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**Datasheet for the decision
of 22 March 2022**

Case Number: T 0718/17 - 3.3.10

Application Number: 06771890.8

Publication Number: 1968529

IPC: A61K8/02, C11D17/04, A01N25/34,
C11D1/62

Language of the proceedings: EN

Title of invention:
WIPER FOR USE WITH DISINFECTANTS

Patent Proprietor:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
Essity Hygiene and Health Aktiebolag

Headword:

Relevant legal provisions:
EPC Art. 100(c)
RPBA 2020 Art. 13(1), 25, 12(1)(d)
RPBA Art. 13(1), 12(1)(c)

Keyword:

Grounds for opposition - late-filed ground for opposition - inherently admitted by the opposition division - added subject-matter (yes)

Basis of proceedings - communication of board of appeal

Amendment to appeal case - exercise of discretion

Decisions cited:

G 0001/95, T 2227/15

Catchword:



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Case Number: T 0718/17 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 22 March 2022

Appellant: Essity Hygiene and Health Aktiebolag
(Opponent) 405 03 Göteborg (SE)

Representative: Hoffmann Eitle
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Respondent: KIMBERLY-CLARK WORLDWIDE, INC.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 December 2016 concerning maintenance of the
European Patent No. 1968529 in amended form.**

Composition of the Board:

Chair P. Gryczka
Members: R. Pérez Carlón
L. Basterreix

Summary of Facts and Submissions

- I. The appellant (opponent) lodged an appeal against the decision of the opposition division concerning maintenance of European patent No. 1 968 529 in the form of the main request before it.
- II. Notice of opposition had been filed on grounds which did not include that of added subject-matter (Article 100(c) EPC).
- III. The main request of the respondent (patent proprietor) in these appeal proceedings was the main request before the opposition division. Claim 1 reads as follows:

"A dry wiper for use with disinfectant solutions, comprising;

a dry substrate comprising 100 percent synthetic fibers; and

a disinfectant release treatment present on the substrate at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate; wherein the disinfectant release treatment is

an N,N-dialkyl-N,N-dimethylammonium X compound, where X is a chemical group selected from the group of carbonate, bicarbonate, sulfate, methyl sulfate, and ethyl sulfate; or

a lauryldimethylammoniumhydroxypropyl alkyl polyglucoside."

With the statement setting out the grounds of appeal, the appellant filed auxiliary requests 1 to 8. Auxiliary requests 9 to 17 were filed with a letter dated 10 January 2020.

Like claim 1 of the main request, claim 1 of all the auxiliary requests contains the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"*.

- IV. The opposition division concluded that this feature found the required basis on page 13, lines 21-26 of the application as originally filed.
- V. The appellant argued in a letter dated 26 April 2017 that this feature did not find the required basis not only for the reasons provided before the opposition division and in the statement of grounds of appeal but also since there was no basis for the part *"based on the weight of the substrate"*.
- VI. The board informed the parties in a communication dated 13 November 2019 that it was inclined to conclude that the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* did not find the required basis in the application as originally filed.
- VII. The respondent's reply to the board's communication was dated 10 January 2020. It relied, as a basis for that part of the feature, on page 3, lines 18-21 and claim 8, in combination with page 13, lines 21-26 of the application as filed.
- VIII. At the oral proceedings before the board, which took place on 22 March 2022, the respondent argued that Article 100(c) EPC was a fresh ground for opposition raised in appeal. The respondent did not agree that it was introduced into the proceedings.

Were it introduced, it argued that the new objection

against the feature "*at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate*" should not be admitted into the proceedings under Article 13(1) RPBA 2020.

Were it admitted, the respondent saw the passage on page 3, lines 18-21 in combination with claim 8 of the application as originally filed as a basis for that feature. Claim 1 of the main request thus found the required basis. The argument applied to all the requests on file.

IX. The arguments of the appellant at the oral proceedings before the board were as follows.

Although the notice of opposition did not rely on Article 100(c) EPC, objections of added subject-matter had been raised during the written procedure before the opposition division, which decided on them in point 1 of the decision under appeal. Article 100(c) EPC was thus not a fresh ground raised for the first time in appeal.

The specific objection against the feature "*at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate*" was not raised in the statement of grounds of appeal. However, it should be admitted into the proceedings as it was highly relevant.

This feature did not find the required basis in the application as originally filed. Page 13, lines 21-26 defined the relative amount of disinfectant with respect to the wiper, not to the wiper substrate, as required by claim 1. As all the requests on file

contained this feature, none was allowable.

X. The final requests of the parties were as follows.

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 or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1 to 8 filed on 14 September 2017 with the reply to the statement of grounds of appeal or one of auxiliary requests 9 to 17 filed with the letter dated 10 January 2020.

XI. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. The appeal is admissible.

Amendments

2. The board concluded that all the requests on file contained added subject-matter for the reasons which follow.

The respondent's arguments against this conclusion hinged on three points.

(a) It first argued that Article 100(c) EPC was a fresh ground for opposition in the appeal proceedings. It did not consent that it was introduced into the

proceedings.

(b) It further argued that the specific objection against the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* was an amendment of the appellant's case and should not be admitted pursuant Article 13(1) RPBA 2020 as the appellant had not justified why this new objection was raised so late in the proceedings.

(c) Lastly, it argued that the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* found the required basis on the combination of claim 8, page 3, lines 18-21 and page 13, lines 21-26.

Each of these three points is addressed below.

3. The first issue to be decided is whether Article 100(c) EPC was a fresh ground for opposition in these appeal proceedings, as argued by the respondent.

3.1 In accordance with G 1/95, a fresh ground for opposition may not be introduced into the appeal proceedings without the respondent's agreement.

Were Article 100(c) EPC a fresh ground for opposition filed during appeal proceedings, the board would have no power to examine it as the respondent did not give its consent.

3.2 It was not disputed that the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* was to be found in claim 1 of the patent as granted.

It was further undisputed that the appellant did not rely on Article 100(c) EPC as a ground for opposition either in its notice of opposition or in the statement of the grounds for opposition. This is reflected in point 1.2 of the appealed decision.

What needs to be examined is whether the opposition division had nevertheless introduced the ground set out in Article 100(c) EPC into the proceedings.

- 3.3 In a letter dated 8 October 2015, the patent proprietor-respondent referred to new requests, including a new main request. Points 9 and 10 of that letter provided a basis for the amendments in the patent as granted and in the application as originally filed. The requests mentioned in the letter were not filed with it but four days later.
- 3.4 With a letter dated 18 May 2016, the opponent-appellant replied and argued that all the requests contained added subject-matter. Point 3.2 of this letter addresses the feature *"at an add-on level of between 0.05 percent and 0.15 percent"*, which was also present in granted claim 1.
- 3.5 The opposition division provided its preliminary view on the amendments in point 2.1 of the annex to the summons to oral proceedings.

Its final conclusion on the matter can be found in point 1 of the appealed decision. The opposition division examined all the features of claim 1, regardless of whether they were present in the claims as granted. The feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of*

the substrate" is addressed on page 4, lines 15-19 of the appealed decision.

- 3.6 Having regard to the line of events, the board concludes that the ground for opposition in Article 100(c) EPC was raised by the opponent-appellant and de facto admitted into the proceedings by the opposition division since the objection was addressed in substance in the appealed decision. This is therefore not a new ground for opposition raised for the first time in the appeal proceedings.
- 3.7 Since Article 100(c) EPC is not a fresh ground in appeal, the board has the power to examine it without the respondent's consent.
4. The second issue to be examined is whether the line of argument raised by the appellant in the appeal proceedings, namely that the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* has no support in the application as filed, can be admitted into the appeal proceedings.
- 4.1 The appellant objected to the feature before the opposition division in a different way arguing namely that the two endpoints of the required add-on level had not been disclosed in combination. This argument was also part of the statement of grounds of appeal dated 26 April 2017.

Only in a subsequent letter dated 24 July 2018 did the appellant bring forward that no basis could be found, either, for the reference of the add-on level to the weight of the substrate.

This is not disputed.

4.2 However, in view of the objection raised before the opposition division and reiterated in the notice of appeal, the board had necessarily to examine whether the whole feature "*at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate*" to which the objection was directed finds support in the application as filed.

4.3 The respondent cannot expect the examination of the objection, raised already in opposition, to concern only the endpoint of the range as such, i.e. 0.05 and 0.15%, without taking into account the feature to which these endpoints refer to, namely that the percentages are defined with regard to "the weight of the substrate". Examining whether the endpoints of the range are disclosed in the application as originally filed inevitably implies determining whether they are disclosed in relation to the correct reference.

In fact, the board's communication in preparation for oral proceedings not only addressed whether there was a basis for the combination of the endpoints 0.05 and 0.15%, but also whether these endpoints were disclosed in combination with the required reference in the application as originally filed (last paragraph of point 2.3 of the communication).

Therefore, the argument of the lateness of the appellant-opponent's objection with regard to this reference is irrelevant.

5. Is there a basis for the feature "*at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate*" in the application as

originally filed?

5.1 It is undisputed that the specific endpoints of the add-on level of 0.05 and 0.15% can only be found on page 13, lines 24 and 26 of the application as originally filed. This passage, however, defines the add-on level with respect to the weight of the wiper, not of the substrate. This is not disputed.

5.2 The respondent argued that this passage, nevertheless, provided the required basis in view of claim 8 as originally filed, which required an add-on level of disinfectant of about 0.20% or less, based on the weight of the substrate. The same wording could be found on page 3, lines 18-21 of the application. The skilled reader, confronted with the values on page 13, lines 21-26, would recognise that it was meant to refer also to the substrate. This was, furthermore, the usual way to define the add-on amount.

However, page 13 explicitly provides the wiper, not the substrate, as the reference value. Regardless of whether this reference is infrequent, it is what the application as originally filed discloses. There is no reason to recognise it as erroneous.

5.3 The respondent also argued that the target add-on level must be defined based on the weight of substrate as the final weight of the wiper was not yet known before applying it.

However, calculating the add-on with respect to the final weight of the wiper only requires simple additional calculation steps.

5.4 The board thus concludes that the passage on page 13, lines 21-26 does not clearly and unambiguously disclose the feature *"add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* required by claim 1. Claim 1 thus contains added subject-matter.

5.5 The main request is for these reasons not allowable.

6. Auxiliary requests

It was undisputed that the feature *"at an add-on level of between 0.05 percent and 0.15 percent, based on the weight of the substrate"* was to be found in claim 1 of all the requests on file and that the conclusion on the main request would also apply to all of them.

None of the respondent's requests is thus allowable.

7. Having regard to the board's negative conclusion on the issue of added subject-matter, it is not required to decide on any other point.

Order

For these reasons it is decided that:

The decision under appeal is set aside and the patent is revoked.

The Registrar:

The Chair:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated