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**Datasheet for the decision
of 22 January 2018**

Case Number: T 0296/14 - 3.3.06

Application Number: 08804758.4

Publication Number: 2195409

IPC: C11D17/06, C11D3/40, C11D3/50,
C11D17/00

Language of the proceedings: EN

Title of invention:
IMPROVED VISUAL CUES FOR PERFUMED LAUNDRY DETERGENTS

Patent Proprietor:
Unilever PLC / Unilever N.V.

Opponent:
The Procter & Gamble Company

Headword:
Visual cues II / UNILEVER

Relevant legal provisions:
EPC Art. 83
RPBA Art. 12(4)

Keyword:

Admittance of a specific insufficiency objection raised for the first time in the reply to the statement of grounds of appeal with regard to an independent claim amended by incorporation of a feature taken from a granted dependent claim (yes)

Sufficiency of disclosure - enabling disclosure (no)

Decisions cited:

Catchword:



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Case Number: T 0296/14 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 22 January 2018

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
3 December 2013 concerning maintenance of the
European Patent No. 2195409 in amended form.

Composition of the Board:

Chairman B. Czech
Members: P. Ammendola
 J. Hoppe

Summary of Facts and Submissions

- I. The present appeal by the Opponent is against the decision of the Opposition Division concerning maintenance of European Patent No. 1 195 409 in amended form on the basis of the set of claims filed as First Auxiliary Request during the oral proceedings before the Opposition Division.
- II. Claim 1 of this Auxiliary Request is a combination of claims 1 and 3 as granted. It reads as follows (features stemming from claim 3 as granted highlighted by the Board):
- "1. A granular laundry detergent composition comprising at least 5 wt% surfactant, optional builder, optional further cleaning ingredients, a perfume and 0.01 to 10 wt% of lamellar visual cues made from coloured and shaped film material wherein the visual cues are flower shaped having a centrally generally circular area with six rotationally symmetrically disposed petals radiating therefrom with petals coloured to have a naturally occurring petal colour selected from the group comprising: pink, yellow, red, blue, lilac, violet, orange, purple and green and wherein the perfume is floral in essence and the flower shaped visual cues have a diameter of between 2mm and 10mm, **wherein the flower shaped visual cues have a relative density of less than 0.8, preferably less than 0.5, most preferably less than 0.4.**"*
- III. In its notice of opposition the Opponent raised objections under Article 100(a), 100(b) and 100(c) EPC. In particular, in this notice, the insufficiency objection had been raised on the ground that the patent

in suit did not disclose a specific example of how to make the "*flower shaped visual cues*". At the oral proceedings before the Opposition Division, the Opponent also considered of relevance in this respect that the patent in suit gave no clear definition of the term "*relative density*".

- IV. The Opposition Division found that the patent in the amended version with the claims according to the First Auxiliary Request (herein below referred to as **claims held allowable by the Opposition Division**) met the requirements of the EPC, *inter alia* as regards Article 83 EPC, because
- the presence of an example was no requirement of Article 83 EPC, and
 - the "*relative density*" was a commonly accepted dimensionless parameter that in the context of the patent in suit could only indicate the ratio between the density of the visual cues and the density of water.
- V. In its statement of grounds of appeal the Appellant (Opponent) argued that the Opposition Division erred *inter alia* in deciding that the invention was sufficiently disclosed. The Appellant's line of reasoning was based on the consideration that the patent in suit did not disclose how to obtain visual cues having "*a relative density of less than 0.8, preferably less than 0.5, most preferably less than 0.4*" as required according to claim 1 at issue (herein below referred to as **cue density objection**).
- VI. In its reply, the Respondent (Patent Proprietor) defended the patent in the version held allowable by the Opposition Division, *inter alia* requesting the non-admittance of the the cue density objection into the

proceedings pursuant to Article 12(4) RPBA in view of its belated submission. With the reply, it nevertheless also filed three sets of amended claims labelled 2nd, 3rd and 4th Auxiliary Requests.

Claim 1 according to the **2nd Auxiliary Request** essentially differs from claim 1 as allowed by the Opposition Division in that it additionally requires that the flower shaped visual cues are formed of a *"water soluble film material with a maximum thickness of 1 mm, preferably 0.4 mm, more preferably 0.25 mm, most preferably 0.2 mm"*.

Claim 1 of the **3rd Auxiliary Request** differs from claim 1 according to the 2nd Auxiliary Request in that it additionally requires that the *"film material comprises water soluble polymer, surfactant and colorant and wherein each visual cue comprises 10 to 80% of said water soluble polymer"*.

- VII. In a letter dated 7 July 2015 the Appellant, *inter alia*, maintained its objections and extended them to the Respondent's auxiliary claim requests.
- VIII. At the oral proceedings held before the Board on 22 January 2018, the Respondent expressly withdrew its 4th Auxiliary Request.
- IX. Final requests

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

The Respondent (Patent Proprietor) requested that:

- the appeal be dismissed (Main Request)

or, if that was not possible,
- that the patent be maintained on the basis of one of the sets of claims filed with letter of 21 October 2014, labelled 2nd and 3rd Auxiliary Request, respectively.

X. The Appellant's arguments of relevance for the present decision may be summarised as follows.

Admittance of the cue density objection

Raising this objection for the first time in the statement of grounds of appeal was perfectly legitimate and equitable in view of the Respondent's late reliance on the density of the visual cues in defining the claimed subject-matter. An accordingly amended independent claim 1 had been filed for the first time at the oral proceedings before the Opposition Division. The Board should thus admit this objection into the proceedings.

Insufficiency of disclosure

In order for the invention to be sufficiently disclosed across the ambit of claim 1, the skilled person must have been able, based on the content of the patent specification and common general knowledge, to produce lamellar visual cues from films having a relative density below 0.8 and most preferably even below 0.4, i.e. PVA-based films as described in [0031] of the patent in suit, and films formed from other water soluble polymers listed in paragraph [0030].

However, even the water-soluble polymer referred to in the opposed patent as the most preferred film material, i.e. the PVA, undisputedly had a relative density well

above 0.8. Moreover, none of the other possible ingredients of the film materials disclosed in the patent in suit was stated to have (or causing in the final film) a substantially lower density. Hence, the patent specification contained no description at all of how the density of a PVA film, or any other polymeric film, could be reduced.

Sufficiency of the disclosure was thus only given provided this had been part of the relevant common general knowledge. However, the Respondent had provided no evidence of such common general knowledge. Also the mere reference made by the Respondent (at the oral proceedings before the Board) to the passage in the decision under appeal referring to "known measures, such like incorporating air into the material, to decrease the density of the visual cues" was no clear proof of the existence of common general knowledge, enabling the production of the visual cues as defined in claim 1, i.e. small in diameter and most preferably having a relative density of less than 0.4 and a maximum thickness of 0.2 mm. Indeed, it was apparent that if visual cues with all these characteristics were to be formed from a polymer film in which air had been incorporated, this inevitably implied specific requirements as to the amount, dimensions and homogeneity of distribution of the air bubbles that had to be present into the polymer film. Whether a skilled person would be able to prepare a polymer film complying with these specific requirements, could not be predicted simply on the basis of some not further identifiable common general knowledge regarding the possibility of incorporating air polymer films.

The Appellant also maintained that the person skilled in the art would not be able to carry out the invention

because no clear meaning could be attributed to the term "*relative density*", considering that paragraph [0022] of the patent referred to visual cues with a "*specific gravity*" of ">200".

- XI. The Respondent's arguments of relevance for the present decision may be summarised as follows.

Admittance of the cue density objection

The Board of Appeal should not to admit this insufficiency objection by the Appellant pursuant to Article 12(4) RPBA, since it could have been raised earlier, i.e. during the opposition proceedings. More particularly, the following had to be considered in this respect (see page 6 of the reply, third to fifth paragraphs):

"No submission was made by the Opponent (Appellant) in the Opposition Proceedings under Article 83 EPC / Article 100(b) EPC as to the Appellant's new submission that the Opposition Division should have considered, in relation to sufficiency of disclosure, 'whether a person of ordinary skill in the art would, at the priority date, have been able to produce a lamellar visual cues [sic] made from shaped film material having a relative density of less than 0.8, or even less than 0.4, as is preferred in claim 1".

"Given that the feature of the visual cues having a relative density of less than 0.8 was incorporated into claim 1 as granted from claim 3 as granted (= claim 6 as originally filed), the Opponent (Appellant) has had ample opportunity to raise an objection in respect of the sufficiency or otherwise of this feature prior to submission of its Grounds of Appeal, i.e. during the Opposition Proceedings."

Sufficiency of disclosure

The Respondent disputed in writing the substance of the cue density objection, arguing in general that (reply, page 6, sixth paragraph, to page 7, third paragraph) the possible components of the film material other than the water soluble polymer disclosed in the patent in suit would have "a bearing on the structure of the film material" and were "suitable for achieving an overall relative density of less than 0.8".

However, at the oral proceedings the Respondent's only responded to the cue density objection by referring to the decision under appeal (page 10, last paragraph), where the Opposition Division had acknowledged the existence of common general knowledge regarding the possibility to decrease the density of polymer films by incorporating air therein. Hence, the requirements of Article 83 EPC were met also in respect of the question how to achieve the low relative density required for the visual cues.

Reasons for the Decision

Respondent's Main Request (claims held allowable by the Opposition Division)

1. Construction of the term "*relative density*" in claim 1
- 1.1 The Board notes that the term "*relative density*" is a commonly accepted dimensionless parameter whose normal meaning is, in the absence of further indications, the ratio between the density of a shaped body and that of water. As also stressed by the Opposition Division (see the fourth paragraph of reason 2.3.2 of the decision

under appeal), the fact that the patent in suit (see paragraphs [0018] and [0050]) describes the floating of the visual cues in the washing liquid, i.e. upon addition of the detergent composition to water, is perfectly consistent with such normal meaning of the term "*relative density*".

- 1.2 Accordingly, the Board holds that also in claim 1 at issue this term must reasonably be construed as indicating the ratio between the density of the visual cues and the density of water. Considering that the patent is revoked for another reason, there is no need to provide further arguments as regards the Appellant's interpretation of the term "*relative density*" (and the other insufficiency objection based thereon).
- 1.3 The Board stresses that in its submissions regarding sufficiency of disclosure discussed at 2.2 below, the Appellant also implicitly construed the term "*relative density*" as relative to the density of water.

Admittance of the cue density objection.

2. In its statement of grounds of appeal the Appellant submitted for the first time that the claims held allowable by the Opposition Divisions were objectionable on the ground of insufficiency of disclosure, because the person skilled in the art would not be able to produce "*lamellar visual cues made from coloured and shaped film material ... wherein the flower shaped visual **cues have a relative density of less than 0.8, preferably less than 0.5, most preferably less than 0.4***" as defined in claim 1.
3. The cue density feature taken from claim 3 as granted had only been incorporated into claim 1 according to

the auxiliary request 1 presented for the first time at the oral proceedings before the Opposition Division.

Is it not apparent from the contents of the file that the Respondent had already (at least indirectly) signalled before the date of said oral proceedings that it was considering the possibility to limit the claimed subject-matter to compositions wherein the flower shaped cues had a relative density of less than 0.8. This is also undisputed by the Respondent.

- 3.1.1 Hence, the Board accepts that the Opponent may not have been able to consider all the possible implications on the insufficiency objection raised against the patent as a whole of the amendments only made to claim 1 at the oral proceedings before the Opposition Division.

For the Board, it is understandable that the Appellant's arguments regarding sufficiency in respect of the more specific, amended claim evolved somewhat further when the Appellant, in preparing its statement of grounds, has had additional time to review the all possible implications of these amendments that came as a surprise to it at the oral proceedings before the Opposition Division. Furthermore the Appellant had already raised objections under Article 100(b) EPC against all claims as granted in its notice of opposition, pointing out that no specific and detailed examples were given in the patent, in particular as regards the visual cues (only shape information) and that this objection also applied to the dependent claims. Moreover, at the hearing before the Opposition Division sufficiency of the disclosure was also disputed considering that the term "*relative density*", as appearing in claim 3 as granted (incorporated into

claim 1 at issue), was not defined. Thus the argumentation of the Appellant was not completely new.

3.1.2 The Board thus concludes that the cue density objection was not raised unjustifiably late, despite the fact that the cue density features were present in granted dependent claim 3.

3.1.3 Accordingly, the Board, in the exercise of its discretion under Article 12(4) RPBA, decided to admit the cue density objection raised by the Appellant into the proceedings and considered it in the assessment of sufficiency of the disclosure.

Insufficiency of the disclosure

4. Claim 1 under consideration requires the "*lamellar flower shaped visual cues made from coloured and shaped film material*" present in the claimed composition to "*have a relative density of less than 0.8*".

According to the patent in suit these visual cues are particles in the form of planar film material made into shapes, using e.g. the methods described in [0049]. The film material is made of (see paragraphs [0028] to [0031]) a water-soluble polymer, advantageously from PVA, and preferably also comprising surfactant, colorant or other additives.

4.1 As pointed out by the Appellant, no information is given in the patent in suit as regards the providing of visual cues having a relative density of less than 0.8.

4.1.1 The Board holds that the information given in the patent is indeed insufficient in this respect,

considering the following facts identified by the Appellant, which were not disputed by the Respondent:

- The water-soluble polymers and in particular the preferred PVA mentioned in paragraphs [0030] and [0031] of the patent have relative densities well above 0.8.
- None of the other possible components of the film material mentioned in the patent in suit is also disclosed therein as having (or causing in the final film to have) a relative density lower than 0.8.
- The patent in suit neither discloses any specific example of a film material, let alone of a film material with a relative density of less than 0.8, nor identifies any specific measure (e.g. some film processing operation) as possibly contributing to providing a low density of the film material and, thus, of the lamellar flower shaped visual cues made therefrom.

4.1.2 Moreover, the Board has no reason to consider that the person skilled in the art reading the patent in suit would be aware of generally known ways of decreasing to less than 0.8 the relative density of a polymer film (e.g. a PVA film).

In particular, the Respondent's written submission in this respect is manifestly of no relevance, since it only points to the general disclosure in the patent in suit regarding possible components of the film material other than the water soluble polymer. It was not even alleged, let alone demonstrated that any of the mentioned film components was known (or could

reasonably be assumed) to possess a sufficiently low relative density or any other property suitable for decreasing to less than 0.8 the relative density of a polymeric (e.g. PVA-based) film material.

Thus, neither the patent itself nor the Respondent's written submissions clarify to any extent how the skilled person could obtain the visual cues with the required low density.

4.1.3 Hence, for this reason alone, the Board finds the cue-density objection raised by the Appellant convincing.

4.2 At the oral proceedings the Respondent has ultimately responded to the cue-density objection exclusively by referring to the last paragraph on page 10 of the reasons of the decision under appeal, where the Opposition Division states that "a skilled person would have to take some known measures, such like incorporating air into the material, to decrease the density of the visual cues".

4.2.1 In this respect, the Board notes the following:

- The cited statement is only an incidental consideration by the Opposition Division in the context of its reasoning regarding inventive step, not sufficiency, and in view of possibly obvious modifications of visual cues of the closest prior art.
- This statement is manifestly vague and does not appear to (at least implicitly) refer to any of the evidence (documents) on file before the Opposition Division.

- At the oral proceedings before the Board, the Respondent did not further substantiate, let alone make submissions referring to evidence, as to the nature of the "measures, such like incorporating air into the material" that the Opposition Division was apparently considering to be "known", also without referring to evidence on file.

4.2.2 Moreover, as convincingly argued by the Appellant, even if some methods for incorporating air in a polymer film were part of the common general knowledge, it was still necessary to establish whether such known methods enabled to achieve the homogenous distribution of fine air bubbles (or pores) required for the actual production of the flower shaped visual cues as defined in claim 1. The latter are indeed not only small (less than 1 cm in diameter, as also required in claim 1 at stake) but preferably very thin (most preferably thinner than 0.2 mm (paragraph [0017] of the patent in suit) and very light (already claim 1 indicates that their most preferable relative density is less than 0.4). Hence, further details regarding common general knowledge (on the incorporation of air in film materials) possibly referred to in the cited passage of the decision under appeal were necessary

- not only for verifying the actual existence of such common general knowledge at the effective filing date of the patent in suit but also, and more importantly,
- for establishing whether it at least plausibly permitted the incorporation of air into the film material so finely and homogeneously as required for making, therefrom, visual cues as defined in claim 1.

4.2.3 Hence, the Board finds that in the absence of further corroborating elements, the quoted statement of the Opposition Division does manifestly not suffice to

establish some common general knowledge enabling the skilled person to obtain lamellar flower shaped visual cues made from film materials with the required low density.

4.3 The patent as such neither provides plausible explanations nor examples as to possible ways of preparing lamellar flower shaped visual cues made from film materials and having the required low density. Moreover, the Respondent provided no sound counter-argument to the convincing objection of the Appellant that the disclosure in the patent in suit does not enable the reproduction of visual cues as defined in claim 1. Hence, the Respondent did not discharge the burden of proof resting with it in this respect.

4.3.1 The Board therefore concludes that the patent in suit does not disclose the claimed invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art (Article 83 EPC).

5. Thus, the Respondent's Main Request is not allowable.

Respondent's Auxiliary Requests

6. At the oral proceedings the Respondent, made aware of the Board's view that the Main Request was objectionable for insufficiency of the disclosure as regards the cue density feature, expressly conceded that such finding would likewise be applicable to the two pending Auxiliary Requests, since the amendments made to the claims according to the latter had no bearing on this particular issue.

6.1 Indeed, the respective claims 1 of the 2nd and 3rd Auxiliary Requests (wording under VI *supra*) also

require that the lamellar flower shaped visual cues must "have a relative density of less than 0.8, preferably less than 0.5, most preferably less than 0.4".

6.2 Hence, the reasoning given under 4, *supra*, applies *mutatis mutandis* to the invention as claimed according to the pending 2nd and 3rd Auxiliary Requests. The invention as claimed according to these two requests is thus likewise objectionable under Article 83 EPC.

6.3 Accordingly, in the Board's judgement, none of the 2nd and 3rd Auxiliary Requests is allowable either.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated