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**D E C I S I O N**  
**of 23 November 2001**

**Case Number:** T 0894/97 - 3.3.6

**Application Number:** 90309376.3

**Publication Number:** 0415698

**IPC:** C11D 17/00

**Language of the proceedings:** EN

**Title of invention:**  
Fabric softening composition

**Patentee:**  
UNILEVER PLC, et al

**Opponent:**  
PROCTER & GAMBLE EUROPEAN TECHNICAL CENTER N.V.

**Headword:**  
Deflocculating polymer/UNILEVER

**Relevant legal provisions:**  
EPC Art. 56, 114(2)  
OJ EPO 1996, 342, 1.2.1, 1.2.2

**Keyword:**  
"Admissibility of late-filed test results (no) - no relevance"  
"Inventive step (yes) - solution not suggested in the prior art"

**Decisions cited:**  
T 0156/84, T 0534/89, T 0270/90, T 0939/90, T 0375/91,  
T 0951/91, T 1002/92, T 0039/93

**Catchword:**  
-





Case Number: T 0894/97 - 3.3.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.6**  
**of 23 November 2001**

**Appellant:** PROCTER & GAMBLE EUROPEAN TECHNICAL CENTER  
(Opponent) N.V.  
Temselaan 100  
B-1853 Strombeek-Bever (BE)

**Representative:** TER MEER STEINMEISTER & PARTNER GbR  
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**Respondent:** UNILEVER PLC  
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UNILEVER N.V.  
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**Representative:** Watson, Robert James  
Mewburn Ellis  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 18 June 1997  
rejecting the opposition filed against European  
patent No. 0 415 698 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

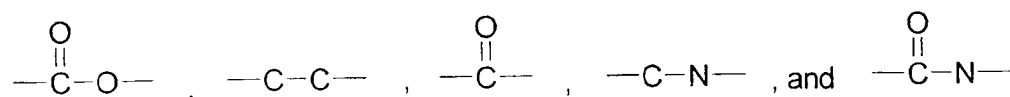
**Chairman:** P. Krasa  
**Members:** G. N. C. Raths  
C. Holtz



### Summary of Facts and Submissions

I. This appeal is from the Opposition Division's decision rejecting the opposition and maintaining European patent No. 415 698 with the twelve claims as granted. The independent claim 1 as eventually filed at the oral proceedings before the Board of Appeal and claims 10 and 12 as granted read as follows (the text is reproduced only to the extent necessary for the purpose of this decision):

"1. A fabric softening composition comprising: (a) an aqueous medium; (b) from 1% to 80% by weight of one or more fabric-softening materials in the aqueous medium, each of said materials being selected from cationic fabric softeners having a solubility in water at pH 2.5 and 20°C of less than 10g/l; and (c) from 0.01% to 5% by weight of a deflocculating polymer having a molecular weight of from 500 to 500,000 and/or a standard viscosity of from 1 to 100 mPas, said deflocculating polymer comprising a hydrophilic backbone and at least one hydrophobic side chain, the hydrophilic backbone having hydrophilic monomers the hydrophilic monomers being linked by a linkage selected from



such that the solubility of said hydrophilic backbone exceeds 1g/l in water at 20°C and pH 7.0, and said at least one hydrophobic side chain being supplied by at least one hydrophobic monomer included in said polymer,

said hydrophilic monomers and said at least one hydrophobic monomer being in a ratio of from 5:1 to 500:1, and the hydrophobic monomer being selected from: (i) water insoluble monomers having a solubility of less than 0.2 parts by weight per hundred parts water; and (ii) ethylenically unsaturated compounds having hydrophobic moieties, said hydrophobic moieties being selected from: (1) those having a solubility at ambient temperature of less than 1g/l at a pH of between 3.0 and 12.5; and (2) those having at least 5 carbon atoms; said fabric softening composition having a structure of lamellar droplets in the aqueous medium, and the viscosity of said composition being lower than that of the equivalent composition without said polymer; with the proviso that said fabric softening composition is not a structured aqueous heavy duty cleaning composition comprising: (1) 1 to 40% by weight of a solid, particulate, substantially water-insoluble organic peroxy acid; (2) 10 to 50% by weight of a surfactant; (3) 1 to 40% by weight of a pH jump system comprising: (a) a borate and; (b) a polyol, said polyol to borate being present in a weight ratio of 1:1 to 10:1; and (4) from 0.1 to 5% by weight of a stability enhancing polymer which is a copolymer having a hydrophilic backbone and a hydrophobic side-chain.

10. Process for the preparation of a fabric softening composition according to any one of the preceding claims wherein the deflocculating polymer is dispersed in the aqueous base before addition of the fabric softening material thereto.

12. Use of (a) a deflocculating polymer .... and (b) one or more cationic softeners .... in an aqueous medium; to produce a fabric softening composition

having a structure of lamellar droplets dispersed in the aqueous medium, and a viscosity of below 2.5 Pas at a shear rate of  $21s^{-1}$ , the viscosity of said composition being lower than that of the equivalent composition without said polymer; and with the proviso that...."

II. In a notice of opposition based on lack of novelty and inventive step, the following documents were, inter alia, cited:

(3) EP-A-0 095 580,

(4) EP-A-0 301 882 and

(5) EP-A-0 220 156.

In its decision, the Opposition Division introduced document

(8) EP-A-0 303 473

which was cited during the examination procedure; during that procedure it was also referred to

(D5) WO-A-90-15857.

III. The Opposition Division held that the invention was novel over document (3) and inventive over documents (3),(4),(5) and (8). The Opposition Division rejected the novelty objection because Genapol, a polymer used by the opponent to reproduce example 3a of document (3) was not identical with the polymer 8 defined in table 2 of that citation.

IV. The appellant (opponent) lodged an appeal and submitted

document

- (9) H.Hein: "Problematik der Herstellung konzentrierter Haushaltsweichspülmittel", Tenside Detergents 18 (1981) 5.

V. Under the assumption that -C-O-C- linkages within the hydrophilic backbone of the deflocculating polymer were now excluded, the appellant did no longer contest the novelty of the subject-matter claimed according to the main request.

Relying, inter alia, on experimental results submitted by letter of 19 October 2001, the appellant argued that the composition of document (3) displayed a lamellar droplet structure and that the problem to be solved was to provide a further softening composition having equivalent stability/viscosity behavior. The appellant maintained that the claimed solution to this problem was obvious in view of documents (4), (5) and (8).

VI. The respondents requested that the tests submitted by the appellant with letter of 19 October 2001 be rejected as inadmissible for being late, alternatively for not being relevant. In support of this request the respondents referred to the following:

Under the case law of the boards of appeal, in particular decisions T 270/90 and T 939/90, the test results should not be admitted, regardless of their relevance. The appellant had known from the decision under appeal that the original test results were not acceptable to the Opposition Division. The claims now on file were submitted already in May 1998. It was an abuse of proceedings to file the new tests only one



month before the oral proceedings before the Board of appeal. The test document only said that polymer 8, meanwhile synthesised by the appellant, was used, but not how it was obtained and no details were given so that it could not be verified that the tests were actually carried out in accordance with document (3). The test results were therefore not relevant with regard to the claims on file.

The appellant contended, although admitting that the test results were filed late, that they were relevant and should therefore be admitted with regard to decision T 156/84 (OJ 1988, 372). These results should not be considered as new evidence, since test results had already been filed with a similar polymer, called Genapol, in the proceedings before the Opposition Division and the test now made was similar to the original one. The respondent could therefore not be surprised. It was admitted that the appellant had used the time available until one month before the oral proceedings for submitting observations as generally allowed in communications sent with the invitation to oral proceedings but that it might have been possible to start the testing earlier and consequently also to file the results earlier.

The respondents submitted that document (8) was the proper starting point for evaluating inventive step and maintained that the claimed subject-matter was inventive.

VII. The oral proceedings were held on 23 November 2001.

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

The respondents requested that the decision under appeal be set aside and that the patent be maintained on the basis of either of the following requests:

Main request: Claim 1 as filed in the oral proceedings and claims 2 to 12 as filed with letter of 18 September 2001;

Auxiliary requests A, C, or D as filed with letter of 18 September 2001.

At the end of the oral proceedings the Chairman announced the decision of the Board.

## **Reasons for the Decision**

### 1. *Article 114(2) EPC*

- 1.1 The appellant knew from the decision under appeal that the tests provided before the first instance had not been sufficient. Yet there was neither any indication in the grounds of appeal that new tests were to be carried out, nor any response to the amended claims filed by the respondent in May 1998, ie more than three years before the oral proceedings before the Board of Appeal.

It is a misunderstanding of the appellant to conclude from information in a communication regarding the time limit of at least one month before the oral proceedings for the filing of observations, that new evidence does not have to be indicated or filed before that date (cf. eg. T 39/93, OJ EPO 1997, 134, point 3.3 of the reasons). In the present case no excuse has been

brought forward; on the contrary, the appellant has admitted that the tests could have been carried out earlier. The evidence filed one month before the oral proceedings is therefore late.

- 1.2 Article 114(2) EPC leaves a discretion for the deciding body to disregard late filed facts and evidence. Pursuant to Article 108 EPC, grounds of appeal must be filed within four months of the decision under appeal.

The role of the Boards of Appeal includes bringing appeal proceedings to an efficient and expedient close. Obviously, this requires the collaboration of the parties. The earliest possible filing of new facts and evidence is essential for this to function properly. Thus, according to Guidance for parties to appeal proceedings and their representatives (OJ EPO 1997, 342, points 1.2.1 and 1.2.2), the statement of grounds "must indicate the points of law and of fact on which the contested decision should be set aside. If any allegations of facts or law are being made that were not argued in the previous proceedings, this should be made clear. Since it lies within the Board of Appeal's discretion whether or not to admit late-filed facts and evidence...., the appellant should indicate why the new submission was not filed earlier."

- 1.3 Under the case law of the Boards of Appeal it is within the discretion of a Board under Article 114(2) EPC to consider all the circumstances of the case, including the relevance of the facts or evidence, the delay of the proceedings its examination may cause, any excuses for the lateness and whether its filing could be considered as an abuse of the proceedings (T 156/84, T 951/91, OJ EPO 1995, 202, and T 1002/92, OJ EPO 1995,

605), the latter pointing out that new evidence should only exceptionally be admitted into appeal proceedings, ie only when it is prima facie relevant. In T 951/91, which concerned further fresh experimental data, the Board refused to take the offered evidence into account even before it had been submitted, mainly for the reason that, if the party had no adequate excuse and admittance would lead to a delay, the Board was fully justified in refusing to admit it. In T 375/91 the Board rejected to admit test results, since it found no good reason why the opponent had filed this evidence only seven weeks before the oral proceedings, which not only jeopardized the whole object of those proceedings but also denied the other party the right to file a detailed counterstatement, which was contrary to fair and proper procedure. In T 534/89 (OJ EPO 1994, 464), the Board found that the filing of an objection of prior use constituted abuse of proceedings, entitling the Board to discard it without checking the evidence for relevance.

This case law acknowledges that there is no absolute obligation under Article 114(2) EPC to test every piece of late-filed evidence for relevance, but that there is room for the Boards to disregard late filed evidence where appropriate, for example if the conduct of the party would amount to abuse of proceedings.

- 1.4 Appellants are thus as a rule required already in the grounds of appeal to at least indicate the evidence on which they intend to rely. If they file evidence later, they must explain why it could not have been done earlier. The later evidence is indicated and filed, the higher the risk will be that the Board will disregard it, even without considering its relevance.

1.5 In the present case, the late filed evidence is, prima facie, not more relevant than the evidence already on file. The test report filed with letter of 19 October 2001 is not admitted into the proceedings. It is appropriate to emphasize, that, in the light of the circumstances of the present case the Appellant ran a high risk that the Board would reject the late filed evidence even without examining its relevance, in particular since the appellant's behaviour came close to abuse of proceedings.

2. *Main request*

2.1 Articles 84 and 123 EPC

The subject-matter of Claim 1 as filed during oral proceedings before the Board did not give rise to objections under Articles 84 and 123 EPC nor did the subject-matter of the depending claims 2 to 12 as filed with letter of 18 September 2001. Claims 1 to 12 meet the requirements of Articles 84 and 123 EPC.

2.2 Novelty

The objection raised by the Appellant was based on document (3) disclosing polyether type derivatives. Since the amendment to Claim 1 made clear that ether-type linkages were excluded from the hydrophilic backbone, this objection was no longer maintained.

The Board is satisfied that the subject-matter of the claims is not disclosed in any citation and, therefore meets the requirements of Articles 52(1) and 54 EPC. Since the novelty objection was no longer maintained by the Appellant, further details need not be given.

2.3 Inventive step

2.3.1 Claim 1 concerns in essence a fabric softening composition comprising an aqueous medium, (b) cationic fabric softening materials and (c) a deflocculating polymer having a hydrophobic backbone and at least one hydrophilic side chain.

2.3.2 The problem as stated in the patent in suit was to favorably influence the dependency of stability and/or viscosity upon volume fraction of softening compositions (page 2, lines 43 to 45). In particular, importance was attached to the stability of the composition in terms of volume separation observed during storage, and further, to spherulitic droplets or the lamellar structure.

2.3.3 The problem of control of viscosity and stability was addressed by document (3). But no detailed considerations were given to the aspects of phase separation; document (3) did not mention the lamellar structure.

However, as to document (8), not only the problem of control of viscosity, both in diluted and concentrated products, was addressed but this document mentions also that in aqueous dispersions of cationic fabric conditioners a characteristic spherulitic structure is obtained, which undergoes spontaneous creaming when electrolytes are included in certain critical concentrations in aqueous dispersions of cationic fabric conditioners (page 2, lines 27 and 28; lines 50 to 52). As this document is more related to the interdependence of stability, viscosity and phase separation than document (3), the Board finds this

document (8) more appropriate as starting point for evaluating inventive step.

2.3.4 Thus, in the light of document (8) the problem underlying the patent in suit was to provide an alternative to the addition of an electrolyte for improving the stability and reducing the viscosity of softening compositions comprising a lamellar phase.

2.3.5 In view of the examples I-XII of the patent in suit, the Board accepts that this problem was credibly solved by adding the deflocculating polymer as defined in Claim 1 to a fabric softening composition comprising an aqueous medium and cationic fabric softeners.

2.3.6 The question remains to be decided whether the use of such a deflocculating agent involved an inventive step or was obvious.

As already stated, document (8) taught that dilute dispersions of cationic fabric conditioners in water undergo creaming in the presence of dissolved electrolyte to form concentrated, readily dispersible creams having a spherulitic structure. This document contains no hint for a skilled person to use a deflocculating polymer instead of particular electrolyte concentrations for improving the stability and viscosity properties of softening compositions. Therefore, this citation cannot render obvious the claimed solution of the existing technical problem.

2.3.7 The appellant taking document (3) as the starting point for the evaluation of inventive step submitted that the problem underlying the patent in suit was the provision of an alternative softening composition having

equivalent stability and viscosity behavior. It argued that document (3) taught to use as a deflocculating agent a polymer having a hydrophilic backbone, the monomers of which were linked by C-O-C linkages, ie the hydrophilic backbone is a polyether, and that in the light of documents (9) and (4), the change of the C-O-C linkages into the linkages as mentioned in Claim 1 of the patent in suit, was an obvious step for a skilled person.

The Board does not agree.

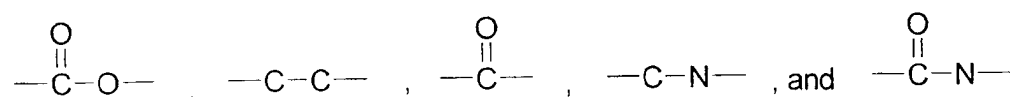
Document (9), a scientific paper, concerned with the manufacturing problems of concentrated softening compositions was submitted by the appellant to reject the statement in the Opposition Division's decision that viscosity and lamellar structure are related parameters; the appellant hinted to the passage dealing with instability of systems comprising electrolytes (page 244, right-hand column, 6th paragraph, first line), wherefrom it concluded that electrolytes are not preferred as viscosity reducing agents. This passage only allows to conclude that the skilled person would probably look for other viscosity reducing agents but this passage still does not explain why the skilled person would replace the ether type linkages by those defined in Claim 1 of the patent in suit.

Document (4) disclosing copolymers of acrylate and maleate sodium salt as viscosity reducing polymers (page 5, lines 55 to 58) does also not help the skilled person in solving the existing technical problem since this document is concerned with detergent compositions and not with softening compositions; further, the cited polymers are hydrophilic polymers whereas the patent in



suit teaches the use of polymers having a hydrophilic backbone and hydrophobic side chains.

The appellant failed to prove that ether linkages and those defined in Claim 1 of the patent in suit lead to equivalent effects. In the absence of such a proof, the Board concludes that the use of polymers having in the hydrophilic backbone hydrophilic monomers linked by a linkage selected from



involved an inventive step.

- 2.3.8 The subject-matter of claim 1 of the main request meets the requirements of Article 56 EPC. Dependent Claims 2 to 12 derive their patentability from Claim 1. Hence, an examination of the remaining requests is not necessary.

## Order

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of claim 1 as filed in the oral proceedings and claims 2 to 12 as filed with letter of 18 September 2001 (main request) and a description to be adapted thereto.

The Registrar:

The Chairman:

G. Rauh

P. Krasa