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**Datasheet for the decision
of 28 May 2015**

Case Number: T 0597/13 - 3.3.07

Application Number: 01945492.5

Publication Number: 1304999

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A61K8/37, A61K8/44, A61K8/891,
A61Q15/00

Language of the proceedings: EN

Title of invention:
ANTIPERSPIRANT FORMULATIONS

Patent Proprietor:
Unilever PLC
Unilever N.V.

Opponent:
Henkel AG & Co. KGaA

Headword:
ANTIPERSPIRANT FORMULATIONS/ Unilever PLC, Unilever N.V.

Relevant legal provisions:
EPC Art. 123(2), 111(1)

Keyword:
Amendments - added subject-matter (no)
Appeal decision -
remittal to the department of first instance (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0597/13 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 28 May 2015

Appellant: Unilever PLC
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 4 January 2013 revoking European patent No. 1304999 pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman J. Riolo
Members: D. Boulois
W. Ungler

Summary of Facts and Submissions

- I. European patent No. 1 304 999 based on application No. 01 945 492.5 was granted on the basis of a set of 30 claims.

Independent claim 1 as granted read as follows:

"1. An anhydrous antiperspirant formulation comprising a particulate antiperspirant suspended in a water-immiscible carrier fluid which is structured by an effective amount of a structurant, characterized in that the particulate antiperspirant has a mean particle size of from 3 to 20 μm and at least 50% by weight of said carrier fluid comprises an oxygen-containing emollient oil of higher RI having a refractive index of at least 1.465, and said structurant comprises a wax or a non-polymeric fibre-forming gellant other than 12-hydroxystearic acid alone or in combination with stearic acid or a polymeric alkylmethylsiloxane obeying formula (I) or (II) or a combination of β -sitosterol and γ -oryzanol."

- II. An opposition was filed under Article 100 (a) EPC on the grounds that its subject-matter lacked inventive step.
- III. The present appeal by the patent proprietor lies from the decision of the opposition division to revoke the patent (Article 101(3) (b) EPC). The decision was based on 4 sets of claims as the main request filed with letter of 16 December 2008 and auxiliary requests 1-3 filed during the oral proceedings of 13 December 2012.

Independent claim 1 of the main request and auxiliary request 1 read:

The subject-matter of the independent claims 1 of the requests read as follows, the difference(s) compared with the main request as granted shown in bold:

main request

"1. An anhydrous antiperspirant formulation comprising a particulate antiperspirant suspended in a water-immiscible carrier fluid which is structured by an effective amount of a structurant, characterized in that the particulate antiperspirant has a mean particle size of from 3 to 20 μm and at least 50% by weight of said carrier fluid comprises an oxygen-containing emollient oil of higher RI having a refractive index of at least 1.465, **and said structurant comprises wax in an amount of 10 to 25% by weight of the formulation**"

Auxiliary request 1

The subject-matter of claim 1 of auxiliary request 1 was identical to claim 1 as granted.

Auxiliary request 2

"1. An anhydrous antiperspirant formulation comprising a particulate antiperspirant suspended in a water-immiscible carrier fluid which is structured by an effective amount of a structurant, characterized in that the particulate antiperspirant has a mean particle size of from 3 to 20 μm and at least 50% by weight of said carrier fluid comprises an oxygen-containing emollient oil of higher RI having a refractive index of at least 1.465, **and said structurant comprises a wax**".

Auxiliary request 3

"1. A **substantially** anhydrous antiperspirant formulation comprising a particulate antiperspirant suspended in a water-immiscible carrier fluid which is structured by an effective amount of a structurant, characterized in that ~~the particulate antiperspirant has a mean particle size of from 3 to 20 μm and~~ at least 50% by weight of said carrier fluid comprises an oxygen-containing emollient oil of higher RI having a refractive index of at least 1.465, and said structurant comprises a wax or a non-polymeric fibre-forming gellant other than 12-hydroxystearic acid alone or in combination with stearic acid or a polymeric alkylmethylsiloxane obeying formula (I) or (II) or a combination of β -sitosterol and γ -oryzanol, **wherein by substantially anhydrous means that the composition does not have any separate aqueous phase present although some water may be present bound to the antiperspirant active or as a small amount of solute within the water immiscible liquid phase, and wherein the particle size of the antiperspirant falls within the range of 0.1 to 200 μm with a mean particle size of from 3 to 20 μm .**"

IV. According to the decision under appeal, a new ground for opposition under Article 100(c) EPC, raised for the first time during oral proceedings, was admissible in view of its relevance.

The description of the original application WO 02/11692 stated that "*the particle size of the antiperspirant salts often falls within the range of 0.1 to 200 μm with a mean particle size often from 3 to 20 μm (...) both larger and smaller mean particle sizes can also be contemplated such as from 20 to 50 μm or 0.1 to 3 μm ". The term "with" induced a dependency between the size range and the mean particle size. Since claim 1 of the main request did not specify the*

size range, the conditions of Article 123(2) EPC were not met.

Another incriminated feature was the feature relating to the wax, namely "*said structurant comprises wax in an amount of 10 to 25% by weight of the formulation*". In the description, this feature was correlated with the fact that waxes from a network, a feature absent from claim 1. The conditions of Article 123(2) EPC were not met.

The same conclusions applied to auxiliary requests 1 and 2.

The subject-matter of claim 1 of auxiliary request 3 included the amended feature "*substantially anhydrous*" instead of the term "*anhydrous*" in the granted version. Both terms were not considered as synonyms, and thus auxiliary request 3 did not meet the requirements of Article 123(3) EPC.

- V. The proprietor filed an appeal against this decision. With the statement setting out the grounds of appeal the appellant submitted a main request and auxiliary requests 1-3.

The subject-matter of independent claim 1 of the main request read as follows, the difference(s) compared with the main request as granted shown in bold:

"1. An anhydrous antiperspirant formulation comprising a particulate antiperspirant suspended in a water-immiscible carrier fluid which is structured by an effective amount of a structurant, characterized in that the particulate antiperspirant has **a size within**

the range of from 0.1 to 200 μm and has a mean particle size of from 3 to 20 μm and at least 50% by weight of said carrier fluid comprises an oxygen-containing emollient oil of higher RI having a refractive index of at least 1.465, and said structurant comprises a wax or a non-polymeric fibre-forming gellant other than 12-hydroxystearic acid alone or in combination with stearic acid or a polymeric alkylmethylsiloxane obeying formula (I) or (II) or a combination of β -sitosterol and γ -oryzanol."

- VI. With a letter dated 3 March 2015, the respondent - opponent submitted arguments and informed the appellant and the Board that it will not take part to the oral proceedings.
- VII. A Board's communication dated 24 April 2015 was sent to the parties. In particular, it stated that the main request invention appeared to meet the requirements of Article 123(2) EPC.
- VIII. Oral proceedings took place on 28 May 2015.
- IX. The arguments of the appellant may be summarized as follows:
- The subject-matter of claim 1 of the main request had a basis on pages lines 27-29 and page 38, lines 29 to page 39, line 1. The term "*anhydrous*" in claim 1 would be understood by the skilled person in the art to allow for the presence of water.
- X. The arguments of the respondent in its written submissions may be summarized as follows:

The subject-matter of claim 1 of the main request did not meet the requirements of Article 123(2) EPC. The feature "*the particulate antiperspirant has a size within the range of from 0.1 to 200 µm and has a mean particle size of from 3 to 20 µm*" was disclosed in the context of a "*substantially anhydrous*" composition. The description mentioned further that a "*substantially anhydrous*" composition is a composition which did not have any separate aqueous phase present although some water may be present bound to the antiperspirant active or as a small amount of solute within the water immiscible liquid phase.

Since these explanations are absent from claim 1, the main request did not meet the requirements of Article 123(2) EPC.

XI. Requests

The appellant requested that the decision under appeal be set aside and the patent be maintained according to the main request or auxiliary requests 1 to 3 all filed with letter of 3 May 2013.

The respondent requested in writing that the appeal be dismissed.

Reasons for the Decision

1. Main request - Amendments

- 1.1 The subject-matter of claims 1 and 28-30 of the main request differ from the subject-matter of claim 1 of the original application WO 02/11692 by the addition of the features "*has a size within the range of from 0.1 to 200 µm and has a mean particle size of from 3 to 20 µm*" and "*and least 50% by weight of said carrier*".

- 1.2 The feature *"and least 50% by weight of said carrier"* is disclosed directly and unambiguously in the original description of WO 02/11692 on page 12, line 29, a passage relating to the proportion of the emollient in the carrier fluid.
- 1.3 As to the feature *"has a size within the range of from 0.1 to 200 μm and has a mean particle size of from 3 to 20 μm "* it is disclosed directly and unambiguously in the original application WO 02/11692 on page 38, line 21 to page 39, line 1, a passage relating to the particle size of the antiperspirant salts. This disclosure is made in the frame of the compositions of the present invention, defined in said passage by the term *"in the present invention, the composition takes the form of a suspension in which antiperspirant active in particulate form is suspended in the water-immiscible liquid carrier"*, thus unambiguously the *"anhydrous antiperspirant formulation"* of claim 1 of the main request. *"Anhydrous"* indicates indeed that the claimed formulation is free from a distinct aqueous phase, which means in practice that it does not comprise an aqueous emulsion.

Even if said passage further mentions that *"such a composition does not have any separate aqueous phase present and may conveniently be referred to as "substantially anhydrous" although it should be understood that some water may be present bound to the antiperspirant active or as a small amount of solute within the water-immiscible liquid phase"*, this passage can only be interpreted as a mere explicative information, and cannot be considered to present a contradictory definition of the anhydrous compositions of the present invention. It is thus not necessary to

incorporate these redundant indications in claim 1 of the main request.

1.4 The main request meets the requirements of Article 123(2) EPC.

2. Remittal to first instance

Although Article 111(1) EPC does not guarantee the parties an absolute right to have all the issues in the case considered by two instances, it is well recognised that any party should, whenever possible, be given the opportunity to said consideration by two instances of the important elements of the case. The essential function of an appeal in inter partes proceedings is to consider whether the decision which has been issued by the first instance department is correct. Hence, a case is normally remitted if further opposition grounds have not yet been examined and decided by the department of first instance. This is the situation here.

Hence, the Board considers it appropriate to remit the case to the Opposition Division for further prosecution on the basis of the main request.

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 for further prosecution.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated