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Datasheet for the decision of 27 March 2019

Case Number: T 2433/16 - 3.3.06

Application Number: 08159022.6

Publication Number: 2138564

IPC: C11D11/02, C11D11/04, C11D11/00

Language of the proceedings: EN

Title of invention:
A process for preparing a detergent powder

Patent Proprietor:
The Procter & Gamble Company

Opponents:
1) Dalli-Werke GmbH & Co. KG
2) Henkel AG & Co. KGaA
3) UNILEVER PLC / UNILEVER NV

Headword:
Process for preparing detergent/Procter & Gamble Company

Relevant legal provisions:
EPC Art. 123(2)

Keyword:

Amendments - extension beyond the content of the application as filed (yes) - all claim requests

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2433/16 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 27 March 2019

Appellant: (Opponent 1)	Dalli-Werke GmbH & Co. KG Zweifaller Strasse 120 52224 Stolberg (DE)
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Appellant: (Opponent 2)	Henkel AG & Co. KGaA Henkelstrasse 57 40589 Düsseldorf (DE)
Representative:	dompatent von Kreisler Selting Werner - Partnerschaft von Patent- und Rechtsanwälten mbB Deichmannhaus am Dom Bahnhofsvorplatz 1 DE-50667 Köln (DE)
Appellant: (Opponent 3)	UNILEVER PLC / UNILEVER NV Unilever House, 100 Victoria Embankment / Weena 455 GB-London EC4Y 0DY / NL-3013 AL Rotterdam (GB)
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Respondent: (Patent Proprietor)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 September 2016 maintaining European Patent No. 2138564 in amended form.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: G. Santavicca
J. Hoppe

Summary of Facts and Submissions

I. The appeals of opponents 1 to 3 lie from the interlocutory decision of the Opposition Division to maintain European Patent No. 2 138 564 in amended form on the basis of the claims of the second auxiliary request filed at the oral proceedings on 7 July 2016.

II. Claim 1 of this request (also main request in the present appeal proceedings) has the following wording (amendments to Claim 1 as granted made apparent by the Board):

"*1. A process for preparing a powder comprising:*

(i) anionic detersive surfactant;

(ii) from 0wt% to 10wt% zeolite builder;

(iii) from 0wt% to 10wt% phosphate builder; and

(iv) from 0wt% to 15wt% silicate salt;

wherein the process comprises the steps of

(a) forming a slurry that comprises a volatile compound; and

(b) spraying the slurry through a nozzle into a drying apparatus; and

(c) drying the slurry to form a powder,

wherein the slurry enters the nozzle at conditions such that ~~either~~:

(I) at the temperature at which the slurry enters the nozzle, the slurry is at a pressure that is equal to or greater than the vapour pressure of the volatile component, and wherein, the slurry enters the nozzle at temperature such that the vapour pressure of the volatile compound is above the pressure in the drying apparatus; ~~or~~

~~(II) the volatile component is in supercritical form when the slurry enters the nozzle, and~~

~~*wherein the conditions in the drying apparatus are such that when the volatile component enters the drying apparatus, at least a portion of the volatile component is in gaseous form,*~~ *wherein the volatile component is water,* ~~*and*~~ *wherein in step (b) the slurry is sprayed at a temperature of below 125°C,* ***and wherein the powder is in spray-dried form, and wherein the drying apparatus is a spray-drying tower and***

wherein the powder produced in step (c) is contacted with non-ionic detersive surfactant."

It is noted that compared to claim 1 as originally filed, claim 1 of the main request and claim 1 of the patent as granted include the following additional features: "*wherein the volatile component is water, and wherein in step (b) the slurry is sprayed at a temperature of below 125°C*".

III. In their respective grounds of appeal, the three opponents maintained the objection of added subject-matter under Article 123(2) EPC.

They objected to in particular that the double selection of water as the volatile component and of a temperature of below 125°C as the spraying temperature out of long lists was neither preferred nor pointed at, let alone directly and unambiguously disclosed in the application as filed.

IV. With its response dated 2 June 2017, the patent proprietor (hereinafter "the respondent") filed seven amended sets of claims as first to seventh auxiliary requests and argued *inter alia* that:
- the limitation to water as the volatile component was not a selection from a list, but a feature already

disclosed in the application as filed in an individualised form, thus a feature which was combinable with other features disclosed in the application as filed, and that
- the defined spraying temperature was a mere limitation of the spray temperature defined in general terms in claim 1 as filed.

V. Following the communication expressing the board's provisional opinion that the amended claims of all requests did not appear to be allowable under Article 123(2) EPC, the respondent announced that it would not be represented at the oral proceedings and that its request for oral proceedings was withdrawn.

VI. Oral proceedings were held on 27 March 2019 in the announced absence of the respondent.

VII. At the closure of the debate, the final requests of the parties were as follows:

The **appellants** requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

The **respondent** requested in writing that the appeals be dismissed (main request) or that the patent be maintained on the basis of the claims according to one of the first to seventh auxiliary requests, all filed with letter dated 2 June 2017.

Reasons for the Decision

1. *Main Request - Allowability of amendments (Article 123(2) EPC)*

1.1 The board notes that - contrary to the respondent's allegation in this respect - this objection was not only raised by all opponents in their respective notice of opposition, but it was also maintained and substantiated in their grounds of appeal.

1.2 For the board, the features "*wherein the volatile component is water, and wherein in step (b) the slurry is sprayed at a temperature of below 125°C*", which were added to claim 1 as filed during the examination proceedings, are not directly and unambiguously derivable in combination from the application as originally filed for the following reasons:

1.2.1 Claim 1 as originally filed defined the lower temperature of the spray temperature range in a generic way, namely as follows: "*the slurry enters the nozzle at temperature such that the vapour pressure of the volatile compound is above the pressure in the drying apparatus*".

This means that all temperatures satisfying the condition that "*the vapour pressure of the volatile compound is above the pressure in the drying apparatus*" may be used (i.e. all temperatures higher than the temperature corresponding to the vapour pressure above the pressure in the spray drier), which temperatures are thus a function of the pressure within the dryer.

1.2.2 The features added to original claim 1 are found separately at page 2, lines 1-3 ("*Preferably, in step (b)* (i.e. of the process defined in claim 1 as originally filed) *the slurry is sprayed at a temperature of below 150°C, or below 125°C, or below 100°C, or below 90°C, or below 80°C, or below 70°C, or*

even below 60°C into the drying apparatus") and page 5, line 17 ("*The volatile component may even be water*").

1.2.3 The disclosure on page 2, lines 1-3, however, concerns the preferred "highest" spraying temperature in generic terms without, however, specifying which spraying temperature is preferable for each volatile compound.

1.2.4 Also the disclosure on page 5, line 17, is not an isolated disclosure, as alleged by the respondent. It is indeed included in a description part labelled "Volatile compound", which deals generally (on the basis of the boiling point) and particularly (by identifying some of them) with the volatile compounds, and thus discloses a plurality of volatile compounds, of which carbon dioxide is preferred. Thus, the basis indicated by the respondent does not disclose water as the preferred volatile compound (as apparent from the statement "may *even* be water"), but as a less or least preferred volatile compound.

1.2.5 Moreover, this alleged basis leaves open (i.e. does not directly and unambiguously disclose) how the claimed combination is to be made, namely:
- with which kind of slurry (aqueous or non-aqueous) water is to be used as a volatile compound,
- how is it to be used, e.g. at which spraying temperature,
- what for, e.g. whether water is used for making the slurry, or
- whether another (form of) water is used, or under which operating conditions water is to be added or injected into the (aqueous/non aqueous) slurry.

1.2.6 On the basis of the comparative examples submitted during the examination phase (D4(02)), the patent

proprietor invoked (see letter dated 4 December 2012 and D41) that the selection of water as a volatile compound (which in fact appears to be the water used for making the aqueous slurry) and of a spraying temperature fulfilling the two conditions defined in claim 1 (i.e. higher than that defined by part (I) of claim 1 and lower than 125°C) is purposive, i.e. results in effects such as "high pour grade" (allegedly indicating good free flowing properties) and "high cake grade" (allegedly indicating little or no tendency to caking and lump formation).

1.3 In the Board's view, the original application neither discloses the claimed combination of features nor does it provide any indication for this preference, let alone as regards the invoked effects, which are not disclosed either, nor unambiguously implied by the originally mentioned effect "poor stability profile".

1.4 The original examples at page 9 of the application as filed in turn merely illustrate the injection of liquid carbon dioxide into the high pressure line of an aqueous slurry, which is then sprayed at 65°C.

1.5 It follows from the foregoing that there is no pointer whatsoever in the application as filed for the presently claimed combination of features, which therefore has not been directly and unambiguously disclosed in the application as filed.

1.6 Consequently, the main request is not allowable under Article 123(2) EPC).

2. First to seventh auxiliary requests - Article 123(2) EPC

Claim 1 of each of these requests comprises the combination of features added to claim 1 as originally filed, namely "*wherein the volatile component is water, and wherein in step (b) the slurry is sprayed at a temperature of below 125°C*", so that the conclusion drawn for claim 1 of the main request applies equally against claim 1 of each of first to seventh auxiliary requests, which are therefore not allowable either.

3. It follows that the provisions of Article 123(2) EPC prejudice the maintenance of the patent in suit in any of the proposed forms.

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