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**Datasheet for the decision
of 11 October 2022**

Case Number: T 0082/20 - 3.3.06

Application Number: 12199236.6

Publication Number: 2746376

IPC: C11D3/00, C11D1/83, C11D1/825,
C11D3/37

Language of the proceedings: EN

Title of invention:

Dishwashing composition

Patent Proprietor:

The Procter & Gamble Company

Opponent:

UNILEVER N.V. / UNILEVER PLC

Headword:

Dishwashing composition / The Procter & Gamble Company

Relevant legal provisions:

EPC Art. 100(c), 123(2)

Keyword:

All requests - added subject matter (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0082/20 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 11 October 2022

Appellant: UNILEVER N.V. / UNILEVER PLC
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 November
2019 rejecting the opposition filed against
European patent No. 2746376 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. The appeal by the opponent is against the decision of the opposition division to reject the opposition against European patent n° 2 746 376, claim 1 thereof (hereinafter **granted claim 1**) reading as follows:

"1. An automatic dishwashing detergent composition comprising:

a) from about 0.1% to about 20% by weight of high foaming surfactant having a foam volume of above 30 ml according to the test described herein wherein the high foaming surfactant comprises an anionic surfactant;

b) from about 0.5% to about 15% by weight of low foaming non-ionic surfactant having a foam volume of less than 30 ml according to the test described herein;

c) from about 0.001% to about 5% by weight of suds suppressor selected from the group consisting of a silicone fluid, a silicone resin, silica, and mixtures thereof; and

d) from about 1% to about 50% of builder,
wherein said automatic dishwashing detergent has a foam volume less than about 30 ml per 250 mL of a 4.0 g/L detergent solution at 45°C according to the test method described herein."

- II. This patent is based on European patent application n° 12199236.6, in which **original claims 1** and **8** read:

"1. An automatic dishwashing detergent composition comprising:

a) from about 0.1% to about 20% by weight of high foaming surfactant;

b) from about 0.5% to about 15% by weight of low foaming non-ionic surfactant;

c) *from about 0.001% to about 5% by weight of a suds suppressor; and*

d) *from about 1% to about 50% of builder,*
wherein said automatic dishwashing detergent has a foam volume less than about 30 ml per 250 mL of a 4.0 g/L detergent solution at 45°C according to the test method described herein."

"8. A composition according to any preceding claim wherein said suds suppressor is selected from the group consisting of a silicone fluid, a silicone resin, silica, and mixtures thereof."

III. In the appealed decision, the opposition division found that granted claim 1 was based *inter alia* on claims 1 and 8 of the original application.

IV. In its grounds of appeal the appellant rejected this finding by arguing that, as apparent from original claim 1 and from page 2, lines 8-9 and page 11, lines 15-18 of the original description, the application as filed would only disclose the presence of the suds suppressor component in limited weight amounts: while "[t]his weight amount limitation is irrespective of the kind of suds suppressor used, the original disclosure clearly indicates that this weight limitation refers to the total amount of suds suppressor present in the composition" (last paragraph on page 1 and first paragraph on page 2 of the grounds of appeal). However, granted claim 1 only limited the amount of the specific suds suppressor recited in item "c)" and thereby did not exclude the presence of further suds suppressors in addition to those described in "c)", so that the total amount of suds suppressors could be above the 5 wt.% limit implied in original claim 1 or even above the 10% by weight of the composition disclosed as an upper

limit in paragraph [0042] of the application as published: *"The suds suppressor is included in the composition at a level from about 0.0001% to about 10% ..."*. Hence, for example, granted claim 1 would cover a composition containing, viz. *"4 wt.% silicone fluid and 7 wt.% alkyl phosphate ester"* (page 2 of the grounds of appeal).

V. With its reply the patent proprietor (hereinafter **respondent**) filed five sets of amended claims labelled as **auxiliary requests 1 to 5**, whereby auxiliary requests 1 to 4 are identical to those with the same numbering already filed before the opposition division.

In each version of claim 1 of auxiliary requests 1 to 4, the definition of ingredient "(c)" is identical to the corresponding definition in granted claim 1.

In claim 1 of auxiliary request 5, the definition of ingredient "(c)" reads as follows (amendments vis-à-vis the corresponding definition in granted claim 1 made apparent):

"c) from about 0.001% to about 1.55% by weight of suds suppressor selected from the group consisting of a silicone fluid, a silicone resin, silica, and mixtures thereof; and ...".

The respondent also rebutted appellant's submissions under Article 100(c)/123(3) EPC by arguing (last paragraph on page 1 and first paragraph on page 2 of the reply) that it would be clear from the wording of granted claim 1 that the weight limitation applied to the total amount of suds suppressors in the composition and that only silicone fluid, silicone resin, and silica could be used as suds suppressors. Thus, the

example composition given by the appellant would not be covered by granted claim 1. Moreover, granted claim 1 could not extend beyond the disclosure of the application as filed because of its "explicit basis" in original claim 8.

- VI. The appellant requested not to admit auxiliary request 5.
- VII. At the oral proceedings held before the board, the parties made oral submissions substantially similar to those summarised above. In particular, the respondent initially argued that if the definition of component "(c)" in granted claim 1 were to be construed as not imposing any limitation to the amount of "*suds suppressor*" of a different composition from the one explicitly recited in such definition then, due to the substantial identity of the wording used in granted claim 1 and in original claim 8, also the latter would not impose any such limitation.

In the opinion of the respondent the skilled person could only reasonably construe the definition of component "(c)" in granted claim 1 as defining the total amount of "*suds suppressor*"(s) further defined by its specific composition. Component "(c)" thus defined the possible range for the total amount of this ingredient(s).

The respondent did not dispute the preliminary opinion of the board that the same reasons that should be objectionable to granted claim 1 under Articles 100(c) and 123(2) EPC would equally apply to any other version of claim 1 on file, and explicitly declined the opportunity to discuss any of the auxiliary requests.

VIII. The parties' final requests were as follows.

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

The respondent/patent proprietor requested that the appeal be dismissed (**main request**), or that the patent be maintained in amended form based on the claims of one of **auxiliary requests 1 to 5** filed with the reply to the appeal.

Reasons for the Decision

1. *Main request - Article 100(c)/123(2) EPC*

1.1 In regard of the original disclosure of the patent, the parties cited claims 1 and 8 as originally filed and paragraphs [0041] and [0042] of the application as published. The board finds it helpful to first give its interpretation of claim 1 as granted, and then to analyse whether this teaching was originally disclosed.

1.2 Claim 1 as granted defines a dishwashing detergent composition "*comprising ... from about 0.0001% to about 5% by weight of suds suppressor selected from the group consisting of a silicone fluid, a silicone resin, silica and mixtures thereof*" (hereinafter these suds suppressors are referred to as **the listed silicone suds suppressors**) .

1.2.1 The board first notes that feature "*c*)" of granted claim 1 is formulated as a single definition rather than a combination of a first characterising feature - e.g. that the suds suppressor must in general be present in an amount up to 5 wt.% - with a further and distinct characterising feature to be applied to the

embodiments of the claimed subject-matter qualified by the first characterising feature (e.g. as it would be expressed by wording such as "said suds suppressor being selected from ..."). Hence, feature "c)" in granted claim 1 does not apply to the total amount of any type of suds suppressor ingredient, and does not exclude further suds suppressor(s) in addition to the listed silicone suds suppressors.

- 1.2.2 Secondly, the board notes that the maximum amount of all four ingredients specifically mentioned (high foaming surfactant, low foaming surfactant, suds suppressor, builder) amounts to a maximum of 90 wt.%, leaving an amount of 10 wt.% of further, non-specified ingredients. Hence, while the amount of suds suppressor as defined in "c)" (i.e. the total amount of all listed silicone suds suppressors present in the claimed composition) is limited to an amount of 5 wt.%, the remaining 10 wt.% of undefined ingredients may very well consist of further (e.g. non-silicone) suds suppressors.

Hence, even if all the four defined ingredients "a)" to "d)" were contained in the patented composition to their maximum limit as claimed (i.e. 90 wt.% in total), the claim would not exclude the presence of 10% undefined substances which could very well be of a non-silicone type suds suppressor. Accordingly, granted claim 1 also appears to possibly embrace the example composition proposed by the appellant (see IV above) wherein the total amount of suds suppressor in the composition adds to 11 wt.%.

- 1.2.3 The respondent argued that such construction of the definition in "c)" of granted claim 1 (namely as only requiring an amount limitation for suds suppressor

ingredient(s) of the listed silicone suds suppressor classes) would not be a reasonable reading of granted claim 1 to the skilled person.

However, in the board's view such construction is fully justified by the literal wording used for feature "c)" in such claim.

After all, the respondent did not point to any technical reasons known to the skilled person why feature "c)" of claim 1 would be rendered technically irrelevant when (only) limiting the amount of such specific suds suppressors in the case that other suds suppressors (such as the "*alkyl phosphate ester suds suppressor*"s mentioned among as "*suds suppressor*" ingredient in paragraph [0044] of the granted patent) would additionally be present in the composition. Nor do there appear any other technical reasons for excluding in the patented composition an additional presence of e.g. alkyl phosphate ester suds suppressors.

Thus, a restriction of the 5% limit to the listed silicone suds suppressors only would not imply any contradiction depriving the claim of a plausible technical meaning, and the respondent did not point to any specific passage of the granted patent that would justify a different construction of feature "c)" in granted claim 1.

- 1.2.4 The board concludes that the skilled reader of granted claim 1 understands that the definition in "c)" only describes the mandatory presence of the listed silicone suds suppressors in the specified amounts and thus, that the amount range recited in "c)" does not exclude the possible presence of further suds suppressors so

that the total amount of suds suppressors might well be above 5 wt.%.

- 1.3 The board then turns to claims 1 and 8 of the application as filed and the decision under appeal as the basis for the definition of component "c)" in granted claim 1.
- 1.3.1 In a first line of reasoning, the respondent argued that original claim 8 would provide an explicit basis to the definition of component "c)" in granted claim 1. Hence, if granted claim 1 could be read by the skilled person as imposing no restriction to the amount of suds suppressors in general (as now held by the board), then the same would apply to original claim 8.
- 1.3.2 It is convenient at this stage to turn to claim 1 as originally filed in that it relates to a composition *"comprising: ... c) from about 0.001% to about 5% by weight of a suds suppressor, and ..."*.
- 1.3.3 It is apparent to the board and undisputed between the parties that the maximum of 5 wt.% of the composition defined in above "c)" relates to the total amount of any suds suppressor(s) possibly present in the composition. This interpretation is confirmed by paragraph 41 of the original description as published that defines "suds suppressors" as *"an alkyl phosphate ester suds suppressor, a silicone suds suppressor, or combinations thereof"*. Thus, at least according to claim 1 alone, the composition as claimed should not contain more than 5% per weight of whatever type of suds suppressor.
- 1.3.4 Original claim 8 then specifies that in the *"composition according to any preceding claim", "said*

suds suppressor is selected from" a group of silica-based suds suppressors. Original claim 8 according to its explicit reference is dependent on original claim 1 which describes in "c)" the mandatory presence of "a suds suppressor" in an amount of up to 5 wt.%. Thus, it *specifies* and thereby *limits* the type of suds suppressors (silicon type), yet it does not *add* any further suds suppressor to the mixture as defined in claim 1. Nor can it, as a dependent claim, broaden the limit of 5%, because otherwise it would not be a "*composition according to any preceding claim*".

As also original claims 2 to 7 are all (directly or indirectly) dependent on original claim 1, and since the latter is the sole claim providing a definition of ingredient "c)", it is apparent that original claim 8 cannot embrace a composition with e.g. 5 wt.% of specified suds suppressors plus other suds suppressor(s) of a different type.

Hence, original claim 8 does not provide an explicit or implicit basis to the definition of component "c)" in granted claim 1 (when the latter is correctly construed as indicated above in 1.2.4).

- 1.4 In a second line of reasoning, the respondent argued that although original claim 8, by way of its dependence on the preceding claims, might imply a limitation of the total amount of (any) suds suppressor(s) present in the composition, such limitation should also be read into granted claim 1. However, for the reasons indicated in points 1.2 to 1.2.4 above, the board is unable to interpret granted claim 1 in such a manner.

Hence, also this second line of reasoning is found unconvincing by the board.

- 1.5 The board also observes that paragraph [0042] of the published application (p. 11, lines 10 et seq. of the application as filed) teaches that the *"suds suppressor is included in the composition at a level of from about 0.0001% to about 10%"*.

As the appellant has demonstrated with the example given on page 2 of the grounds of appeal (see V above), the subject-matter of claim 1 as granted could also extend to compositions in which the total amount of suds surfactant(s) add up to more than 10 wt% and thus beyond the limitation of the original disclosure expressed in original paragraph [0042].

The respondent submitted that a skilled person would read the disclosure of this upper limit of 10 wt.% in the original application as a "throw-away remark".

To the board, it is not clear what this is supposed to mean, and how a person skilled in the art should be able to distinguish a "throw-away remark" from a technical teaching. For the board the passage offers a clear technical teaching that any type of suds suppressor in the composition is limited to 10 wt.%, a limitation that can no longer be found in granted claim 1.

Hence, granted claim 1 extends beyond the limit for the total amount of suds surfactant(s) in the composition as originally disclosed in paragraph [0042].

- 1.6 For these reasons, and contrary to the respondent's submissions, the definition of component "c)" in

granted claim 1 is found not to have a basis in original claims 1 and 8 and to extend beyond the disclosure of the original description.

- 1.7 Thus, granted claim 1 is found not to comply with the requirements of Articles 100(c)/123(2) EPC and thus prejudices the maintenance of the patent as granted.

2. *Auxiliary requests 1 to 5*

- 2.1 The same reasoning given in 1.2 above necessarily applies to the identical definition of feature "c)" in each version of claim 1 of auxiliary requests 1 to 4.

- 2.2 Moreover, it is apparent and undisputed that substantially the same reasoning given in 1.2 above also applies to the version of feature "c)" in claim 1 of auxiliary request 5 which only differs from the definition of "c)" in granted claim 1 in that the range is defined more narrowly. No further argument in this regard was advanced by the respondent in oral proceedings.

- 2.3 Hence, the board concludes that neither version of feature "c)" in claim 1 of auxiliary requests 1 to 5 finds a basis in original claims 1 and 8, or the original description.

Thus, claim 1 of these auxiliary requests is also found not to comply with the requirements of Article 123(2) EPC and therefore none of the auxiliary requests is allowable.

- 2.4 As auxiliary request 5 is unallowable for the above reasons, there is no need to decide on its admittance.

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. Hampe

J.-M. Schwaller

Decision electronically authenticated