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**Datasheet for the decision
of 31 August 2016**

Case Number: T 0555/13 - 3.3.06
Application Number: 05018028.0
Publication Number: 1754777
IPC: C11D17/06, C11D1/22, C11D3/37,
C11D3/10
Language of the proceedings: EN

Title of invention:

A solid laundry detergent composition comprising alkyl benzene sulphonate, carbonate salt and carboxylate polymer

Patent Proprietor:

The Procter & Gamble Company

Opponents:

- 01) Henkel AG & Co. KGaA
02) UNILEVER N.V. / UNILEVER PLC

Headword:

Laundry detergent composition/Procter & Gamble Company

Relevant legal provisions:

EPC Art. 52(1), 54, 108 sentence 3
EPC R. 99(2), 101(1)
RPBA Art. 13(1), 13(3)

Keyword:

Novelty - (no) - claim request upheld by the Opposition
Division (Sixth Auxiliary Request)
Auxiliary claim request filed at the oral proceedings not
admitted - no justification for late filing (Eighth Auxiliary
Request)

Decisions cited:

Catchword:



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Case Number: T 0555/13 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 31 August 2016

Appellant II: The Procter & Gamble Company
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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
6 February 2013 concerning maintenance of the
European Patent No. 1754777 in amended form.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The appeals by Opponent 01, Opponent 02 and the Patent Proprietor lie from the interlocutory decision of the Opposition Division concerning maintenance of European Patent No. 1 754 777 in amended form.
- II. Two oppositions had been filed against the patent in suit on the grounds of lack of novelty and inventive step (Article 100(a) EPC). The items of evidence relied upon in this respect include document

D8: WO 2006/020789 A1.

The Opposition Division found that with the claims according to the then pending Fourth Auxiliary Request and the description accordingly modified the patent met the requirements of the EPC.

Claim 1 held allowable by the Opposition Division reads as follows (amendment to the claim as granted made apparent by the Board):

"1. A solid laundry detergent composition in particulate form comprising a plurality of particulate components, the composition comprises:

- (i) alkyl benzene sulphonate anionic detergent surfactant;*
- (ii) carboxylate polymer;*
- (iii) carbonate salt;*
- (iv) from 0% to less than 5%, by weight of the composition, of zeolite builder;*
- (v) from 0% to less than 5%, by weight of the composition, of phosphate builder; and*
- (vi) optionally, from 0% to less than 5%, by weight of the composition, of silicate salt;*

wherein:

(a) any particulate component that-comprises-at-least [sic] 5%, by weight of the articulate [sic] component, of alkyl benzene sulphonate anionic deterative surfactant also comprises carbonate salt, wherein the weight ratio of the carbonate salt to the alkyl benzene sulphonate anionic deterative surfactant present in the particulate component is greater than 1:1;

(b) any particulate component that comprises at least 5%, by weight of the particulate component, of alkyl benzene sulphonate anionic deterative surfactant also comprises carboxylate polymer, wherein the weight ratio of the alkyl benzene sulphonate anionic deterative surfactant to the carboxylate polymer present in the particulate component is in the range of from 0.2:1 to 5:1 and

(c) any particulate component that comprises at least 5%, by weight of the particulate-component [sic], of alkyl benzene sulphonate anionic deterative surfactant also comprises from 0% to 10%, by weight of the particulate component, of silicate salt; and

(d) the weight ratio of carbonate salt to carboxylate polymer present in the composition is in the range of from ~~1:1~~ 8:1 to 30:1".

The Opposition Division held, in particular, that the feature "a plurality of particulate components" was to be construed as merely meaning "a number of different particles". The claimed particles could differ from each other in their terms of physical form or chemical composition or both.

Moreover, D8 was found not to be novelty destroying.

III. In its statement setting out the grounds of appeal, Appellant I (herein below Opponent 01) relied *inter alia* on newly filed prior art documents.

- IV. In its statement setting out the grounds of appeal, Appellant II (herein below Patent Proprietor) defended the patent as granted (Main Request) and maintained the First to Third Auxiliary Requests that had been pending before the Opposition Division. However, it also submitted two further amended sets of claims as Fourth and Fifth Auxiliary Requests.
- V. A notice of appeal was also filed by Appellant III (herein below Opponent 02). However, no statement setting out the grounds of appeal was filed within the prescribed time limit. Opponent 02 was therefore informed by a communication from the Registrar that it was to be expected that the appeal would be rejected as inadmissible. No reply thereto was ever submitted.
- VI. Opponent 01 replied to the statement setting out the grounds of appeal of the Patent Proprietor raising objections under Article 123(2) EPC and/or regarding novelty (*inter alia* over D8) and inventive step, taking various documents as closest prior art.
- VII. In its reply dated 29 November 2013 to the statement of grounds of Opponent 01, the Patent Proprietor rebutted the objections raised. Nevertheless it also filed further sets of amended claims as Seventh (claims upheld by the Opposition Division) to Tenth Auxiliary Requests.
- VIII. In a further letter Opponent 01 took position regarding the admissibility of its own appeal, raised objections under Article 123(2) EPC regarding the latest auxiliary requests and maintained several inventive step objections, taking different art documents as closest prior art, *inter alia* a newly filed one.
- IX. In a communication issued in preparation for oral

proceedings, the Board expressed its provisional opinion regarding some particular issues. In particular, the Board indicated that the appeal by Opponent 01 seemed to be admissible, whilst the appeal by Opponent 02 was inadmissible, and that claim 1 appeared to require that the particulate components making up the claimed composition had to be of different chemical compositions.

- X. In response thereto
- the Patent Proprietor confirmed that no Sixth Auxiliary Request had been filed, and
 - Opponent 01 *inter alia* raised a further novelty objection against the subject-matter of Claim 1, in view of the composition disclosed in Example 9 of D8.
- XI. Oral proceedings were held on 18 March 2016. Regarding the admissibility issues, the Board indicated that it considered
- the appeal by Opponent 01 to be admissible, but
 - the appeal by Opponent 02 not to be admissible, and
 - that, accordingly, Opponent 02 was Respondent to the appeal by the Patent Proprietor (Appellant II) and Party as of Right to the appeal by Opponent 01 (Appellant I).

The Board found that the novelty objection raised in view of on Example 9 of D8, was to be admitted into the proceedings in view of its *prima facie* extremely high relevance. However, in order to warrant a fair trial, oral proceedings were to be resumed on a later date, i.e. on 31 August 2016.

- XII. In its letter dated 29 July 2016, the Patent Proprietor still defended the patent as granted (Main Request). Nevertheless, it also filed six fresh sets of claims, intended to overcome *inter alia* the novelty objection

based on D8/example 9, as new First to Fifth and Seventh Auxiliary Requests. As Sixth Auxiliary Request it requested maintenance of the patent in the amended form held allowable by the Opposition Division, i.e. rejection of the appeal of Appellant I.

XIII. In their response thereto, Opponents 01 and 02 raised objections under Article 84 and 123(3) EPC against the latest auxiliary requests 1 to 5 and 7, and maintained several novelty objections, *inter alia* in view of D8/example 9 and regarding the Sixth Auxiliary Request. Opponent 02 also submitted a further document supposed to show that the sodium percarbonate ingredient of the composition of D8/example 9 was to be considered as a "*carbonate salt*".

XIV. Oral proceedings were resumed on 31 August 2016. At the very beginning, the Patent Proprietor withdrew its pending Main Request, First Auxiliary Request and Fifth Auxiliary Request.

The parties were then heard in particular regarding novelty of the subject-matter of of Claim 1 held allowable by the Opposition Division (now Sixth Auxiliary Request) in view of D8/Example 9. The Board indicated that this claim request was not allowable.

The Seventh Auxiliary Request was then debated as to its admissibility and merit. The Board admitted this request into the proceedings but indicated it did not fulfill the requirements of Article 123(2) EPC. Thereupon, the Patent Proprietor also withdrew its pending Second, Third, Fourth and Seventh Auxiliary Requests,

It submitted a new set of claims as Eighth Auxiliary

Request. Claim 1 according to the Eighth Auxiliary Request differs from Claim 1 according to the pending Sixth Auxiliary request (wording as under III, *supra*) in that it read as follows (amendments by deletion and addition made apparent by the Board):

"1. A solid laundry detergent ...

...

(c) any particulate component that comprises at least 5%, by weight of the particulate-component [sic], of alkyl benzene sulphonate anionic detergent surfactant ~~also comprises from 0% to 10%, by weight of the particulate component,~~ **is essentially free** of silicate salt; and

(d) the weight ratio of carbonate salt to carboxylate polymer present in the composition is in the range of from 8:1 to 30:1".

The admissibility of this claim request into the proceedings was then controversially debated.

XV. Requests

Appellant I (Opponent 01) requested that the decision under appeal be set aside and that the patent be revoked.

Appellant II (Patent Proprietor) requested, as Main request, that the appeal by Appellant I be dismissed (i.e. that the patent be maintained in the form held allowable by the Opposition Division) or, alternatively, that the patent be maintained on the basis of the claims according to the Eighth Auxiliary Request filed at the oral proceedings.

XVI. The arguments of the opponents of relevance for the present decision can be summarised as follows:

Admissibility of the appeal by Opponent 01

The statement setting out the grounds of appeal of Opponent 01 dealt with the attacked decision also in respect of evidence already invoked and dealt with during opposition proceedings. The appeal was thus admissible.

Construction of Claim 1

According to the wording of Claim 1 as granted, any composition comprising a plurality of particles met the requirement "*comprising a plurality of particulate components*". The construction invoked by the Patent Proprietor was too narrow and not supported by the description of the patent in suit. The claimed composition might e.g. even consist of a powdery composition obtained from a single spray-drying operation, the particles of which might only differ from each other in terms of particle size.

Novelty

Novelty of the claimed subject-matter over D8 had never been conceded. The mention in the minutes of the oral proceedings before the Opposition Division (page 1, third paragraph, penultimate sentence) invoked by the Patent Proprietor concerned other prior art documents than D8. As D8 had been cited in the opposition proceedings, it was surprising to hear for the first time in the appeal proceedings that the carbonate speckles of Example 9 of D8 were not entirely made of carbonate. The argument of the Patent Proprietor

regarding assumptions allegedly to be made as to the carbonate content of the speckles and the spray-drying conditions used according to D8 were thus late and surprising.

According to the opponents' experts, no more than 1% by weight of dye/pigment would be contained therein. Nobody would dare to add too much colorant to a laundry composition, as it could end up on the substrate to be washed. Furthermore, D8 mentioned the relative amounts of the ingredients used. A higher proportion of colorant in said carbonate speckles would thus certainly have been expressly indicated. The laundry composition of Example 9 of D8 was even novelty-destroying in case the carbonate speckles contained as little as 50% by weight carbonate: In this case, the ratio of carbonate salts to carboxylate polymer in the composition would already be 7.6 or greater, which amounted to a rounded value of 8. All values given in paragraph [0022] of the patent in suit were clearly rounded to an integer number. Percarbonate salt, also included in the composition of Example 9 of D8, was not a peroxocarbonate, but a particular variant of a carbonate salt, and had thus to be taken into account.

Eighth Auxiliary Request - Admissibility

The filing of this further amended claim request at an advanced stage of the oral proceedings came as an absolute surprise. This new claim request could have been submitted earlier, the behavior of the Patent Proprietor was thus not fair. Such a claim request had not been the subject of a debate before. In particular, the combination of "*essentially free of silicate*" with the amended ratio of at least 8:1 had not been dealt with before. If admitted, the Opponents needed another

adjournment of the oral proceedings in order to review their positions and react accordingly. This request should thus not be admitted into the proceedings.

XVII. The arguments of the Patent Proprietor of relevance for the present decision can be summarised as follows:

Admissibility of the appeal by Opponent 01

Opponent 01 had not asserted that the decision under appeal was wrong in respect of the evidence then invoked and dealt with. The appeal of Appellant I was only based on the prior art documents filed with the statement of grounds, that should not be admitted into the proceedings. Hence, the appeal was inadmissible.

Construction of Claim 1

The meaning to be given to the wording "*a plurality of particulate components*" hinged on the question of how "*particulate component*" had to be understood. The finding in the decision under appeal that the claim merely required the composition to contain particles differing from each other in some way, e.g. in terms of their chemical composition, size, shape, or any other property, was based on a claim construction that the person skilled in the art would not adopt. Instead, Claim 1 had to be construed as requiring, by virtue of the wording "*a plurality of particulate components*", the presence of sets of particles having different chemical compositions. This construction was technically sensible and in line with the description.

Sixth Auxiliary Request - Novelty

The finding of the Opposition Division that the claimed

subject-matter was novel over D8 had not been disputed by the opponents in these appeal proceedings until shortly before the first oral proceedings of 18 March 2016. This late objection was based on assumptions regarding, on the one hand, the carbonate content of the speckles disclosed in D8 and, on the other hand, the spray-drying conditions used according to Example 9.

Disregarding the "carbonate speckle" ingredient of the composition of this example gave a carbonate salt: carboxylate ratio of only 7.1, i.e. of less than 8. Considering the totality of the speckles this ratio would be 8.2. However, since carbonate salt was white, the colored speckles disclosed in D8 could not consist only of 100% carbonate salt. Hence, the calculation made by the opponents was based on a assumption finding no direct and unambiguous basis in the disclosure of D8. The speckles of D8 might be colored with dyes or pigments present in an undisclosed relative amount. Furthermore, Claim 1 required a "*carbonate salt*", not a source of carbonate ions, so that the percarbonate could not be taken into account as carbonate salt. This was also apparent from the patent in suit, wherein Paragraph [0028] dealing with carbonates did not mention any percarbonate, whilst Paragraph [0034] dealing with adjuncts mentioned percarbonate.

Moreover, D8/example 9 did not directly and unambiguously disclose whether the "spray-dried powder" component was produced using a single or a plurality of nozzle(s), and this could also not be inferred from Example 1 of D8. The alleged lack of novelty was thus based on a second assumption not directly and unambiguously supported by the disclosure of D8.

Therefore, the objection based on 8/example 9 should be

disregarded as late filed and not relevant, and the claimed subject-matter should be found novel over D8.

Eighth Auxiliary Request - Admissibility

This single, "last" claim request was in fact an amended version of the pending Sixth Auxiliary Request addressing, overcame the novelty objection based on D8/ Example 9, and dealt with all the problems that had arisen during the debate without giving rise to further objections of clarity or added matter. This claim request had not been deliberately withheld but its filing was merely an attempt to address the current situation in the best manner.

The latest amendment made was based on Claim 3 as granted, identical to Claim 3 of the Sixth Auxiliary Request. Such a claim had always been on file, also in the context of the request held allowable by the Opposition Division. Since novelty of the now claimed subject-matter had not been attacked by the opponents in their very last writs, (only) the issue of inventive step would be left to be dealt with.

Reasons for the Decision

Admissibility of the appeals

1. The admissibility of the appeal of Opponent 01 was called into questions by the Patent Proprietor, who argued that it was only based on evidence filed with the statement of grounds.
- 1.1 It is, however, apparent from the arguments presented in Opponent 01's statement setting out the grounds of

appeal (page 4, last paragraph, to page 5, penultimate paragraph) that the decision under appeal was attacked *inter alia* as regards the Opposition Division's finding of non-obviousness over D7 (contested decision, reasons 7.3), and this without relying on evidence filed on appeal only.

- 1.2 For this reason alone, the Board is satisfied that the appeal of Opponent 01 (Appellant I) is admissible (Article 108 and Rule 99(2) EPC).
2. The Board is a satisfied, and it was not in dispute, that the appeal by the Proprietor is also admissible (Article 108 and Rule 99(2) EPC).
3. Opponent 02 filed a notice of appeal but did not submit a statement setting out the grounds of the appeal within the prescribed time limit (see VI, *supra*).

It is not in dispute that the appeal of Opponent 02 is, thus, inadmissible (Article 108 EPC).

Sixth Auxiliary Request (claims held allowable by the Opposition Division)

4. Construction of Claim 1

Taking into account the actual wording of Claim 1, the Board holds that Claim 1 implies the presence of particulate components of different chemical nature/composition, this reading being also fully in line with the description of the patent in suit. The following reasoning regarding lack of novelty is based on this construction of Claim 1 suggested by the Patent Proprietor.

5. Lack of novelty - Claim 1

5.1 Example 9 of D8 discloses a solid laundry detergent composition in particulate form comprising a plurality of particulate components of different chemical composition ("spray-dried powder," "AES surfactant agglomerate", "dry-added/spray on" components), the composition meeting all the requirements regarding the nature of the ingredients and their relative amounts that are recited in Claim 1, up to and including the one of feature (c).

5.2 The argument of the Patent Proprietor that the "spray-dried powder" contained in the composition of Example 9 of D8 could have been obtained using either a single or a plurality of nozzles, whereby spray-dried particles of differing chemical composition could have been obtained, has no bearing on the above finding, because Example 9 of D8 discloses the chemical composition of the spray-dried powder actually incorporated into the particulate laundry detergent composition, irrespective of how exactly this spray-dried powder has been produced.

5.3 It was in dispute whether the last requirement defined in feature (d) of Claim 1 is met by the composition disclosed in Example 9 of D8, i.e. whether *"(d) the weight ratio of carbonate salt to carboxylate polymer present in the composition is in the range of from 8:1 to 30:1"*.

5.4 It was common ground between the parties that if only the sodium carbonate (salt) respectively present in the spray-dried powder and in the AES surfactant agglomerate were considered, then the weight ratio of carbonate salts to carboxylate polymer in the composition of Example 9 of D8 would only be 7.11 ((11.63% sodium

carbonate in the "spray-dried powder" component + 5.43% sodium carbonate in the "AES surfactant agglomerate" component)/2.40 "acetate/maleate copolymer", i.e. "carboxylate polymer", in the "spray-dried powder component"), i.e. outside the range prescribed by Claim 1 at issue.

It is not in dispute either that if the total weight (2.50%) of the green/blue speckles contained as "dry added" component is taken into account, then the ratio according to feature (d) of Claim 1 becomes 8.15 $((11.63+5.43+2.50)/2.40)$, i.e. the requirement (d) of Claim 1 would be met.

- 5.5 A decisive question is thus whether or not, and/or to which extent, the dry-added green/blue carbonate speckle (2.50 wt% of the composition of Example 9) and/or the dry-added percarbonate salt (19.63 wt% of the composition of Example 9) are to be taken into account as "carbonate salt" when calculating the ratio defined in requirement (d).
- 5.5.1 D8 does not expressly mention the relative amounts of dye/colorant and carbonate contained in the green/blue carbonate speckles used as dry-added particle in the composition of Example 9 (see page 28).
- 5.5.2 The opponents argued that the designation "green/blue **carbonate** speckles" (emphasis added) used in D8 meant that these particles were essentially consisting of "colored carbonate". According to their experts, such colored carbonate speckles did not usually contain more than 1% colorant (dye/pigment). Hence, they contained at least 99% carbonate salt (letter of Opponent 01 dated 18 August 2016, Page 4/8, first to fourth full paragraphs)

(letter of Opponent 02 of 26 August 2016, Point [18]).

5.5.3 The Patent Proprietor, however, merely relied on the argument that since the amount of colorant was not directly and unambiguously disclosed, higher amounts of colorant would be technically possible and could thus not be excluded.

Although the Patent Proprietor is also the Applicant of D8, it did not submit evidence corroborating that a high content of dye/pigment had been used or could be used in the context of the compositions disclosed in D8.

5.5.4 On the basis of the evidence on file, it is not possible to establish with certainty whether the speckles disclosed in D8/example 9 actually contain more or less than 1% of dye/colorant.

5.5.5 However, considering that

- the speckles of D8 are designated "green/blue **carbonate** speckles" (emphasis added),
- that D8 does not mention a particularly high content of colorant (or of any other further ingredient of said speckles), although for other components the concentration of the essential ingredient is always expressly indicated, even if only present in amounts substantially below 1% by weight (see compositions of Examples 2 to 10 reported in the table on pages 23 to 28 of D8),

and

- that the composition in dispute is a laundry detergent composition and that a too high dye/colorant concentration could entail the risk of colouring the laundry to be washed, the Board has no doubts that the skilled person reading D8 would understand that the colored carbonate speckles must essentially be made of

carbonate salt and contain only minor amounts of dye/colorant.

- 5.5.6 Even assuming (*arguendo* only) a carbonate content of only about 50% by weight of carbonate salt in the speckles (the remainder being e.g. dye/colorant), the ratio according to feature (d) of Claim 1 at issue would be 7.63 $((11.63+5.43+1.25)/2.40)$. The rounding of 7.63 to an integer (whole number), as defined in the feature in dispute (see also paragraph [0022] of the patent in suit, showing that integers are used to designate ratio (d)) would thus inevitably correspond to a rounded value of 8.

Consequently, the Board is convinced that for the skilled person reading D8, the composition of D8/example 9 implicitly meets the requirement of feature (d) of Claim 1 at issue.

- 5.6 In view of this finding, it is not necessary for the Board to come to a conclusion regarding the question of whether also the **per**carbonate salt ingredient of the composition according to Example 9 of D8 should be taken into account as "*carbonate salt*" in calculating the weight ratio according to feature (d) of Claim 1. Taking it into account as well would lead to a ratio of about 19, i.e. clearly within the range indicated in Claim 1.
- 5.7 Therefore, in the Board's judgement, Example 9 of D8 is novelty-destroying for the subject-matter of Claim 1 (Articles 52(1) and 54(1)(2) EPC.
- 5.8 The Sixth Auxiliary Request (claims held allowable by the Opposition Division) is thus not allowable.

Eighth Auxiliary Request - Admissibility

6. The Eighth Auxiliary claim Request was only filed in the course of the oral proceedings.
Feature (c) of Claim 1 according to this request is more limited by virtue of the incorporation of the terms of dependent claim 3 as granted.
- 6.1 The admissibility of this claim request into the proceedings was strongly challenged by the adverse parties. They argued that the proposed amendments took them by surprise and that they needed to reconsider the case in view of the shift created by the belated filing of this claim request.
- 6.2 The Patent Proprietor provided no justification for the very late filing of this request. It merely stressed that it had not deliberately withheld this claim request, that it was trying to do its best, that this claim request included only claims as granted presenting no clarity or added matter problems and that it overcame the novelty objection based on D8 and that, hence, inventive step could be dealt with.
- 6.3 It is immediately apparent that the filing of this claim request constitutes an attempt to overcome the novelty objection based on D8, as the composition of Example 9 of D8 contains a significant amount of silicate salt, whereas Claim 1 according to Eighth Auxiliary Request requires that "(c) *any particulate component that comprises at least 5%, by weight of the particulate-component [sic] is **essentially free of silicate salt***" (emphasis added), i.e. no addition of silicate salt.
- 6.4 However, the issue of novelty over D8 had already been

raised since the very beginning before the first oral proceedings.

6.5 The Board thus holds that claims amended in this manner could and should have been filed earlier, in order for the Board and the adverse parties to be able to reconsider the case and review their positions before the oral proceedings, *inter alia* as regards inventive step over the other documents relevant in this respect.

6.6 Moreover, the Eighth Auxiliary Request also differs and diverges from all the other new auxiliary claim requests that had been pending at the beginning of the oral proceedings (although they had previously been objected to under Articles 84 and 123(2) EPC) at least insofar as Claim 1 at issue does not (no longer) contain a limitation as to the minimum amount and type of the alkyl benzene sulphonate surfactants to be contained in the composition. Claim 1 of the Fourth Auxiliary Request, although containing the feature "*essentially free of silicate salt*" also contains such a limitation under item (i) and, additionally, is broader in terms of the range specified in feature (d).

6.7 Taking into account all the above aspects, the Board exercising its discretion pursuant to Article 13(1), (3) RPBA, decided not to admit the Eighth Auxiliary Request into the proceedings.

Conclusion

7. None of the claim requests ultimately maintained by the Patent Proprietor is both admissible into the proceedings and allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated