ii) With its letter of 13 September 2013, the appellant

submitted two further references, including prior art document D19 found upon "reviewing the art", raising novelty and inventive step objections based on the latter.

iii) The filing of the very relevant document D19 thus occurred at a late stage of the appeal proceedings, but was not objected to by the respondent and therefore admitted into the proceedings and considered by the board (Article 114(2) EPC and Article 13(1) RPBA).

iv) The amendment made to claim 1 considered allowable by the opposition division consists in defining more narrowly the anchor groups of the type comprising a "*heteroaromatic ring*", by additionally incorporating all - except one - alternative structural definitions taken from a dependent claim (claim 4 as granted).

The board considered this amendment as a straightforward, logical and foreseeable reaction to the objections based on late-filed document D19, *prima facie* overcoming at least the novelty objection based on the latter, and thus potentially contributing to the convergence of the debate on patentability.

v) Moreover, the board did not consider that some new and/or particularly complex issues arose from the amendment in question. On the contrary, the limiting amendment made was considered to have the potential to promote the convergence of the debate on the basis of the prior art on file.

vi) The board thus considers that a preparation time of only a couple of days was sufficient for the board and the appellant to get familiarised with the changes made and to form a reasonable opinion thereon.

vii) As regards the prior art on file, the board noted that the subject-matter additionally incorporated into claim 1, i.e. the more limiting definition of possible heteroaromatic dye anchor groups (see IX, *supra*) and the relevance thereof had repeatedly been considered, and attacked, during the opposition and the appeal procedure. The latest attack, based on D19, was raised after further "reviewing the art" (ii, *supra*) in the course of the appeal procedure.

viii) Hence, the fact that claim 1 at issue is not strictly speaking a literal combination of claims 1, 2 and 4 as granted, since one of the alternatives listed in claim 4 as granted is omitted from the ambit of amended claim 1, is not decisive for the board.

1.1.2 It is true that the claim request at issue should preferably have been filed earlier in the procedure. However, considering the nature of the amendment, and that a change of representation had occurred on the respondent's side close to the holiday season, the board considers that the late filing of the amended claims was neither an abusive behaviour nor intended to "ambush" the adverse party.

1.1.3 The board, taking into account all the above considerations in the exercise of its discretion, thus decided to admit the respondent's main request into the proceedings despite its very late filing (Article 13(3) RPBA).

1.2 First auxiliary request

1.2.1 The set of claims according to this request was filed during the oral proceedings before the board. It differs from the main claim request, admitted by the

board (*supra*), in that proviso-type features were inserted into independent claims 1 and 8, respectively (see wordings under point XI, *supra*).

1.2.2 Amendments consisting in the insertion of such provisos had already been proposed (*verbatim*) in the respondent's reply (dated 10 June 2013; page 2) to the statement of grounds of appeal as a possible remedy, in case the appellant's pending objections under Article 123(3) EPC were found to be relevant despite the opposition division's finding that they were not. The proposal was repeated in the respondent's letter of 6 August 2015 (page 3).

The additional amendments according to the request at issue thus did not come as a surprise for the board and the adverse party.

1.2.3 Neither did said amendments to claims 1 and 8 give rise to any unforeseeable issue of particular complexity, which could not reasonably be dealt with without adjournment of the oral proceedings.

Quite to the contrary, since they were made to overcome a further pending objection, the filing of this request contributed to promoting the convergence of the debate.

1.2.4 Therefore, the board decided to also admit this request into the proceedings despite its late filing (Article 13(3) RPBA).

2. Appellant's request for remittal and cost apportionment

2.1 For the board, the filing of the amended claim requests of more limited ambit, caused by the citation of new document D19 during the appeal proceedings does not *per*

se constitute a reason for remittal to continue examination, in particular considering that the amendment in question merely consists in the incorporation of features (definition of alternative anchor groups) taken from dependent claim 4 as granted, and further limiting the ambit of the claim in terms of the anchor group definition, i.e. a along a line of defense already adopted earlier on (see amended claims pending before the filing of D19).

2.2 As already pointed out above, the board and the appellant could be expected to deal with the issues resulting from the filing of the more limited claim requests admitted by the board.

2.3 The board notes that the appellant already "reviewed the art" in the course of the appeal proceedings, as regards prior art relevant to the use of hydrolysed reactive dyes with heteroaromatic anchor groups in shading, and found D19. Hence, and this is also of relevance in regard of the appellant's right to be properly heard (*infra*), the board was neither convinced that there was a justifiable need for the appellant to retrieve further more relevant prior art or to provide more relevant experimental evidence regarding the amended, more specific claims now at issue, nor was the board convinced that there was a realistic chance for the appellant to come across more relevant new prior art, which should already have been found earlier in the proceedings, e.g. upon raising inventive step attacks against the subject-matter of claim 4 as granted when the opposition was filed.

2.3.1 Therefore, and also taking into account the need for procedural economy, the board did not decide to remit the case pursuant to Article 111(1) EPC for further

prosecution, but decided itself on the substantive issues of the case. Consequently, a decision on cost apportionment as conditionally requested by the Appellant needed not be taken.

3. Appellant's right to be heard

3.1 At the oral proceedings the appellant's representative argued that its right to be heard had been compromised as regards the issue of inventive step.

3.2 The board, subsequently to its decisions to admit the respondent's main and first auxiliary claim requests, however exhaustively heard the parties with respect to both requests, regarding the formal objections raised by the appellant and regarding the question whether the claimed subject-matter involved an inventive step in the light of the cited prior art.

3.3 The appellant's representative nevertheless stated that its right to be heard had been infringed in this respect, since there had been insufficient time for an additional prior art search and in that he had to "guess on technical issues".

3.3.1 In this connection the appellant's representative emphasised that he had only received the amended main request a few days before the date of oral proceedings and that since the person responsible for the case on his client's side had been on holiday and not contactable, he had been unable to obtain technical or commercial instructions.

3.3.2 He also emphasised that the amendment made was not a simple incorporation of a dependent claim but also involved a selection (deletion of triazine-containing

anchor groups) changing the emphasis of the claimed invention, and potentially requiring the submission of comparative tests or an additional prior art search. Prompted by the board, the appellant indicated in this connection that its previous searches had not covered all potentially relevant documents since there had been no need to do so, as a document very relevant with regard to the claims then on file had already been found.

3.4 In deciding on the merit of the appellant's complaints regarding the alleged breach of its right to be heard, the board took into account the following aspects:

3.4.1 The impossibility for the representative to obtain technical and commercial instructions from its client (point 3.3.1, *supra*), if required at all, was a matter of internal organisation on the appellant's side.

Hence the board does not accept that this particular aspect *per se* could justify the appellant's complaint. Moreover, the board is not convinced that assessment of the commercial implications of a limiting amendment of the patent at issue requires a further prior art search or comparative experiments.

3.4.2 Objections regarding inventive step had already been raised in the statement setting out the grounds for opposition (point 5.8 thereof) regarding *inter alia* the subject-matter of dependent claims 2 and 4 as granted, the features of which are now comprised in claim 1 at issue.

3.4.3 After the filing of said statement the opponent (and later appellant) repeatedly filed further prior art and

comparative evidence supposed to corroborate and/or complement its inventive step objections:

i) In its letter of 21 December 2011 it had cited another two documents and experimental data and asserted that "*[t]he claims are not inventive across their scope*" (point 5).

ii) With its letter of 10 September 2012 (pages 8 and 10, last two lines, point 4.3), it had filed four additional prior art documents and comparative tests, asserting again that the then pending claims were objectionable for lack of inventive step.

iii) In its statement of grounds of appeal it cited three further documents (D15 to D17) in support of its inventive step attacks.

iv) In its reply dated 12 September 2013 the appellant cited two further prior art citations, D18 and D19, the latter being considered to take away novelty of the subject-matter of the pending claims 1 to 5, 7 to 11 (last line of point 5.2), i.e. of subject-matter with the features of the discussed features of the current claim 1. Under point 6.1, D19 was also reported to be relevant for inventive step.

3.4.4 Thus, in summary, the subject-matter of claims 1, 2 and 4 of the patent as granted has repeatedly been objected to by the appellant for lack of inventive step throughout the opposition and appeal procedure.

3.4.5 Nevertheless, near the end of appeal procedure the representative of the appellant submits that a potential necessity arose for providing further

comparative data and/or for carrying out a further prior art search.

3.5 The board thus notes that although in the present case the amendment in question consists of the incorporation of only some of the anchor groups structure listed as alternatives in a dependent claim, this does not mean that the appellant was not given the opportunity to search, cite and rely on existing prior art, if any, which would be more relevant than D19 in respect of the use, as shading dyes, of the non-triazine alternatives of hydrolysed reactive dyes with anchor groups as defined in dependent claim 4 of the patent as granted.

3.6 It is to be emphasised that the features incorporated into claim 1 were not taken from the description but were all expressly present in the dependent claims as granted, and that this amendment was a foreseeable way of overcoming in particular the novelty objection raised on the basis of late-filed D19 by excluding the shading dyes advocated by this document. Moreover, the additional limitation of the anchor group definition resulting from this amendment follows the same line of defense that was already adopted earlier by the respondent.

3.7 In view of the above, the board concluded that throughout the opposition and appeal procedures the appellant has had ample opportunity to retrieve and invoke prior art to support its inventive step objections regarding the subject-matter defined in the claims of the patent as granted, including other alternatives in terms of anchor groups as defined in dependent claim 4 as granted. The board thus holds that amendments to claim 1, although submitted very late, do not justify that a further opportunity be given to the

appellant for a further prior art search over and above the searches made hitherto. A postponement of the oral proceedings, or the remittal of the case to the first instance with the purpose of giving the appellant the possibility of a further prior art search would have given an undue prejudice to the respondent.

3.8 Hence, in the board's judgement, the course of action taken by the board at the oral proceedings was not unfair to the appellant and, in particular, did not compromise its right to be heard (Article 113(1) EPC) having regard to the question of whether the subject-matter of claim 1 at issue involves an inventive step.

4. Main request - Extension of the protection conferred

4.1 The appellant submitted that due to the amendments made the protection conferred by the patent was extended. More particularly, claim 1 at issue no longer excluded subject-matter that was excluded by claim 1 as granted.

4.2 At the oral proceedings, it was common ground between the parties that the feature "*comprising between 0.0001 to 0.1 wt% of a hydrolysed reactive dye*" as contained in claim 1 as granted expressed a limitation

- of the (total) relative amount of **all** hydrolysed reactive dyes present in the laundry treatment composition, irrespective of the exact nature of their anchoring groups

- and not only of the relative amount of **a single specific** reactive dye, which may be present in the composition as one of several (see "*comprising*") such hydrolysed reactive dyes.

The board sees no reason for taking a different stance in this respect.

4.3 In amended claim 1 at issue the feature quoted under point 4.2, *supra,* is complemented by features specifying *inter alia* that "*the hydrolysed reactive dye*" is of the type "*... wherein the anchor group is selected from: ...*".

4.3.1 Accordingly, the board holds that claim 1 at issue is, on the one hand, limited to compositions comprising 0.0001 to 0.1 wt% of one or more hydrolysed reactive dyes belonging to the class of dyes containing the specific anchoring groups listed.

4.3.2 However, on the other hand, the wording of claim 1 at issue no longer excludes the presence of an additional amount of a further hydrolysed reactive dye with an anchoring group differing from the ones listed in claim 1, resulting in a total relative amount of hydrolysed reactive dyes in the composition which may be greater than 0.1 wt% (i.e. beyond the upper limit prescribed by claim 1 as granted).

4.4 The difference in scope may best be illustrated by an example of a laundry treatment composition falling within the ambit of claim 1 of the main request, but no longer within the ambit of claim 1 as granted, and comprising, respectively, e.g.

- 0.1 wt% of hydrolysed Reactive Black 5, i.e. having in its hydrolysed form a $-SO_2-CH_2-CH_2-OH$ anchor group as required by claim 1 at issue (see paragraph [0047] of the granted patent referring to the unhydrolysed form),

as well as

- 0.1 wt% of hydrolysed Reactive Blue 4, a dye with a specific anchor group with a triazine-based structure (see paragraph [0046] of the granted patent) not listed in claim 1 at issue.

The total amount of hydrolysed reactive dye(s) being present in such a composition would thus be 0.2 wt%, i.e. an amount outside the range defined in (and thus excluded by) claim 1 as granted. Nevertheless the composition falls within the ambit of claim 1 at issue (as established under 4.2 and 4.3, *supra*).

4.5 Thus, in the board's judgement, claim 1 at issue extends the protection conferred (Article 123(3) EPC).

4.6 This finding is in line with the rationale of the decisions invoked by the appellant (**T 1312/08**, Reasons, 2.1, and **T 2017/07**, Reasons, 2.2.1 to 2.2.3).

4.7 Decision **T 262/13**, invoked by the respondent, concerns a different situation: Claim 1 as granted was directed to a **process** of making a film comprising a film-forming composition including polyvinyl alcohol (PVA) and a "salt" (unspecified), the process comprising the steps of forming a PVA comprising film and **applying** thereto a salt, wherein "said said salt comprises between 0.5% and 15% of the weight of said film". According to the amended claim 1, "said salt is selected from" a group consisting of five specific salts and mixtures thereof. The latter features were taken *verbatim* from a dependent claim defining a preferred embodiment.

4.7.1 In **T 262/13**, the board entrusted with the case held that, according to a technically sensible interpretation taking into account the whole disclosure of the patent, the wording of said amended claim was

subjected to an "implicit proviso" excluding the application of any other salt than those therein specified. Moreover, "*the skilled reader of the claim would exclude any other interpretation of the claim as illogical and artificial*" (point 3.3.1 of the reasons).

4.7.2 However, in the present case none of the parties argued that the presence of further hydrolysed dyes would, technically speaking, not make sense. On the contrary, the respondent expressly conceded at the oral proceedings that the wording of claim 1 as granted referred to **all** hydrolysed reactive dyes possibly present in the composition(see 4.2, *supra*).

4.7.3 Moreover, the board notes that in the present case, claim 1 is not a *verbatim* combination of claims 1 and 4 as granted, since triazine-based anchoring groups listed in said claim 4 are omitted in claim 1 at issue.

4.7.4 Hence, the board concludes that the rationale of **T 262/13** is not applicable to the present case.

5. The respondent's main request is thus not allowable.

First Auxiliary request

6. Admissibility of the amendments under Rule 80 EPC

6.1 The appellant's objection under Rule 80 EPC was raised against both the main and the first auxiliary requests at issue and concerns the same change in the wording of the respective claims 1.

6.2 The objection had been raised for the first time during the opposition procedure: Whereas dependent claim 4 as granted contains the wording "*wherein the anchor group*

is **of the form** [list of formulae]..." (emphasis added by the board), this wording was amended to read "*wherein the anchor group is* **selected from** [list of formulae]..." in the corresponding dependent claim 3 held allowable by the opposition division. As this was at that time the only amendment to this dependent claim, the appellant considered that this amendment was not occasioned by a ground for opposition and did not, therefore, meet the requirements of Rule 80 EPC.

6.3 Independent claim 1 of the first auxiliary request now at issue also contains the amended wording "*wherein the anchor group* **is selected from ...**", but in combination with further amendments including a narrower definition of the reactive dyes specifically prescribed anchor groups.

6.4 Said amendment to claim 1 consisting in the incorporation of a narrower definition of the reactive dyes that may be used, taken from dependent claim 4 as granted, was apparently made to overcome the grounds for opposition raised, including the novelty and inventive step objections based on D19, and *de facto* resulted in the abandonment of the novelty objection based on D19 by the appellant. This was not *per se* in dispute.

6.5 At the core of the objection maintained by the appellant was rather the change in wording from "*is of the form:*" to "*is selected from:*" in claim 1, carried out at the same time, and supposed to "improve the language" according to the respondent.

6.6 However, considering also that it was not argued that this change in wording implied a change in meaning, and that no objection under 123(2) EPC arose due to it, the

Board concludes the amendments made to claim 1 comply with Rule 80 EPC.

7. Allowability of the amendments under Article 123(2) EPC

7.1 Claim 1

7.1.1 The appellant argued that by virtue of the introduction of the proviso (wording under XI, *supra*), claim 1 as amended was also directed to a laundry treatment composition comprising hydrolysed reactive dyes other than the ones defined in claim 1 at issue in terms of specific anchor groups. Since the patent in suit only referred to one hydrolysed dye being present, such subject-matter extended beyond the content of the application as filed.

7.1.2 The board observes that this line of argument of the appellant is in contradiction with the latter's understanding of the terms of claim 1 according to the main request: In the context of its objection under Article 123(3) EPC, the appellant even expressly invoked a concrete example of a second hydrolysed dye (reactive blue 4) possibly present as well in the claimed composition, besides a dye having one of the anchor groups recited in the claim.

7.1.3 The board does not see any justification for the appellant's change of view depending on the objection to be discussed. For the board, based on the common understanding of claim 1 according to the main request, the insertion of a "cap" for the total **amount** of hydrolysed reactive dye(s) present has *per se* no bearing on the nature and number of such dyes that may be present.

7.1.4 Hence, the board concludes that the insertion into claim 1 of an express limitation of the total amount of hydrolysed reactive dye(s) present in the laundry treatment composition according to claim 1 does not amount to adding subject-matter undisclosed in the application as filed. Instead, it brings the ambit of claim 1 back into line with the one of claim 1 as granted.

7.2 Claim 8

7.2.1 The board's reasoning above applies *mutatis mutandis* to the analogous objection raised against claim 8.

7.2.2 A further objection was raised against the introduction of the proviso into claim 8, based on the argument that the range "*10 ppb to 1 ppm*" was not disclosed in the application as filed in combination with the more restricted list of possible hydrolysed reactive dyes *viz.* anchor groups to which claim 1 at issue was limited by way of amendment.

7.2.3 However, for the board, said concentration range in claim 8 merely specifies, in the most general terms originally disclosed, the amount of hydrolysed reactive dye(s) required to be present in the aqueous washing solution used for treating a textile.

7.2.4 Literal basis for amended claim 8 at issue is found e.g. in claim 11 and on page 2, third paragraph, of the application as originally filed. On page 2, reference is made to both laundry treatment compositions and to the method of treating a textile with an aqueous solution according to the invention.

Hydrolysed dyes suitable for being used according to

the invention are referred to on pages 3 to 4 of the application as filed, with preferred embodiments being listed on page 4.

7.2.5 Hence, for the board, there is no doubt that **all** the hydrolysed dyes listed are generally disclosed as being intended to be used both as component of the laundry treatment compositions according to the invention and in form of aqueous solutions, in a concentration from 10 ppb to 1 ppm, in the context of the textile treating method according to the invention.

7.3 The fact that in claim 1 the definition of the hydrolysed reactive dyes in terms of their anchoring groups is more limited by the deletion of one out of nine preferred anchoring listed in the application as filed, in order to overcome a novelty objection, does not, for the board, result in a combination of features undisclosed in the application as filed.

7.4 Thus, in the board's judgement, the subject-matter defined by amended claims 1 and 8 does not extend beyond the content of the application as filed. Therefore, the amended claims at issue meet the requirements of Article 123(2) EPC.

8. Compliance with the requirements of Article 123(3) EPC, novelty and sufficiency of disclosure

8.1 The board is satisfied that the provisos inserted into the independent claims 1 and 8 prevent an extension of the protection conferred by the patent that would result from the other amendments made to claims (see 4.2 *et seq.*, *supra*), and that the requirements of Article 123(3) EPC are thus met. The board is also satisfied that the claimed invention is disclosed in a

manner sufficiently clear and complete for it to be carried out by the skilled person, and that the claimed subject-matter is novel over the prior art relied upon by the appellant, in particular over D8 and D19 (see 9.2.2, *infra*).

8.2 Since the appellant did not raise or maintain corresponding objections regarding the claims according to the first auxiliary request in this respect, detailed reasons need not be given.

9. Inventive step

9.1 The invention

9.1.1 The invention relates to laundry treatment compositions comprising a dye and a surfactant (see patent in suit, paragraphs [0001] and [0007]).

9.1.2 According to the description of the patent in suit, the laundry treatment compositions according to the invention may be used to impart shading to textiles whilst reducing the risk of irritation/sensitization of the respiratory tract and skin in comparison to reactive dyes (paragraph [0005] of the patent in suit).

9.2 Closest prior art

9.2.1 At the oral proceedings it was common ground between the parties that D19 was the closest prior art. Considering the similarity of the invention according to the patent in suit and the disclosure of D19 in terms of problems addressed and laundry treatment compositions described, the board has no reason to take another stance.

9.2.2 D19 relates to laundry detergent compositions comprising 0.001 to 0.5 wt%, preferably about 0.01 wt%, of a dye component for blueing (shading) the fabrics in order to improve the impression of whiteness (column 1, lines 50 *et seq.;* claim 1). To achieve this aim, D19 proposes the incorporation of dyes with a triazine-containing structure (see column 1, generic formula (1)).

9.2.3 The board accepts that in particular example 3, referring *inter alia* to the dye of formula (8), represents the most appropriate starting point for the assessment of inventive step, since this dye can be considered as a hydrolysed reactive dye within the meaning of claim 1 at issue, with a -OH group bearing heteroaromatic anchor group.

9.3 Technical problem

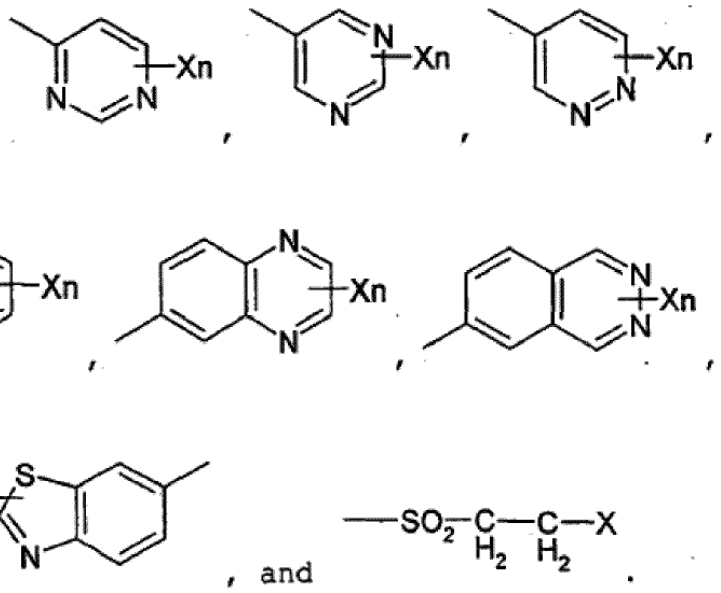
As explicitly confirmed by the respondent at the oral proceedings, the technical problem in the light of D19 can at least be seen in the providing of an alternative laundry treatment composition providing shading.

9.4 Solution

As the solution to this technical problem the patent in suit proposes the laundry treatment compositions according to amended claim 1 at issue, which are characterised in particular in that they comprise

"*between 0.0001 to 0.1 wt% of a hydrolysed reactive dye and between 2 to 60 wt% of a surfactant, wherein the hydrolysed reactive dye comprises a chromophore moiety covalently bound to an anchoring group, the anchoring*

group for binding to cotton, wherein the anchor group is selected from:



wherein:

n takes a value between 1 and 3;
X is selected from the group consisting of: -Cl, -F, NHR, a quaternary ammonium group, -OR and -OH;
R is selected from: an aromatic group, benzyl, a C1-C6-alkyl; and, wherein at least one X is -OH."

9.5 Success of the invention

Absent any evidence to the contrary, the board has no reason to call into question that the claimed laundry treatment compositions may be used to impart shading to the textiles treated as indicated paragraph [0005] of the patent in suit. This was not disputed by the appellant.

9.6 (Non-)Obviousness of the solution

9.6.1 It remains to be decided whether, in the light of the

closest prior art D19/example 3/formula (8)) the claimed subject-matter was obvious to the person skilled in the art seeking to solve the technical problem posed.

Document D19 taken alone

9.6.2 In D19 (column 2, lines 47 to 62) it is expressly indicated that prior attempts to incorporate blueing agents into detergent compositions had not been not entirely successful. On the one hand, commonly used acid dyes, dispersion dyes and basic dyes had only a weak affinity to cellulose fibres and thus showed insufficient blueing effect under usual washing conditions. On the other hand, although direct dyes and reactive dyes may provide a blueing effect due to their affinity to cotton, they imparted a blue colour to the laundry treated upon repeated washing due to dyestuff accumulation on the fibres, instead of providing whiteness.

As the solution to the problem of imparting a slight bluish hue to white cotton fabrics without accumulating dye on the fibre upon repeated washing and without producing stains, D19 (column 4, lines 2 to 13) proposes and claims detergent compositions comprising the specific dyes according to formula (1). The latter have a relatively low affinity to cellulosic fibres and all have a triazine structure mandatorily comprised in the part of the dye molecule that can be considered as anchor group within the meaning of the patent in suit.

9.6.3 For the board, D19 can thus not possibly suggest using dyes wherein the anchor group does not comprise a triazine structure, for instance dyes having anchor groups as defined in claim 1 at issue.

9.6.4 The appellant argued that it would be immediately apparent to the skilled person that at least some of the specific dyes falling under formula (1) and being exemplified in columns 3 to 18 of D19 represented hydrolysed reactive dyes within the meaning of the patent in suit. For instance, the dye of formula (8) mentioned on page 6 of D19 could be considered as hydrolysed Reactive Blue 4.

Therefore, the replacement of the dyes proposed as components of the detergent compositions of D19 (as in example 3 thereof) by other hydrolysed reactive dyes, i.e. by one of those defined in claim 1 at issue, would be obvious to the skilled person seeking to solve the technical problem posed (point 9.3, *supra*).

9.6.5 The board does not accept this argument.

As regards the dyes exemplified in D19, the board observes that they differ from the hydrolysed reactive dyes to be used according to claim 1 at issue in terms of their anchor group, and that only some of them actually comprise an anchor group carrying at least one hydroxy group as required by claim 1 at issue. A substantial number of the dyes mentioned in D19 does not comprise an anchor group carrying at least one hydroxy group, for instance the dyes with formulas (14) to (20), (27), (30) and (37) to (39).

Hence, the board holds that without the benefit of hindsight the skilled person would not find in D19 any pointer towards the use of one of the types of hydrolysed reactive dye required according to claim 1 at issue.

Thus, for this reason alone, D19, taken *per se*, does

not induce the skilled person to provide a laundry treatment composition according to claim 1.

D19 and common general knowledge

9.6.6 In an alternative approach the appellant complemented the teaching of D19 by common general knowledge.

i) In particular, reference was made to the penultimate paragraph on page 169 of D18 reading as follows:

"Reactive dyes. *The covalent bonds formed between the triazinyl and pyrimidyl reactive dyes and cellulose have more 'ester-like' than 'ether-like' character. They are therefore prone to slow hydrolysis under strongly alkaline washing conditions, and full shades tend to 'wash down' over many wash cycles.* **Hydrolysed dye** *washed from the fibre* **behaves** *towards cellulosic fibres in the same way* **as direct dyes** of **low affinity**, *and towards wool and nylon in the same way as acid dyes*" (emphasis added by the board).

However, in D19 (column 2, lines 56 to 62) direct dyes are expressly considered to be unsuitable for shading, because they accumulate on the cellulosic fibre and impart a blue colour.

ii) Documents D2/D20 are excerpts taken from a textbook concerning dyeing, and not shading, and listing the chemical structures of known reactive dyes.

Thus, even taking into account common general knowledge as illustrated by D18 and D2/D20, the skilled person starting from D19 would not, without the benefit of hindsight, be oriented towards replacing the dyes advocated by D19 by a hydrolysed pyrimidyl dye, or any

other hydrolysed reactive dye possibly falling under the definition according to claim 1 at issue.

D19 and D15 / D16

9.6.7 D15 and D16 are both rather specific scientific journal articles relating to the dyeing of cotton. They cannot be considered to represent common general knowledge, let alone in the field of shading laundry treatment compositions.

For this reason, the board is not convinced that the skilled person seeking to solve the technical problem posed would actually consider their contents at all.

9.6.8 However, even assuming, for the sake of argument only but in favour of the appellant, that the skilled person would actually consider D15 or D16, he would not, for the following reasons, be induced to modify a composition according to D19, e.g. the one of example 3/formula(8) such as to arrive at a compositions falling within the terms of claim 1 at issue.

i) D15 (abstract) reports on reusing hydrolysed reactive dyes for **dyeing** cotton using application procedures and after-treatments suitable for direct dyes. The four reactive dyes actually referred to (page 38, "Materials") all comprise an anchoring group comprising a triazine structure.

ii) D16 is also concerned with the **dyeing** of cotton and more particularly reports on investigations regarding "effects of dye substantivity in dyeing cotton with reactive dyes". D16 also describes **dyeing** trials with hydrolysed reactive dyes (pages 24 to 26, Section

"Substantivity of hydrolyzed reactive dyes") and concludes that the dyes used either had (too) low substantivity and/or behaved like direct dyes.

Thus, neither D15 nor D16 provides a hint towards a replacement of the shading dyes prescribed according to D19 by hydrolysed dyes having anchoring groups as defined in claim 1 at issue.

Alternative attacks based on D1 or D17

9.6.9 At the oral proceedings, the appellant did not pursue the alternative inventive step attacks raised in writing before the filing of D19, which started from either D1 or D17 as the closest prior art.

The board also considers that D1 and D17 do not qualify as a more appropriate closest prior art than D19, but is anyway satisfied that even taking into account the invoked common general knowledge and/or D15 or D16, the skilled person was not induced to modify the blueing laundry detergent compositions according to D1 or D17 in an obvious manner leading to a composition falling within the terms of claim 1 at issue.

Conclusions on obviousness

9.7 The board concludes that that the laundry treatment compositions according to claim 1 and dependent claims 2 to 7 involves an inventive step (Articles 52(1) and 56 EPC).

9.8 For analogous reasons, the textile treatment method of claim 8, involving the use an aqueous solution containing not more than 1 ppm of a hydrolysed reactive dye as defined in claim 1 in combination with a

substantially greater concentration of surfactant, is not obvious either in the light of the prior art invoked.

9.9 Thus, the subject-matter of claim 8, and of dependent claim 9, also involves an inventive step (Articles 52(1) and 56 EPC).

10. Conclusion regarding the first auxiliary request

The claims according to the first auxiliary request are thus allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance with the order to maintain the patent based on the claims according to the first auxiliary request as filed during oral proceedings, and a description to be amended where appropriate.

The Registrar: The Chairman:

D. Magliano B. Czech

Decision electronically authenticated