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Datasheet for the decision of 5 March 2018

Case Number: T 2154/13 - 3.2.07

Application Number: 07822288.2

Publication Number: 2097326

IPC: B65D5/42, C11D17/04

Language of the proceedings: EN

Title of invention:
FABRIC SHADING GUIDE

Patent Proprietors:
Unilever PLC
Unilever N.V.

Opponents:
Henkel AG & Co. KGaA
The Procter & Gamble Company

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA Art. 12(4)

Keyword:
Inventive step - (no)
Late-filed request - request could have been filed in first instance proceedings (yes)

Decisions cited:
T 1704/06

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Chambres de recours

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Case Number: T 2154/13 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 5 March 2018

Appellant: (Patent Proprietor 1)	Unilever PLC Unilever House 100 Victoria Embankment London EC4Y 0DY (GB)
Appellant: (Patent Proprietor 2)	Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	Hardy, Susan Margaret Unilever Patent Group Colworth House Sharnbrook Bedford, MK44 1LQ (GB)
Respondent: (Opponent 1)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA CLI Patents Z01 40191 Düsseldorf (DE)
Respondent: (Opponent 2)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnatti, Ohio 45202 (US)
Representative:	Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 9 August 2013 revoking European patent No. 2097326 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
G. Patton

Summary of Facts and Submissions

I. The patent proprietors (appellants) lodged an appeal against the decision of the opposition division revoking European patent No. 2 097 326 in due time and form.

II. Oppositions had been filed against the patent as a whole for lack of novelty and inventive step, and for insufficient disclosure (Article 100(a) and (b) EPC).

III. The opposition division found that the subject-matter of claim 1 of the patent as granted lacked novelty over the disclosure of document WO 01/32097 (D6).

IV. With their statement setting out the grounds of appeal the appellants requested

that the decision under appeal be set aside and

that the patent be maintained as granted,

or, in the alternative,

that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 3 filed therewith.

The appellants also referred to document D8 (Results of an eBay query on "teeth whitening").

V. The respondents (opponents O1 and O2) requested

that the appeal be dismissed.

VI. In the annex to the summons to oral proceedings, the Board provided the parties with its preliminary opinion on the above requests.

VII. Oral proceedings were held on 5 March 2018, in the absence of the appellants and of respondent 1. In

accordance with Rule 115(2) EPC and Article 15(3) RPBA, the proceedings were held without the parties.
For the further course of the oral proceedings, in particular the issues discussed with respondent 2, reference is made to the minutes.

The present decision was announced at the end of the oral proceedings.

VIII. Claim 1 of the patent as granted reads as follows:
"A laundry package and fabric whiteness guide comprising at least one visual scale of whiteness, wherein the guide is integral with a part of the package, characterised in that the guide comprises a plurality of discrete portions and said portions are 0.5 - 4cm in length or diameter."

Claim 20 of the patent as granted reads as follows:
"A method of consumer-measuring and/or monitoring of the whiteness of a fabric, the method including the step of comparing the fabric with a scale of whiteness of the guide of any preceding claim."

Claim 1 of the first auxiliary request corresponds to claim 1 of the patent as granted, with the addition of the following features at the end thereof:
"characterised in that said package contains a laundry composition."

Independent claim 20 of the first auxiliary request corresponds to claim 20 of the patent as granted.

Independent claim 1 of the second auxiliary request reads as follows:
"A method of consumer-measuring and/or monitoring of the whiteness of a fabric, the method including the

step of comparing the fabric with a scale of whiteness of a fabric whiteness guide comprising at least one visual scale of whiteness, wherein the guide is integral with a part of the package, characterised in that the guide comprises a plurality of discrete portions and said portions are 0.5 - 4cm in length or diameter."

Independent claim 20 of the second auxiliary request reads as follows:
"A laundry package and fabric whiteness guide further including instructions for use of said fabric whiteness guide to measure the whiteness of a fabric according to the method of any preceding claim."

The only independent claim 1 of the third auxiliary request corresponds to claim 1 of the second auxiliary request.

IX. Insofar as relevant to the present decision, the appellants argued substantially as follows.

The opposition division did not correctly apply the novelty criteria to be met for a selection invention as referred to the EPO Guidelines for Examination, as this was done on the basis of an assumption of the most probable dimensions of the package disclosed in Figure 1 of D6.
D6 failed to disclose the claimed discrete portions of the whiteness guide. These portions enabled the consumer, at home and without expensive laboratory equipment, to evaluate the relative whiteness of a laundry item.

The claimed subject-matter of auxiliary requests 1-3 was patentable over the available prior art, in

particular because D6 disclosed neither a laundry composition nor a method step of comparing **a fabric** with a scale of whiteness. The appellants' arguments will be dealt with in more detail in the reasons for the decision (point 4).

X. Insofar as relevant to the present decision, the respondents argued substantially as follows.

The subject-matter of claim 1 of the patent as granted lacked novelty, because D6 implicitly disclosed the claimed discrete portions of the whiteness guide. Alternatively, no inventive step was to be acknowledged in respect of the teaching of D6 in combination with the common general technical knowledge, because the application of a whiteness guide to measure the efficacy of cleaning from one cleaning task (teeth cleaning) to another (fabric cleaning) was within the capabilities of a skilled person.

The respondents objected to the admittance into the proceedings of both document D8 and the auxiliary requests, as being irrelevant and/or late-filed.

Reasons for the Decision

1. Right to be heard

Although the appellants and respondent 1 did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC has been observed, since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in

T 1704/06, not published in OJ EPO; see also Case Law of the Boards of Appeal, 8th edition 2016, sections III.B.2.7.3 and IV.E.4.2.6.d).

The following reasons essentially correspond to the preliminary opinion expressed by the Board in the annex to the summons to oral proceedings to which the appellants did not reply, apart from their letter announcing their intention not to attend the proceedings. That opinion is confirmed by the Board after having re-considered the parties' submissions.

2. D8 - Admittance into the proceedings

Article 12(4) RPBA states that everything presented by a party with its statement setting out the grounds of appeal must be taken into account by the Board, provided and to the extent that it relates to the case under appeal.

D8, filed with the statement setting out the grounds of appeal, does not bear a date of publication. Should the date of the copyright notice (2013) be taken as the date of publication, this was seven years after the priority date of the patent. Either way, the Board is unable to establish whether D8 can be regarded as prior art or play any role in the case under appeal, and decides not to admit it into the proceedings.

3. Auxiliary requests - Admittance into the proceedings

3.1 Both respondents argued that none of these auxiliary requests should be admitted, because they could and should have been filed before the opposition division. No argument on the admissibility of these requests has been submitted by the appellants.

3.2 The Board notes that the patent was revoked for lack of novelty in view of the disclosure of D6, and that this objection was raised and discussed only at the oral proceedings before the opposition division in the absence of the appellants.

The procedural conduct of the appellants raises the issue whether this party, exercising due care in its procedural actions, should have submitted these requests during the opposition proceedings. This question is strictly related to the application of Article 12(4) RPBA, which states that the Board has the discretionary power not to admit requests which could have been presented in the proceedings leading to the decision under appeal.

The Board considers that non-attendance at oral proceedings before the opposition division does not in itself justify the submission of new requests in appeal proceedings as a (presumed) reaction to the course of the oral proceedings in which the submitting party deliberately did not participate.

In addition, as also noted in the appealed decision (see point 4.3 of the reasons), the appellants were - or should have been - well aware of the fact that respondent 2 had raised an objection of lack of inventive step based on D6 as the closest prior art. Hence, auxiliary requests aimed at overcoming these objections could and should have been submitted during the opposition proceedings.

Following the principle according to which the appellant should be prevented from seeking unjustified procedural advantages in disregard of procedural

economy and to the disadvantage of other parties (*nemo auditur propriam turpitudinem allegans*), the Board therefore decides not to admit auxiliary requests 1-3 into the appeal proceedings.

4. Inventive step of claim 1 of the main request

4.1 According to claim 1 of the main request the discrete portions of the whiteness guide are 0.5 - 4cm in length or diameter.

4.2 The appellants considered this feature to be the distinguishing feature of the subject-matter of claim 1 of the patent as granted over the disclosure of D6 and associates (see page 3 of the statement setting out the grounds of appeal) the following effect thereto:

The claimed range enabled an easy comparison between laundered fabrics and the portions of the guide, because with these dimensions the portions were big enough to be easily recognised by a user.

The Board concurs with the above effect as formulated by the appellants.

Based on this effect, the problem to be solved is that of evaluating the relative whiteness of a laundry item at home and without expensive laboratory equipment.

4.3 The Board considers that, as argued by the respondents, this feature does not contribute to inventive step.

Starting from Figure 1 of D6, a skilled person would immediately realise that the discrete portions of the guide should not be too big, because they should, as

depicted in Figure 1, be accommodated on the side of a relatively small package.

It would be immediately apparent to a skilled person from simple tests (trial and error) that the claimed range 0.5-4 cm solves this problem.

Accordingly, the subject-matter of claim 1 of the main request does not involve an inventive step in view of D6.

4.4 The appellants argued that D6, being solely concerned with dental shading, is irrelevant for inventive step, because the field of oral cosmetics is totally unrelated to laundry washing.

The Board disagrees, because, as discussed above in relation to novelty, the tooth whiteness guide disclosed in D6 is also suitable for quick in-home testing of the whiteness of a fabric, and that the package shown in Figure 1 of this document is also suitable for holding a laundry composition.

4.5 As a consequence, the subject-matter of claim 1 of the patent as granted lacks inventive step in view of the teaching of document D6 in combination with the common general technical knowledge and practice of the person skilled in the art.

5. Further issues

5.1 The appealed decision is based on the assessment that D6 discloses the feature that the discrete portions of the whiteness guide are 0.5-4 cm in length or diameter.

5.2 This assessment is contested by the appellants.

Both respondents submitted in response arguments according to which this particular feature is known from D6.

5.3 The Board refrains from taking a position on novelty, because in the light of the above conclusions on the issue of inventive step, the issue of lack of novelty over D6 raised by the respondents can be left open.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Nachtigall I. Beckedorf

Decision electronically authenticated