Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 12 October 2018

Case Number: T 0579/15 - 3.3.06

Application Number: 05755866.0

Publication Number: 1765966

IPC: C11D1/62, C11D3/20, C11D3/22, C11D3/18, C11D17/00, C11D1/835

Language of the proceedings: EN

Title of invention:
FABRIC SOFTENING COMPOSITION

Patent Proprietors:
Unilever PLC
Unilever N.V.

Opponents:
THE PROCTER & GAMBLE COMPANY
Henkel AG & Co. KGaA

Headword:
Fabric softening composition/UNILEVER

Relevant legal provisions:
EPC Art. 83

Keyword:
Sufficiency of disclosure - all requests (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0579/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 12 October 2018

Appellant I: (Opponent 1)	THE PROCTER & GAMBLE COMPANY One Procter & Gamble Plaza Cincinnati, Ohio 45202 (US)
Representative:	Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)
Appellant II: (Opponent 2)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA CLI Patents Z01 40191 Düsseldorf (DE)
Respondent: (Patent Proprietor)	Unilever PLC Unilever House 100 Victoria Embankment London EC4Y 0DY (GB)
	Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	Webster, Jeremy Mark Mewburn Ellis LLP City Tower 40 Basinghall Street London EC2V 5DE (GB)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 20 January 2015 rejecting the opposition filed against European patent No. 1765966 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: P. Ammendola
C. Heath

Summary of Facts and Submissions

I. This appeal lies from the decision of the opposition division to reject the opposition filed against European patent No. 1 765 966.

II. Claim 1 of the opposed patent (hereinafter **granted claim 1**) reads as follows:

"*1. A method of manufacturing a liquid fabric softening composition comprising an aqueous base, a cationic fabric softening agent, and an emulsified oil which has a refractive index at 25°C of 1.45 or greater in an amount such that the weight ratio of oil to cationic fabric softening agent is from 1:12 to 1:1, and the D[4,3] droplet size of the emulsified oil is from 0.4 to 8 microns, characterised in that an emulsion of the oil is prepared independently of a dispersion of the cationic fabric softener and the two are then mixed.*"

III. The opposition division found, *inter alia*, that the absence of any teaching in the opposed patent as to how to directly measure the D[4,3] droplet size of the particles of emulsified oil comprised in the liquid fabric softening composition did not render insufficient the disclosure of the method defined in granted claim 1. In particular, the opposed patent appeared to disclose that the D[4,3] droplet size of the emulsified oil could be measured in the separately prepared oil emulsion prior of its mixing with the dispersion of the cationic fabric softener that produced the final composition. The opposition division also rejected as an unproven allegation the objection (of opponent 1) that it was incorrect that the D[4,3] droplet size value of the emulsified oil was maintained

when the emulsified oil was mixed with the dispersion of the cationic fabric softener.

IV. Both opponents 1 and 2 (hereinafter **appellants I and II**) appealed the decision. In particular, appellant I rebutted the finding as to the sufficiency of disclosure by submitting with its statement of grounds of appeal new experimental data in a document labelled "Annex I".

V. The patent proprietor (hereinafter the **respondent**) replied by letter of 15 October 2015 enclosing three sets of amended claims labelled Auxiliary Requests 1 to 3.

Claim 1 of **Auxiliary Request 1** only differs from granted claim 1 for the following amendments (made apparent):

"...is from 1:12 to 1:~~1~~**2**, and the D[4,3] droplet size of the emulsified oil is from ~~0.4~~**1** to ~~8~~**2** microns, ~~characterised in that~~ **wherein** an emulsion..."

Claim 1 of **Auxiliary Request 2** only differs from granted claim 1 for the following amendments (made apparent):

"...is from 1:~~12~~**10** to 1:~~1~~**2**, and the D[4,3] droplet size of the emulsified oil is from ~~0.4~~**1** to ~~8~~**2** microns, ~~characterised in that~~ **wherein the oil represents from 1 to 4.5% of the total weight of the composition, and wherein** an emulsion..."

Claim 1 of **Auxiliary Request 3** is identical to granted claim 1.

With a letter of 10 October 2018 the respondent filed another set of amended claims as **Auxiliary Request 4**, claim 1 of which only differs from granted claim 1 for the following amendment (made apparent):

"...then mixed; **wherein the composition additionally comprises an emulsifier**.".

VI. At the oral proceedings held on 12 October 2018 the respondent filed an **Auxiliary Request 5**, claim 1 of which only differs from granted claim 1 for the following amendments (made apparent):

"...is prepared **in the presence of an emulsifier**, independently of...".

VII. Final requests

The appellants requested that the decision of the first instance be set aside and the patent be revoked.

The respondent requested that the appeal be dismissed (Main Request) or, in the alternative, that the decision under appeal be set aside and that the patent be maintained on the basis of one of Auxiliary Requests 1 to 3, all filed 15 October 2015, or Auxiliary Request 4, filed 10 October 2018, or Auxiliary Request 5 filed at the oral proceedings.

VIII. Both appellants disputed the sufficiency of disclosure (Article 100(b)/83 EPC) of the invention as defined in claim 1 of any of the requests on file, *inter alia*, because the D[4,3] droplet size of the particles of emulsified oil present in a composition manufactured by the claimed method could be neither directly measured nor possibly the same as that (measurable) in the

separately prepared oil emulsion used to form that composition.

Reasons for the Decision

Main request (patent as granted)

1. Insufficient disclosure of the patented method (Article 100(b)/83 EPC).

1.1 Claim 1 as granted (see II, *supra*) defines a method of manufacturing a liquid fabric softening composition, wherein this latter comprises, *inter alia*, an emulsified oil. The claim requires the D[4,3] droplet size of the emulsified oil to be from 0.4 to 8 microns. Said method foresees the separate preparation of an oil emulsion and of a dispersion of a cationic fabric softener, followed by the mixing of the emulsion and the dispersion.

Herein below the following abbreviations will be used:
"final composition" designates the liquid fabric softening composition manufactured by the claimed method;
"O-emulsion" and **"CFS-dispersion"** designate the separately prepared oil emulsion and dispersion of cationic fabric softener, respectively; and
"intermediate O-particles" and **"final O-particles"** designate the particles of emulsified oil present in the O-emulsion and those present in the final composition, respectively.

1.2 It is undisputed that the patent in suit does not disclose how to measure the D[4,3] of the final O-particles and that no conventional method for

determining particle size analysis allows such direct measure.

1.2.1 The respondent argued that the patent would implicitly teach that the occurrence of the required D[4,3] of the final O-particles can be obtained by ensuring that the intermediate O-particles already possessed the required D[4,3]. Indeed, the tables in the examples implicitly disclosed that the D[4,3] values of the intermediate O-particles and those of the final O-particles were identical (see the D[4,3] values measured on the prepared O-emulsions reported in table 1 of the patent in suit that are correspondingly identical to the D[4,3] values that are reported in tables 3 to 5 referring to the final compositions), and the patent clearly disclosed how to measure the D[4,3] values of the intermediate O-particles.

1.2.2 The appellants did not contest that the patent actually taught how to measure the D[4,3] of the intermediate O-particles. They did however dispute that the tables in the examples implicitly disclosed that the D[4,3] values of the intermediate O-particles and those of the final O-particles were identical. In any case, the micrography observations reported in Annex 1 proved that the particle size of the intermediate O-particles was substantially different from that of the final O-particles. Hence, it was simply not possible to predict the D[4,3] of the final O-particles in the final composition from the D[4,3] values of the intermediate O-particles measurable in the O-emulsion.

1.3 The board notes preliminarily that the patent examples are not accompanied with any further explanation as to the origin of the D[4,3] values reported in the tables referring to the exemplified final compositions. Hence,

the board is completely in the dark as to whether the fact that these values are manifestly identical to those of the corresponding O-emulsions originates e.g. from some experimental studies, or from some theoretical considerations, or if the presence of these values in tables 3 to 5 is instead simply a reminder of a property of the used O-emulsions. Nor has the respondent alleged, let aside proven, the existence of common general knowledge that rendered immediately apparent that the particle size of the intermediate O-particles in the O-emulsions may be expected to remain unchanged during the mixing of the O-emulsion with the CFS-dispersion.

1.4 The board further notes that the appellants' statement that the particle size of the intermediate O-particles can actually change substantially during the mixing, and thus be substantially different from that of the final O-particles, is at least qualitatively supported by the experimental evidence provided with Annex 1.

1.4.1 Indeed, given the undisputed impossibility to directly measure the D[4,3] of the final O-particles, the board finds the approach taken by appellant I in preparing the experiments reported in Annex 1 - namely to make qualitative microscopy evaluations of the particle size of the intermediate and final O-particles - to be justified.

1.4.2 The board notes in particular that the statement in the penultimate paragraph on page 10 of Annex 1, as to the experimental observation of "a large change in droplet size" upon mixing an O-emulsion with a CFS-dispersion, appears supported by the comparison between:

- the microscopy picture of the (freshly prepared) "Emulsion E5" (see Annex 1, page 4, left column,

last picture) which is an O-emulsion in water of methyl laurate (i.e. one of the suitable oils mentioned in [0033] of the patent) and the same emulsifier ("Coco 20 EO") used in the patent examples, and

- the microscopy picture of the corresponding (freshly prepared) final composition (see Annex 1, page 11, left column, last picture) obtained by mixing "Emulsion E5" with an aqueous dispersion of a standard "TEA esterquat" (for the reason mentioned in Annex 1 that the specific "TEA esterquat" used in the patent examples was no longer commercially available).

1.5 The respondent did not dispute that these pictures in Annex 1 indeed show a substantial difference in particle size among the O-particles visible therein. Rather, it stressed that these pictures only showed the appearance of very limited portions of matter and that appellant I might have accidentally or intentionally compared micrography pictures of portions of matter which were not representative of the prepared O-emulsion and final composition. Hence, the pictures in Annex 1 could not be considered as unbiased evidence and should be disregarded.

1.6 The board finds that the microscopy observations reported in Annex 1 should not be discarded simply because they were provided by one of the appellants. If the board were to take this course, no party to a dispute could ever dispute issues of patentability by submitting in-house experimental evidence. Indeed, in the absence of any experimental evidence from or theoretical reasoning by the respondent to show that the difference in particle size apparent from the relevant pictures of Annex 1 might be defective or

unsuitable, the respondent's objection to the data in Annex 1 amounts to a mere allegation that must be disregarded, all the more so because the respondent had had sufficient time to provide counter experimental evidence, yet had chosen not to do so.

1.7 Thus, the board concludes that, even assuming, for the sake of an argument in the respondent's favour, that the examples in the patent implicitly disclosed that the particle size of O-particles of the O-emulsion used in them remains unchanged when these latter are mixed with the CFS-dispersion, such hypothetically implicit disclosure is unsubstantiated and is less convincing than the appellant's argument supported by Annex 1 that the particle size of the intermediate and final O-particles as expressed by D[4,3] can instead be substantially different.

1.8 Hence, the board in contrast to the respondent and the opposition division comes to the conclusion that the requirement of the patented method that the manufactured final composition must comprise O-particles with a specific D[4,3] droplet size, cannot even be verified indirectly (i.e. by measuring the D[4,3] droplet size of the intermediate O-particles in the O-emulsion prior of mixing this latter with the CFS-dispersion).

Thus, the disclosure in the patent does not comprise any teaching as to how to verify the occurrence of this essential feature of the patented method.

1.9 Accordingly, the disclosure of the patented method provided in the patent is found insufficient (Article 100(b)/83 EPC) and the Main Request must be refused.

1.10 In view of the above finding, the board does not need to provide details as to other insufficiencies discussed during oral proceedings, namely that the patent in suit does not contain any example of the claimed method in which no emulsifier is used for preparing the O-emulsion and, thus, does not comprise any teaching that might possibly indicate that the D[4,3] value of the final O-particles could be the same as that measurable for the intermediate O-particles even when the latter are prepared without using an emulsifier.

Auxiliary Requests 1 to 5

2. Each version of claim 1 according to Auxiliary Requests 1 to 5 is directed to a method for manufacturing a liquid fabric softening composition wherein the composition is required to comprise particles of emulsified oil with a specific D[4,3] droplet size. Hence, the reasons given above for the finding that the patent in suit fails to disclose how to determine the D[4,3] droplet size of the final O-particles (and thus does not enable the skilled person to verify the occurrence of an essential feature of the patented method) equally apply to each of the methods defined in claim 1 of the Auxiliary Requests. Accordingly, none of Auxiliary Requests 1 to 5 is found sufficiently disclosed as required by Article 83 EPC and, thus, none of them is allowable either.

Consequently, none of the requests on file is 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 J.-M. Schwaller

Decision electronically authenticated