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**Datasheet for the decision
of 8 May 2019**

Case Number: T 2226/15 - 3.3.06

Application Number: 06762503.8

Publication Number: 1904614

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C11D3/37, B01J13/02

Language of the proceedings: EN

Title of invention:
PROCESS TO FORM FABRIC SOFTENING PARTICLE, PARTICLE OBTAINED
AND ITS USE

Patent Proprietor:
Unilever N.V.
Unilever PLC

Opponent:
Henkel AG & Co. KGaA

Headword:
PROCESS TO FORM FABRIC SOFTENING PARTICLE/ Unilever

Relevant legal provisions:
EPC Art. 114(2), 56

Keyword:

Discretion exercised in a reasonable way by the opposition
division - no reason to overrule it
Inventive step - Main Request (yes) - non-obvious solution

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2226/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 8 May 2019

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 6 November 2015 rejecting the opposition filed against European patent No. 1904614 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller

Members: P. Ammendola

J. Hoppe

Summary of Facts and Submissions

I. The appeal was filed by the opponent (hereinafter the "appellant") against the decision of the opposition division to reject the opposition filed against the patent in suit, claim 1 of which reads:

"1. A process for making a dried softening particle with a mean diameter of more than 250 micron and less than 650 micron comprising softening oil emulsion in a polymer matrix, characterised in that the process includes the steps of:
(a) forming a single or double emulsion comprising the oil and water,
(b) dispersing the emulsion in a weight excess of polysaccharide solution,
(c) cross-linking or gelling the polysaccharide with an aqueous solution of cations to form the polymer matrix
wherein the temperature is kept below 60°C during each of steps a, b and c and the polysaccharide is selected from the group comprising kappa carrageenan and alginate, provided that when kappa carrageenan is selected, the cations comprise potassium and when alginate is selected the cations comprise calcium."

II. In its statement of grounds of appeal the appellant requested that the board reverse the decision of the opposition division not to introduce a new ground of opposition under Article 100(c) EPC, and argued that the opposition division had erred in finding that the subject-matter of claim 1 involved an inventive step over the prior art disclosed in documents D2 (EP 1 502 944 A1) and D1 (WO 00/46337 A1).

III. With its reply the patent proprietor (hereinafter the "respondent") filed two sets of amended claims labelled "Auxiliary Request 1" and "Auxiliary Request 2" and requested to remit the case to the opposition division in the event that the new ground of opposition was allowed in the proceedings.

IV. At the oral proceedings the appellant referred to its written submissions on the introduction of the ground of opposition under Article 100(c) EPC. Then the subject-matter of claim 1 as granted was discussed under Article 56 EPC starting from document D2, Example II, as the closest prior art.

V. At the conclusion of the debate, the parties' final requests were as follows:

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

The respondent requested that the appeal be dismissed and the patent be maintained as granted (main request) or, in the alternative, that the patent be maintained in amended form on the basis of Auxiliary Request 1 or 2, both filed with the reply to the grounds of appeal.

VI. The appellant submitted that the facts that substantiated the introduction of the new ground of opposition were not complex. Hence, the opposition division had erred in concluding that the request lacked *prima facie* relevance because of the alleged complexity of the facts to be considered.

As to inventive step, it argued that none of the features distinguishing the subject-matter of granted claim 1 from the process disclosed in Example II of

document D2 (which resulted in beads containing an emulsion of softening oil) gave rise to any surprising technical advantage. The patented process thus represented for a skilled person an obvious alternative to the one disclosed in D2, particularly in view of the teaching in D1.

VII. The respondent held that the opposition division had exercised its discretion in a reasonable way in refusing the introduction of the new ground of opposition.

As regards inventive step, it argued that Example II in document D2 did not disclose in which form the softening oil was present in the "core solution", and thus in the final beads obtained by hardening such "core solution". In any case, if the softening oil was present in such beads in the form of droplets, these latter had necessarily to be much larger than the oil droplets present in the particles produced by the patented process, wherein the softening oil was in the form of an emulsion.

Reasons for the Decision

1. Introduction of a new ground of opposition
 - 1.1 The board notes that the request to introduce the new ground of opposition under Article 100(c) EPC had been filed well after the time limit set in Article 99(1) EPC and also after expiry of the period set in the summons to oral proceedings under Article 116(1) EPC. The opposition division had refused this request in exercising its discretion under Article 114(2) EPC.

- 1.2 It is established case law that a board of appeal should overrule the way in which a department of first instance exercised its discretion only if it comes to the conclusion either that the department had not exercised its discretion in accordance with the proper principles, or that it had done so in an unreasonable way, and had thus exceeded the proper limits of its discretion.
- 1.3 In the present case it is undisputed that the opposition division had exercised its discretion in applying the correct principle of *prima facie* relevance. It is established case law that the consideration of grounds not properly covered by the opposition's statement should only take place before the opposition division in exceptional cases in which, *prima facie*, there are clear reasons for believing that such grounds are relevant and would, in whole or in part, prejudice the maintenance of the patent.
- 1.4 The board notes that the opposition division has explicitly stated in point 11 of its decision that "already the complexity of the explained arguments in support of ... unallowability of amendments is a sufficient reason to disregard the "*prima facie*" evidence". Furthermore the opposition division has noted that the technical information given (especially with regard to the term "*softening oil emulsion*") was insufficient to support the objections raised.

Hence, the opposition division had apparently found the arguments presented by the appellant to be *prima facie* unconvincing because of their complexity and lack of completeness.

1.5 This *prima facie* finding therefore appears to have been reasoned and plausible. Hence, the opposition division appears to have exercised its discretion in accordance with the proper principles and in a reasonable way.

1.6 Thus, the board sees no reason that could justify overruling the way in which the opposition division had exercised its discretion in refusing the introduction of the new ground of opposition under Article 100(c) EPC. Thus, the appellant's request to this extent is refused.

2. Main request - inventive step

2.1 The closest prior art

It is common ground among the parties that the method for preparing beads described in Example II of D2 (see paragraph [0129]) represents a suitable starting point for the assessment of inventive step. The board sees no reason to take a different stance.

According to this prior art example, a solution of polyvinyl alcohol (PVA) and water is first added to a polysaccharide (alginate) and then mixed with a softening oil (the polydimethylsiloxane PDMS).

It follows that at least the sequence of steps (a) and (b) in the process of claim 1 at issue (in which the softening oil is first formed into an emulsion with water and then mixed to a weight excess of a polysaccharide solution) is manifestly absent in the prior art of departure.

2.2 The technical problem

According to the patent in suit, in particular paragraphs [0001] and [0006], the main aim of the claimed invention is the production of fabric softening particles that can be incorporated into solid detergent compositions and deliver the softening oil in the form of fine droplets to the wash liquor, so that the latter is free of large droplets of softening oil. According to the respondent, in contrast to large droplets, fine ones would not create oil stains on the fabric.

2.3 The solution proposed by the patent

The solution to this technical problem is the process according to claim 1 at issue, which is in particular characterised in that the softening particles comprise the softening oil in the form of an emulsion embedded in a polymer matrix. This product is obtained in that a single or double emulsion of softening oil and water is formed and then dispersed in a weight excess of a solution of a polysaccharide, which is itself cross-linked or gelled with an aqueous solution of cations to form the polymer matrix.

2.4 Success of the solution

2.4.1 It is undisputed that the presence of the "*softening oil emulsion*" in the end product implies that the softening oil must also be present therein, and thus delivered to the wash liquor in the form of very fine droplets. The data in Tables 3 and 6 confirm that the oil droplets present in the particles obtained by the claimed process and actually released (upon dissolution of the particles) into the wash liquor are very fine.

2.4.2 The board therefore finds it plausible that the subject-matter of claim 1 produces softening particles

that are free of large oil droplets, and thus solves the technical problem identified in the patent in suit.

- 2.4.3 The appellant's submission that the subject-matter of claim 1 did not provide any technical advantage vis-à-vis D2 but simply offered an obvious alternative to the latter, has been substantiated by arguments that would imply that the technical problem had already been solved by D2 as well.

The appellant stressed that the "core solution" of the beads disclosed in Example II in document D2 was made of water, softening oil (the PDMS), alginate and a well known emulsifier (PVA). It also referred to the disclosure in the second paragraph of page 7 of D1 that defined PVA as an emulsifier. In its view, it was thus apparent to the skilled person that the "core solution" in Example II necessarily had to be an oil emulsion.

- 2.4.4 The board does not accept this argument because it is found not plausible, in the absence of any experimental evidence to the contrary, that the softening oil present in the "core solution" in Example II of D2 (and thus in the final beads obtained by hardening such "core solution") has to be in the form of an emulsion, for the following reasons:

- First, it is self-evident to any skilled person that whether a mixture of certain ingredients is or not in the form of an emulsion would depend not only on the nature and the amount of the ingredients used, but also on the conditions under which the mixture is prepared (e.g. on the use of a high-shear mixer, the mixing time and energy, the

order of addition of the ingredients and/or the temperature);

- Secondly, at most Example II in D2 provides an implicit indication that the step of "mixing" the softening oil with the alginate/PVA mixture has occurred at a temperature of 60°C; no other detail is given as to the conditions used for such a mixing step (see [0129] in document D2);
- Thirdly, the result of this "mixing" step is described in Example II not as an emulsion, but rather as a high viscosity "solution" (the "core solution").

2.4.5 Accordingly, the appellant has not made a plausible case for saying that the beads formed in the process described in document D2 necessarily comprise an emulsion of the softening oil and, thus, are as free of large oil droplets as the particles resulting from the claimed process.

2.4.6 Hence, the board sees no reason to doubt that the subject-matter of claim 1 successfully solves the technical problem indicated in the patent in suit vis-à-vis the prior art of departure.

2.5 Obviousness of the proposed solution

2.5.1 As indicated above, the process in Example II of D2 does not comprise the sequence of steps (a) and (b) of the process of claim 1 under consideration.

2.5.2 It is also undisputed that neither D1 nor D2 suggests such a sequence of steps, namely the possibility first to form an emulsion of oil and then to add such an

emulsion to a (weight excess of the) polysaccharide solution.

In particular, it is undisputed that the preferred process disclosed in D1 (page 3, lines 31 to 33, in combination with page 4, paragraph 2, and page 8, lines 9 to 12, as well as all the examples) for preparing an "emulsion" of the "active substance" (that can also be a conditioning oil) does not foresee the addition of a pre-formed emulsion of the "active substance" to a solution containing the "anionic gum" (which can be a polysaccharide), but rather the direct formation of the emulsion of the "active substance" in the presence of the "anionic gum".

Hence, it is immediately apparent to the board that the cited combination of D2 and D1 cannot render obvious to the skilled person that the posed technical problem could be solved by modifying the sequence of mixing steps used for preparing the core solution in Example 2 of D2 so as to arrive at steps (a) and (b) of the process of claim 1 at issue.

- 2.5.3 Thus, the board concludes that the subject-matter of claim 1 was not obvious in view of the known prior art and, therefore, that the ground of opposition of lack of inventive step (Article 100(a) EPC in combination with Articles 52(2) and 56 EPC) does not prejudice the maintenance of the patent as granted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated