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**Datasheet for the interlocutory decision
of 22 September 2015**

Case Number: T 0239/13 - 3.3.06

Application Number: 06777186.5

Publication Number: 1926809

IPC: C11D3/40, C11D3/37, C09B67/00

Language of the proceedings: EN

Title of invention:
Composition of enhanced stability and a process for making such
a composition

Patent Proprietor:
Unilever PLC / Unilever N.V.

Opponent:
The Procter & Gamble Company

Headword:
Dye storage stability / UNILEVER

Relevant legal provisions:
EPC Art. 112(1)

Keyword:

Stay of the proceedings -

(yes) questions on partial priority pending before the Enlarged Board

Decisions cited:

T 0557/13

Catchword:



Beschwerdekammern
Boards of Appeal
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Case Number: T 0239/13 - 3.3.06

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.3.06
of 22 September 2015

Appellant: The Procter & Gamble Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 29 November
2012 rejecting the opposition filed against
European patent No. 1926809 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman B. Czech
Members: L. Li Voti
 C. Vallet

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division to reject the opposition against the European patent No. 1 926 809

II. Claim 1 as granted reads as follows:

*"1. A granule, for use in the preparation of a basic laundry detergent shading composition, said granule having improved storage properties comprising: a dye selected from the group consisting of acid dyes, basic dyes, solvent dyes, hydrolysed reactive dyes, reactive dyes and disperse dyes and having a dye chromophore type of diarylmethane, triarylmethane, diazines, oxazines, or thiazines and, a component selected from the group consisting of: a cogranulent, a binder and a coating, **characterised in that** the component is an acidic component."*

III. An opposition was filed on the grounds of lack of novelty and lack of inventive step (Article 100(a) EPC) and insufficiency of disclosure (Article 100(b) EPC).

The documents relied upon by the parties include the following:

D1: EP 1 577 374 A1;

D1a: US 2005/0215460 A1 (family member of D1 in English, published on 29.09.2005);

D6: Pages from "Water soluble polymers Sokalan[®] Tamol[®] Lupasol[®]" by BASF The Chemical Company;

D7: WO 2006/053598 A1, published on 26 May 2006 and filed on 05.09.2005;

D8: "The Chemistry of SYNTHETIC DYES" by K. Venkataraman, volume II, 1952, Academic Press

Inc., New York, pages 707 to 711;

D9: "DYEING AND CHEMICAL TECHNOLOGY OF TEXTILE FIBRES"
by E.R. Trotman, fourth edition, 1970, Griffin
London, pages 368 to 373; and

D10: Experimental data filed as annex 1 to the
Proprietors' letter of 29 August 2012.

IV. In its decision, the Opposition Division came *inter alia*
to the following conclusions (points II.a.i and II.b to
d):

- "*The priority of the contested patent [22.09.2005]
was found to be invalid, since some of the dye groups
were not present in the priority document. Moreover, the
priority was silent on the chromophore types...Since the
priority is not valid, D7, which was published after the
priority date of the patent, becomes a document by
virtue of Article 54(2) EPC and may therefore be
relevant for the inventive step issue.*"

- "*...the requirements of Article 83 EPC are met.*"

- "*...the subject-matter of claim 1 of the instant
patent is novel over the documents filed by the
opponents.*"

- "*...The opposition division is also of the opinion
that D7 represents the closest prior art...a combination
of any of D8 or D9 with D7 is based on hindsight...the
term "having improved storage properties" was a limiting
feature of claim 1. The opposition division came to the
finding that the limiting character of this feature
would exclude respective overall basic granules from the
scope of the claims, since such granules indeed would
not show the required improved stability within the
meaning of the patent-in-suit...this limitation of the*

scope of the claim would ensure that it is inventive over its entire scope."

- V. In its statement setting out the grounds of appeal of 9 April 2013, the Appellant requested the revocation of the patent, maintaining *inter alia* that the invention was not sufficiently disclosed and that the subject-matter of claim 1 lacked an inventive step in the light of D7 in combination with documents D6 and/or D1/D1a. D7 was prior art pursuant to Article 54(2) EPC since the priority date claimed for the patent in suit was not valid. Together with the statement, the Appellant filed further documents labelled D11 to D14 in support of its inventive step objection, supposed to show that it had been well known that dyes as used according to claim 1 at issue lose their colour, or are unstable, when exposed to alkali.
- VI. In its reply of 5 August 2013, the Respondent defended the patent as granted (main request). However, together with the reply, it also filed an amended set of claims as first auxiliary request. It expressed its agreement with the findings in the decision under appeal and relied on the written submissions filed before the first instance.
- VII. By letter of 10 September 2015 the Appellant submitted additional arguments concerning, in particular, sufficiency of disclosure. It also filed new documents in support of its sufficiency objection:
- D15: Excerpt from Wikipedia: "Solvent dye";
D16: Excerpt from Wikipedia: "Disperse dye";
D17: Declaration by Gregory S. Michael, dated
3 September 2015.

VIII. The parties were summoned to oral proceedings in accordance with their auxiliary requests to this end.

IX. The oral proceedings before the Board were held on 22 September 2015.

The parties maintained their requests presented in writing.

They were first heard regarding the meaning of claim 1 as granted and the issue of sufficiency of disclosure. The Board then expressed its opinion that the patent was sufficient.

Thereafter the parties were heard as regards inventive step in the light of D7. In this connection, the Appellant requested a stay of the proceedings until the decision of the Enlarged Board of Appeal be issued in case G 1/15. The Respondent raised no objection in this respect.

X. The **Appellant's** arguments, submitted in writing and orally, included the following:

Sufficiency of disclosure

- The skilled person would be unable to realise the claimed invention since the expression "*granule having improved storage properties*" in claim 1 according to the main request was unclear, insofar as the claim neither identified which storage properties are to be improved, nor compared to what.

- Moreover, even if said expression were to be understood as concerning the storage stability of the dye of the claimed granule in a basic laundry detergent

composition, neither claim 1 nor the description specified the method and the conditions by which such an improvement in dye stability had to be measured.

- Even if it was not called into question that the skilled person was able to carry out the method for determining the level of dye in the granule and its stability over time described in the patent in suit (paragraphs [0083] and [0084]), the patent in suit did not provide guidance on how to decide whether or not the stability of the dye in a claimed granule was actually improved.

- The patent thus did not contain enough information to enable the skilled person to determine whether or not a granule comprising a given combination of dye and acidic component fell within the ambit of claim 1.

- Furthermore, the wording of claim 1 also encompassed granules which *in toto* were not acidic, but alkaline, and for which no improvement of the storage properties could credibly be achieved. It was also not credible that any acidic component in any possible concentration would lead to improved dye stability upon storage.

- If the added acidic component was supposed to protect the dye from a possible base catalysed hydrolysis in presence of alkali (resulting in an improved dye stability), then it was not credible that an improved dye stability would be achieved for any type of dye encompassed by claim 1 at issue. In fact, solvent and disperse dyes were insoluble in water, as shown in documents D15 and D16, and thus they could not undergo base catalysed hydrolysis.

- Therefore, the skilled person could only find suitable

combinations of dye and acidic component, i.e. showing improved dye stability, by testing all possible combinations falling under the very broad scope of claim 1, which approach would amount to an undue burden for the skilled person.

- Finally, as stated in D17, it was possible to retrieve from the Colour Index databases only a single disperse dye having one of the chromophores listed in claim 1 at issue. Hence, it appeared that disperse dyes containing one of the other chromophores listed in claim 1 did not exist. Therefore, the invention could not be carried out by the skilled person across the full breadth of claim 1.

- The claimed invention was thus not sufficiently disclosed.

Request for stay of the proceedings

A stay of the proceedings was expedient considering the potential bearing of the Enlarged Board's findings in referral case G 1/15 on the proper assessment of inventive step in the light of D7.

XI. The **Respondent**'s arguments of relevance here can be summarised as follows:

Sufficiency of disclosure

- The description of the patent in suit illustrated how to prepare a granule according to claim 1.
- It was clear from the description of the patent in suit that the "*improved storage properties*" mentioned in claim 1 concerned the increased storage stability of the dye in a granule containing also an acidic component in

a basic laundry detergent composition, as compared to a similar dye granule without the acidic component. Such an improvement was shown in the experimental part of the description of the patent in suit and in D10.

- All combinations of dye and acidic component encompassed by claim 1 according to the main request, including also combinations with overall alkalinity, which were not excluded by the wording of the claim, had such improved storage properties. Therefore, the expression "*improved storage properties*" had no limiting effect on the range of the possible combinations of dye and acidic component encompassed by the wording of claim 1.

- The Appellant's allegations concerning the impossibility of achieving improved storage properties or of carrying out the claimed invention across the whole breadth of claim 1 were not supported by evidence.

- Since at least one disperse dye belonging to the group of dyes selected according to claim 1 could be retrieved by the skilled person, as confirmed by the Appellant in D17, the invention was clearly realisable throughout the whole ambit of claim 1.

- Therefore, the claimed invention was sufficiently disclosed.

Stay of the proceedings

The Respondent did not object to a stay of the proceedings as requested by the Appellant and provided no further comments in this respect.

Reasons for the Decision

Stay of the proceedings

1. As argued by the Appellant at the oral proceedings, the findings of the Enlarged Board in case G1/15 regarding the issue of "partial priority", referred to it under Article 112(1)(a) EPC by decision T 557/13 of 17 July 2015, may have a bearing on the proper assessment of inventive step in the light of D7, in particular regarding the question to which extent the subject-matter claimed D7 may be relied upon as prior art.

2. Under these circumstances the Board considered it appropriate not to take any final decision, but to stay the appeal proceedings pending the outcome of case G1/15, in accordance with the corresponding request of the Appellant, which was not objected to by the Respondent.

Order

For these reasons it is decided that:

The appeal proceedings are stayed until a decision be issued by the Enlarged Board of Appeal in case G 1/15.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated