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**Datasheet for the decision
of 24 November 2021**

Case Number: T 2608/17 - 3.2.07

Application Number: 10156531.5

Publication Number: 2366507

IPC: B26B21/44

Language of the proceedings: EN

Title of invention:

Razor cartridge

Patent Proprietor:

The Gillette Company LLC

Opponents:

Beiersdorf AG
BIC-Violex S.A.
Edgewell Personal Care Brands, LLC

Headword:

Relevant legal provisions:

EPC Art. 123(2)
RPBA 2020 Art. 13(2), 12(3)
RPBA Art. 12(2)

Keyword:

Amendments - added subject-matter (yes)
Amendment after summons - taken into account (no) -
exceptional circumstances (no)

Decisions cited:

G 0002/10, T 0002/81, T 1187/16, T 0042/17, T 1906/17

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 2608/17 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 24 November 2021

Appellant:
(Opponent 1)

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(Opponent 2)

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Respondent:
(Patent Proprietor)

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Representative:

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Party as of right:
(Opponent 3)

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 October 2017 concerning maintenance of the
European Patent No. 2366507 in amended form.

Composition of the Board:

Chairman I. Bechedorf
Members: S. Watson
A. Pieracci

Summary of Facts and Submissions

- I. Two opponents lodged appeals within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 2 366 507 in amended form.
- II. In its decision the opposition division found that the objections raised by the three opponents under Articles 54, 56, 83, 84 and 123(2) EPC and Rule 42 EPC did not prevent maintenance of the patent in the form according to auxiliary request 1, filed during oral proceedings before the opposition division.
- III. With their statement of grounds of appeal, opponents 1 and 2 (appellants 1 and 2) argued that the decision was incorrect with respect to their objections under Articles 54, 56, 83, 84 and 123(2) EPC.
- IV. In its reply to the opponents' statements of grounds of appeal, the patent proprietor (respondent) requested dismissal of the appeals and maintenance of the patent in the amended form found by the opposition division to meet the requirements of the EPC, or alternatively in amended form based on one of the sets of claims of auxiliary requests 1 to 3, filed with the reply to the statements of grounds of appeal of the appellants.
- V. In written submissions made in response to the respondent's reply to the statements of grounds of appeal, appellant 2 requested *inter alia* that auxiliary requests 1 to 3 be disregarded.
- VI. In preparation for oral proceedings the Board gave its preliminary assessment of the case by means of a

communication pursuant to Article 15(1) RPBA 2020. The Board indicated that the appeals were likely to be allowed.

- VII. The respondent reacted to the preliminary opinion of the Board with written submissions of 22 October 2021 and filed new auxiliary requests 1 to 5.
- VIII. Oral proceedings before the Board took place by videoconference on 24 November 2021.

At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

- IX. The final requests of the parties are as follows:

for the appellants

that the decision under appeal be set aside and
that the patent be revoked;

for the respondent

that the appeals be dismissed *i.e.* that the patent be maintained in the amended form held by the opposition division to meet the requirements of the EPC (auxiliary request 1 filed during the oral proceedings before the opposition division on 6 September 2017 - main request in appeal proceedings);
alternatively, when setting aside the decision under appeal,
that the patent be maintained in amended form according to one of the sets of claims filed as

auxiliary requests 1 to 5 with letter dated 22 October 2021.

X. Opponent 3 (party as of right) made no substantive submissions or requests during the appeal proceedings.

XI. Independent claim 1 of the main request reads as follows:

"A wet shaving cartridge (12) comprising:

a) a housing (16) having a guard (18) located at a front end of the housing and a cap (20) located at a rear end of the housing,

b) two or more elongate blades (26) located between the guard (18) and cap (20) and extending in a direction substantially parallel to a length of the guard, wherein edges (28) of the respective blades lie in a shaving plane (A) extending between the guard (18) and the cap (20);

c) a shaving aid retention member (34) located in the cap (20), the retention member (34) having a base (36) arranged to receive a shaving aid (35) and characterized in that a front wall (38) is located at a side of the retention member (34) adjacent the blades, the front wall (38) extending from the base (36) of the retention member (34) towards the shaving plane (A), wherein the edge (40) of the front wall (38) is a distance (d) between 0.2 mm and 0.4mm below the shaving plane A."

XII. Independent claim 1 of auxiliary request 1 differs from claim 1 of the main request through the introduction of the following feature at the end of section c) of claim 1:

"and wherein the edge (40) of the front wall (38) is a distance (y) between 0.4 mm to 0.9 mm away from the edge (68) of the last blade (64)."

XIII. Independent claim 1 of auxiliary request 2 differs from claim 1 of the main request through the introduction of the following features:

"d) a shaving aid (35) located on the base (36) of the shaving aid retention member (34), said shaving aid being thicker than the height of the front wall (38) such that a top surface (52) of the shaving aid (35) protrudes above the edge (40) of the front wall (38) of the retention member."

XIV. Independent claim 1 of auxiliary request 3 differs from claim 1 of the main request through the introduction of all the additional features of auxiliary requests 1 and 2.

XV. The independent claims of auxiliary requests 4 and 5 are based on claim 1 of the main request and auxiliary request 2, respectively, with the following amendment to both independent claims (additions underlined, deletions ~~struck through~~):

"...distance (d) between 0.2mm and 0.34mm below the shaving plane (A)".

XVI. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

Reasons for the Decision

1. *Revised Rules of Procedure of the Boards of Appeal (RPBA 2020) - transitional provisions*

The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. *Article 123(2) EPC - main request - claim 1*

- 2.1 The opposition division found that claim 1 of then auxiliary request 1 (now the main request) fulfilled the requirements of Article 123(2) EPC. It found that paragraph [0013] of the application as published disclosed the feature that:

"the edge (40) of the front wall (38) is a distance (d) between 0.2mm and 0.4mm below the shaving plane A."

(see decision under appeal, page 7, final paragraph, together with page 4, fifth paragraph).

- 2.2 Appellant 2 argued in its statements of grounds of appeal that the opposition division was incorrect as the passage in paragraph [0013] could not directly and unambiguously disclose a range with the combination of a lower limit of 0.2 mm and an upper limit of 0.4 mm as no concrete ranges were disclosed (see statement of grounds of appeal, point B.I.1.).

2.3 The second sentence of paragraph [0013] of the application as published reads as follows:

"In embodiments, the edge 40 may be a distance, d , between 0, 0.05, 0.1, 0.15, 0.2 and 0.3, 0.35, 0.4mm below the shaving plane A, while still reducing the amount of discomfort that may be caused to a user of the razor cartridge through skin bulge following the last blade 64."

2.4 The respondent argued that paragraph [0013] of the application as published, clearly disclosed fifteen equally preferred ranges, presented in a concise, abbreviated form. According to the respondent, the skilled person would directly and unambiguously derive the ranges from all the possible combinations of lower and upper limits given in the second sentence of paragraph [0013], in particular in view of the use of the phrase "between...and...". The skilled person would not understand the sentence as disclosing no particular combinations at all, as this would render the sentence meaningless (see reply to the statements of grounds of appeal, point 2.2 and submissions of 22 October 2021, point 2.1).

During oral proceedings, the respondent cited established case law relating to the disclosure of ranges and, in particular, decision T 2/81 in support of its case. In the respondent's view, as the competent Board in the case leading to decision T 2/81 found that claimed ranges taking the lower limit of a preferred range in combination with the upper limit of a general range, were disclosed (see decision T 2/81, Reasons, point 3.), it had to be accepted in the case at hand that any of the fifteen ranges could be selected and introduced into claim 1 without extending the subject-

matter of the claim beyond the content of the application as originally filed.

- 2.5 The Board, however, follows the arguments of the appellants that the formulation of the sentence is ambiguous and no unequivocal correlation between any particular values is given, so that the combination of the values 0.2 mm and 0.4 mm to create a range is an arbitrary combination which was not directly and unambiguously disclosed.

Even if the argument of the respondent were to be followed, that the phrase "between...and.." indicates that a disclosure of various ranges was intended, the application as originally filed contains no pointer to any specific "pairs" of numbers to create particular ranges. This does not mean that the skilled person finds the sentence of paragraph [0013] completely meaningless, as argued by the respondent, but rather that the sentence does not unambiguously disclose any particular ranges.

Accordingly, any established case law relating to forming ranges by combining end points of disclosed ranges cannot apply in the present case as no specific ranges have been disclosed (case law of the Boards of Appeal [CLB], 9th edition, 2019, II.E.1.5.1).

- 2.6 The Board also agrees with the appellants that the particulars of the case leading to decision T 2/81 are quite different to the present case.
In the description of the case underlying that decision, a broad general range and a narrower more preferred range within the broad range were clearly disclosed in the application documents as originally filed. However, as argued by appellant 2, in the

present case there is no disclosure of a "nested set of concrete (sub-)ranges", with a broad general range and narrower more preferred ranges. Instead there is a disclosure of a first group of five values and a second group of three values, with no explicit indication of which values are to be combined (see statement of grounds of appeal of appellant 2, page 3, second complete paragraph).

Therefore the Board is of the view that the findings in decision T 2/81 have no bearing on the present case.

- 2.7 The respondent further argued during oral proceedings that the skilled person reads the application documents with "a mind willing to understand" and would therefore interpret the sentence of paragraph [0013] of the application as published as disclosing fifteen equally preferred ranges.

Even if it were to be considered that the skilled person generally reads with "a mind willing to understand", this cannot override the requirements of the 'gold standard' (G2 /10) that the claimed subject-matter be directly and unambiguously derivable from the application documents as originally filed. This is, however, not the case as discussed and held in point 2.5 above.

- 2.8 The Board therefore finds that the main request does not fulfil the requirements of Article 123(2) EPC as the subject-matter of claim 1 extends beyond the content of the application as filed.

3. *Auxiliary requests 1 to 3*

As the feature found to extend the subject-matter of claim 1 of the main request is also found in claim 1 of auxiliary requests 1 to 3, these requests do not fulfil the requirements of Article 123(2) EPC for the same reasons as given above (see point 2.). Therefore, and irrespective of any objections relating to their admittance into the proceedings, these requests are not allowable.

4. *Admittance into the proceedings of auxiliary requests 4 and 5*

Auxiliary requests 4 and 5 were filed after notification of the summons to oral proceedings.

Both appellants requested that auxiliary requests 4 and 5 not be admitted into the appeal proceedings according to Article 13(2) RPBA 2020. In addition, both appellants argued that the amended claims would not be allowable at least for the same reasons as for the main request.

Article 13(2) RPBA 2020 states that any "amendment to a party's appeal case made...after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned."

Claim 1 of both auxiliary requests 4 and 5 contains a range for the distance (d), namely 0.2mm to 0.3mm, which was not previously claimed. Therefore, these

requests clearly amount to an amendment of the respondent's appeal case.

During oral proceedings before the Board, the respondent argued that exceptional circumstances did exist in the present case, as the preliminary opinion of the Board deviated from the findings of the opposition division. The respondent further argued that the amendment was a simple and straightforward limitation which did not increase the complexity of the case.

The Board follows established case law, which indicates that if the preliminary opinion of a Board does not raise a new objection but merely arrives at a different conclusion to that given in the decision under appeal, generally no exceptional circumstances have arisen (T 1187/16, Reasons 3.2, final paragraph; T 42/17, Reasons 4.3 and 4.4; see also T 1906/17, Reasons 3.2, sixth and seventh paragraphs, in application of RPBA 2007).

In the present case, as confirmed by the respondent during oral proceedings, the objection had been dealt with by the opposition division in the decision under appeal and had been raised and substantiated by appellant 2 in its statement of grounds of appeal. Therefore, no unforeseen developments had taken place during the appeal proceedings.

Article 12(3) RPBA 2020, which essentially corresponds to Article 12(2) RPBA 2007, requires that parties present their complete appeal case at the start of the appeal proceedings. In the present case, the respondent thus could and should have presented its complete case with its reply to the statements of grounds of the

appellants, rather than waiting to receive the preliminary opinion of the Board and filing new requests at a late stage of the appeal proceedings.

In view of the above and in accordance with Article 13(2) RPBA 2020, auxiliary requests 4 and 5 were not admitted into the appeal proceedings.

5. *Conclusions*

5.1 The appellants have submitted convincing arguments that demonstrate the incorrectness of the decision under appeal regarding extension of the claimed subject-matter beyond the content of the application as originally filed. The decision under appeal must therefore be set aside.

5.2 Furthermore, in the absence of any admissible or in its substance allowable set of claims, the patent must be revoked.

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:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated