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Datasheet for the decision of 21 July 2017

Case Number: T 0514/14 - 3.3.06

Application Number: 04752482.2

Publication Number: 1629075

IPC: C11D3/395, C11D3/08, C11D3/06

Language of the proceedings: EN

Title of invention:
BATHROOM CLEANING COMPOSITION

Patent Proprietor:
Colgate-Palmolive Company

Opponent:
The Procter & Gamble Company

Headword:
Bathroom cleaning composition / COLGATE

Relevant legal provisions:
EPC Art. 84, 123(3)
RPBA Art. 12(4), 13(1), 13(3)

Keyword:
Lack of clarity arising from amendment (all pending requests)
Late-filed auxiliary requests - admitted (no) request filed at oral proceedings

Decisions cited:
T 0287/11, T 0999/10, T 1360/11

Catchword:

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Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0514/14 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 21 July 2017

Appellant: (Opponent)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, Ohio 45202 (US)
Representative:	Kellenberger, Jakob Temselaan 100 1853 Strombeek-Bever (BE)
Respondent: (Patent Proprietor)	Colgate-Palmolive Company 300 Park Avenue New York, NY 10022 (US)
Representative:	Jenkins, Peter David Page White & Farrer Bedford House John Street London WC1N 2BF (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 18 December 2013 concerning maintenance of the European Patent No. 1629075 in amended form.**

Composition of the Board:

Chairman B. Czech
Members: M. Maremonti
J. Hoppe

Summary of Facts and Submissions

I. The appeal by the Opponent lies from the interlocutory decision of the Opposition Division to maintain the European patent EP 1 629 075 in amended form on the basis of the then pending first auxiliary request.

II. Independent claim 1 according to said first auxiliary request held allowable by the Opposition Division reads as follows (amendments to claim 1 as granted made apparent by the Board, additions in bold):

"*1. A bathroom cleaning composition which comprises by weight:*
(a) 0.1 % t 10% of a chlorine bleach compound;
(b) 0.1 % to 3% of an alkali metal silicate;
(c) 0.25% to 5% of a phosphate builder salt ***which is sodium tripolyphosphate****; and*
(d) the balance being water,
wherein the bathroom cleaning composition further includes
(e) an amine oxide surfactant,
and has a pH of ~~*at least*~~ *9* ***to 14****."*

III. In the decision under appeal, the Opposition Division came to the conclusion that the patent as amended according to said first auxiliary request met the requirements of the EPC, in particular those of Article 123(3) EPC.

IV. In its statement of grounds, the Appellant (Opponent) invoked *inter alia* non-compliance of the claims allowed by the Opposition Division with Article 123(3) EPC.

V. In its reply, the Respondent (Patent Proprietor) rebutted the Appellant's objections but nevertheless

filed three sets of amended claims as auxiliary requests 1 to 3.

VI. The parties were summoned to oral proceedings. In a communication issued in preparation therefor, the Board drew the parties' attention to some issues likely to be addressed at the oral proceedings. The Board *inter alia* expressed concerns regarding the clarity of claim 1 held allowable by the Opposition Division (point 3.2.3 of the communication) and pointed out that compliance with Article 84 EPC might also become an issue with regard to the auxiliary requests (point 5 of the communication). Concerning the issue of compliance with Article 123(3) EPC, the Board drew the parties' attention to the "Case Law of the Boards of Appeal of the EPO", 8th edition, 2016, section II.E. 2.4.13" (point 3.2.1 of the communication).

VII. Under cover of a further letter of 2 June 2017, the Appellant filed a further item of evidence (D4) supposed to illustrate common general knowledge. It submitted *inter alia* that claim 1 of the main request (claim 1 in the version held allowable by the Opposition Division) was either objectionable under Article 123(3) or lacked clarity (Article 84 EPC), and extended its Article 123(3) EPC objection to the respective claims 1 of auxiliary requests 1 to 3.

VIII. With letter of 21 June 2017, the Respondent also commented on the points addressed in the Board's communication, submitting *inter alia* that the amended claims of all the already pending requests were clear (Article 84 EPC) and complied with Article 123(3) EPC. It nevertheless filed three additional sets of amended claims as auxiliary requests 4 to 7

IX. Oral proceedings before the Board were held on 21 July 2017. The debate focused on the compliance of the pending claims with Articles 84 EPC and 123(3) EPC. During the oral proceedings, the Respondent filed a further amended set of claims as auxiliary request 1bis, to be intercalated between auxiliary requests 1 and 2. The Appellant asked not to admit auxiliary request 1bis due to its late-filing.

Amended claim 1 of auxiliary request 1bis differs from claim 1 as granted in that it reads as follows (amendments made apparent by the Board, additions in bold):

"*1. A bathroom cleaning composition which comprises*
...
(c) 0.25% to 5% of a phosphate builder salt; and
...
and has a pH of ~~at least~~ 9 ***to 14,***
and in which the composition comprises 0.25% to 5% of a phosphate builder salt which is sodium tripolyphosphate".

X. Final requests

The **Appellant** requested that the decision under appeal be set aside and the patent be revoked.

The **Respondent** requested as its main request that the appeal be dismissed or if that is not possible that the patent be maintained on the basis of the claims according to one of the following auxiliary requests, to be taken in their numerical order:

- auxiliary request 1, filed with letter of 4 September 2014,
- auxiliary requests 1bis, filed at the oral proceedings of 21 July 2017,

- auxiliary requests 2 to 3, filed with letter of 4 September 2014,
- auxiliary requests 4 to 7, filed with letter of 21 June 2017.

XI. The Appellant's objections and arguments of relevance for the present decision can be summarised as follows.

- The formulation of feature (c) in claim 1 of the main request either amounted to an extension of the scope of protection, compared to that of granted claim 1, thus contravening Article 123(3) EPC, or had to be regarded as unclear, thus contravening Article 84 EPC.

- The same applied to the formulation of feature (c) in the respective claims 1 of auxiliary requests 1 and 2 to 7.

- Auxiliary request 1bis was filed too late and should therefore not be admitted into the proceedings, taking into account that an objection under Article 123(3) EPC had already been raised in the notice of opposition and in the statement of grounds of appeal. Such an objection was also raised with respect to auxiliary requests 1 to 3, in the Appellant's response to the Board's communication. The latter also addressed a corresponding clarity issue with respect to claim 1 of the main request. The Patent Proprietor thus had ample opportunity to react by filing an auxiliary request overcoming these deficiencies at an earlier point in time, i.e. before the day of the oral proceedings.

XII. The Respondent essentially counter-argued as follows.

- Feature (c) of claim 1 according to the main request made it clear that the claimed composition was limited to compositions comprising a total amount of 0.25% to

5% of any or all phosphate builder salts, as was claim 1 as granted, but additionally required that all of the 0.25% to 5% phosphate builder salt present had to be in the form of sodium tripolyphosphate.

- The wording of feature (c) of claim 1 of the first auxiliary request expressed the same limitation even more explicitly.

- Auxiliary request 1bis should be admitted into the proceedings because it was filed in reaction to the Board's objection under Article 84 EPC against the first auxiliary request, raised for the first time during oral proceedings.

- Since claim 1 of auxiliary request 1bis was formulated according to the wording "en cascade" considered allowable in decision T 999/10, it was not objectionable under Article 84 or Article 123(3) EPC.

Reasons for the Decision

Main request - Lack of clarity

1. Compared to claim 1 as granted, claim 1 of the main request is amended by incorporating a feature taken from the description. Claim 1 is therefore, open to clarity objections arising from this amendment (decision G 3/14, OJ 2015, 102, Order).

2. Article 84 EPC stipulates that the claims shall be clear and define the matter for which protection is sought. Those requirements serve the purpose of ensuring that it is possible to assess whether or not a given subject-matter falls within the ambit of a particular claim.

Article 123(3) EPC stipulates that a European patent may not be amended in such a way as to extend the protection it confers.

Amendments made to a granted claim should thus not lead to an ambiguity (lack of clarity) in wording, let alone if they pave the way for a technically sensible interpretation of the so-amended claim, which, if adopted, makes the claim objectionable on the ground that it extends the scope of protection conferred by the claim as granted.

3. The Respondent submitted that feature (c) of claim 1 according to the main request (wording under II, *supra*) imposed two conditions on the claimed composition, namely:

- that the total relative amount of any or all phosphate builder salts present had to be within the range from 0.25% to 5% (as according to claim 1 as granted),

and, additionally,

- that all of the phosphate builder salt present was in the form of sodium tripolyphosphate.

Since amended claim 1 comprised an additional limitation, the scope of protection conferred by this claim was clearly restricted in comparison to claim 1 as granted.

4. The Board does not accept this argument for the following reasons.

4.1 Within the context of amended claim 1 at issue feature (c) does not expressly exclude the presence of phosphate builder salts other than sodium

tripolyphosphate in the claimed composition. Considering the open definition ("*comprising*") of the claimed composition, another technically sensible interpretation is that according to feature (c), the claimed composition comprises 0.25% to 5% of sodium tripolyphosphate, but that other phosphate builder salts may also be present in the composition, in undefined amounts.

4.2 Claim 1 construed in this alternative manner also encompasses compositions not encompassed by claim 1 as granted, i.e. compositions comprising phosphate builder salts in a total relative amount of more than 5%, thereby extending the scope of protection conferred by the latter claim, contrary to the requirements of Article 123(3) EPC.

4.3 In the Board's judgement, claim 1 lacks clarity (Article 84 EPC) due to the ambiguity of its wording, generated by the amendment made and allowing for two substantially different interpretations of the claim and its scope of protection.

5. The Appellant's main request is, therefore, not allowable.

First auxiliary request - Lack of clarity

6. Feature (c) of claim 1 according to the first auxiliary request reads as follows (amendments to claim 1 as granted made apparent by the Board):

"*(c) 0.25% to 5% of a phosphate builder salt,* ***wherein the phosphate builder salt is sodium tripolyphosphate***"

7. According to the Patent Proprietor, the presence of the comma after the term "*salt*", together with the inserted term "*wherein*", expressed said "double

condition" (point 3, *supra*) imposed on the claimed composition in an even clearer way.

8. This argument does not, however, convince the Board.

8.1 At the oral proceedings, asked by the Board, the Patent Proprietor could not indicate without hesitation what the term "*wherein*" actually was supposed to refer to, i.e. to the phosphate builder salt or to the whole composition.

8.2 Accordingly, the amended feature (c) of claim 1 at issue can also be interpreted in the sense that the condition regarding the relative amount ("*0.25% to 5%*") only applies to the sodium tripolyphosphate present in the composition.

8.3 As in the case of claim 1 of the main request, this would imply that other phosphate builder salts may be comprised in the composition in amounts bringing the total relative amount of phosphate builder salts to a value beyond 5%, i.e. outside the range of 0.25% to 5% prescribed by claim 1 as granted for the totality of phosphate builder salts present (points 4.1 and 4.2, *supra*).

8.4 This conclusion is also in line with the Case law of the Boards of appeal, see e.g. the rationale of decision T 287/11 (01.04.2014), in which claim 1 as granted was directed to a composition **comprising** *inter alia* "*from from 5% to 90% by weight of a water-soluble polyalkylene glycol*" from a class defined in a relatively generic manner. Claim 1 as amended post-grant comprised the additional wording "***wherein*** *the water-soluble polyalkylene glycol* ***conforms to the formula*** *...*", the formula defining a more specific sub-group of compounds. The entrusted Board found that this

amendment resulted in an extension of the protection conferred (Reasons, 2.4 to 2.6), but that a claim comprising an additional, express indication as to the total amount of compounds falling under the generic definition of the polyalkylene glycol component was allowable under Article 123(3) EPC.

8.5 The ambiguity in the wording of claim 1, feature (c) is thus not resolved by the slightly different wording proposed according to the first auxiliary request.

9. Claim 1 of the first auxiliary request is thus likewise objectionable for lack of clarity (Article 84 EPC). The first auxiliary request is therefore not allowable.

Auxiliary requests 2 to 7 - Lack of clarity

10. Claim 1 of auxiliary request 4 includes the same formulation of feature (c) as claim 1 of the main request. In the respective claims 1 of auxiliary requests 2, 3 and 5 to 7 feature (c) is worded as in claim 1 of the first auxiliary request.

10.1 As conceded by the Respondent at the oral proceedings, the conclusion reached by the Board as regards the lack of clarity (Article 84 EPC) of claim 1 of the main request and of claim 1 of auxiliary request 1 applies likewise to claim 1 of auxiliary request 4 and to claim 1 of each of auxiliary requests 2, 3 and 5-7, respectively (Article 84 EPC).

10.2 These requests are thus not allowable either.

Auxiliary request 1bis - Not admitted into the proceedings

11. Auxiliary request 1bis was submitted for the first time in the course of the oral proceedings before the Board.

11.1 According to the Respondent, the late filing of this request was justified considering that the Board's concerns regarding the clarity of feature (c) in claim 1 of auxiliary request 1 only materialised during the oral proceedings. The objections under Article 84 EPC raised by the Appellant in its letter dated 2 June 2017 were vague and unsubstantiated. The Patent Proprietor should thus be given a fair chance to react to the pending clarity objection.

Moreover, claim 1 of this new request was clearly allowable since it was formulated in accordance with the rationale of decision T 999/10 (19.06.2012), where a similarly amended wording had been considered allowable by the Board.

11.2 The Board does not accept this argumentation for the following reasons.

11.2.1 In point 5 of its communication the Board had indicated that the Patent Proprietor had to be prepared to comment on the compliance of the auxiliary requests with the requirements of *inter alia* Articles 84 and 123(3) EPC at the oral proceedings, giving consideration to the comments made in said communication. More particularly, under point 3.2 of the communication, the Board had drawn the attention of the parties to the publication "Case Law of the Boards of Appeal of the EPO", 8th edition, 2016, section II.E. 2.4.13, as to the way in which wording as used in claim 1 of the main request, feature (c), had previously been assessed by the Boards of Appeal. The quoted section explicitly refers to several decisions, including decision T 287/11 referred to above.

Hence, already in its communication, the Board had indicated to the Patent Proprietor that the compliance

of auxiliary request 1 with the requirements of both Articles 84 and 123(3) EPC might come under scrutiny at the oral proceedings.

Moreover, as already noted above, an objection to the wording of feature (c) of claim 1 of auxiliary request 1 was expressly raised by the Appellant in its letter of 2 June 2017 (point 4.2), i.e. well in advance of the oral proceedings, even if formulated in rather brief terms.

Since in *inter partes* appeal proceedings parties usually have divergent opinions regarding at least some of the issues decided by the Opposition Division, each party must envisage the possibility that the Board may overturn the decision of the Opposition Division and/or adopt the view of the adverse party.

In the written procedure, in reply to the objections raised by the Appellant and the communication of the Board, the Respondent had, however, chosen to defend its position without making any amendment to feature (c) of claim 1 according to auxiliary request 1. Only after the debate during oral proceedings did it decided to file a further auxiliary request supposed to address the clarity issue.

11.2.2 The Respondent also submitted that claim 1 of auxiliary request 1bis clearly overcame the pending clarity objection, since it was formulated in accordance with decision T 999/10.

In the case underlying this decision, granted claim 1 was directed to an adhesive, comprising *inter alia* "*un mélange*: *de 15 à 55% en poids d'au moins une résine tackifiante compatible*". The claim was then amended by appending to said claim the sentence (emphasis added by

the Board) "***et dans lequel*** (mélange) ***la*** *résine tackifiante* ***est*** *une résine...*".

The Board entrusted with the case considered (Reasons, 3.3-3.7) that this wording "en cascade" clearly imposed a double condition on the claimed "*mélange*", and that therefore the scope of protection conferred by this claim was more limited by virtue of the amendment made.

However, claim 1 of auxiliary request 1bis as filed by the Respondent is not worded in a comparable manner since it reads (amendments with respect to granted claim 1 made apparent by the Board, additions in bold) as follows:

"*1. A bathroom cleaning composition which comprises by weight:*
(a) 0.1 % to 10% of a chlorine bleach compound;
(b) 0.1 % to 3% of an alkali metal silicate;
(c) 0.25% to 5% of a phosphate builder salt; and
(d) the balance being water,
wherein the bathroom cleaning composition further includes
(e) an amine oxide surfactant,
and has a pH of ~~at least~~ 9 ***to 14,***
and in which the composition comprises 0.25% to 5% of a phosphate builder salt which is sodium tripolyphosphate".

The Board holds that this formulation is also *prima facie* ambiguous and, hence, unclear (Article 84 EPC) because it is not apparent to what the expression "*in which*" and, hence, the entire following relative clause refers to, i.e. to the whole "*cleaning composition*", or to one or more of the listed components.

This formulation is still open to an interpretation according to which the composition comprises

- according to feature (c), at least one first phosphate builder salt in a relative amount within the stated range,

  and, additionally,

- according to the last feature of the claim, sodium tripolyphosphate (as further, different phosphate builder salt) in a relative amount within the stated range.

Such different phosphate builder salts could thus be present in a combined (total) amount exceeding the upper limit of 5% prescribed by claim 1 as granted as regards the amount of (all) phosphate builder salt(s) present in the composition. According to this interpretation, claim 1 at issue thus confers a protection which is extended compared to the one conferred by claim 1 as granted.

The wording of claim 1 at issue is thus *prima facie* unsuitable for overcoming the pending objection under Article 84 EPC and, thus, not clearly allowable.

For the sake of completeness, the Board observes that also in decision T 1360/11 (11.11.2014), briefly referred to by the Respondent during the oral proceedings, a double condition (expressed differently than in the case underlying T 999/10 mentioned above) was held to be necessary to ascertain that an amendment narrowing down a generic class or list of chemical compounds did not lead to an extension of the protection conferred (Reasons, 3.1-3.9).

11.3 Taking into consideration all aspects addressed above, the Board concludes that the Respondent could have reacted to the raised objections under Article 84 and

123(3) EPC by filing a further auxiliary claim request well in advance of the oral proceedings. Auxiliary request 1bis was, however, only filed during the oral proceedings, i.e. in the latest stage of the proceedings. Due to the new wording added to claim 1, requiring further considerations as to its possible implications having regard to the requirements of Article 84 and/or Article 123(3) EPC, the complexity of the case would have been increased.

11.4 Therefore the Board decided, in the exercise of its discretion under Articles 12(4) and 13(1) and (3) RPBA, not to admit late-filed auxiliary request 1bis into the proceedings.

Conclusion

12. None of the Respondent's requests 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