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**DECISION**  
**of 3 November 2004**

**Case Number:** T 0014/01 - 3.3.6

**Application Number:** 91305515.8

**Publication Number:** 0462806

**IPC:** C11D 3/00

**Language of the proceedings:** EN

**Title of invention:**

Process and composition for treating fabrics

**Patentee:**

UNILEVER PLC, et al

**Opponent:**

The Procter & Gamble Company

**Headword:**

Reduced dye release/UNILEVER

**Relevant legal provisions:**

EPC Art. 123(2), 54

**Keyword:**

"Main request - (no): disclaimer aiming at removing overlap with a non accidental anticipation violates Article 123(2) EPC"

"First and second auxiliary requests - (no): not novel"

**Decisions cited:**

G 0001/03

**Catchword:**

"The allegation that a teaching extracted from a prior art leads away from the invention implies that the skilled person has taken this prior art into consideration. For an anticipation to be accidental it is instead necessary that the skilled person would have never taken it into consideration. (item 1.6 of the reasons)"



Case Number: T 0014/01 - 3.3.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.6**  
**of 3 November 2004**

**Appellants:**  
(Proprietors of the  
patent)

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and

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**Representative:**

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**Respondent:**  
(Opponent)

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**Representative:**

TER MEER STEINMEISTER & PARTNER GbR  
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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted 6 November 2000  
revoking European patent No. 0462806 pursuant  
to Article 102(1) EPC.**

**Composition of the Board:**

**Chairman:** P. Krasa  
**Members:** P. Ammendola  
A. Pignatelli

## Summary of Facts and Submissions

I. This appeal is from the decision of the Opposition Division revoking European patent No. 0 462 806 concerning a process and a composition for treating dyed fabrics.

II. The Opponent sought revocation of the patent for lack of novelty and inventive step (Article 100(a) in combination with Articles 52(1), 54 and 56 EPC). The following documents were cited *inter alia* during the opposition proceedings

Document (3) = US-A 4 634 544

and

Document (13) = Cook C.C., "*Aftertreatments for Improving the Fastness of Dyes on Textile Fibres*", Rev. Prog. Coloration, Vol.12, 1982.

III. In the decision under appeal the Opposition Division considered two sets of amended claims according to the Patent Proprietors' main and auxiliary requests.

It found that the disclaimer introduced in claim 4 of the main request violated Article 123(2) EPC because it aimed at establishing novelty over Document (3), which represented no accidental anticipation. The Opposition Division rejected the auxiliary request because it lacked an inventive step.

IV. The Patent Proprietors (hereafter Appellants) filed an appeal against this decision.

They enclosed three sets of amended claims to the statement setting out the grounds of appeal, which sets were labelled as main request and 1<sup>st</sup> and 2<sup>nd</sup> auxiliary requests. The main and the 1<sup>st</sup> auxiliary request were respectively identical to the main and auxiliary requests considered in the decision under appeal.

V. On 3 November 2004, oral proceedings took place in the absence of the Appellants, as announced in its letter of 21 September 2004.

VI. This decision is based on claim 4 of the Appellants' main request, claim 4 of the 1<sup>st</sup> auxiliary request and claim 3 of the 2<sup>nd</sup> auxiliary request.

Claim 4 of the main request reads:

*"4. A composition for the domestic treatment of a fabric to reduce the amount of dye released from the fabric during wet treatments comprising:*

*i. from 0.01 to 25% by weight of a cationic dye fixing agent,*

*ii. a detergent active, and*

*iii. a cationic fabric softening compound*

*with the proviso that the compositions do not contain 1 to 30% by weight of acylcyanamide salts."*

Claim 4 of the 1<sup>st</sup> auxiliary request differs from the just cited claim 4 of the main request only in that the figure "0.01" has been replaced by "1" and in that the final proviso has been omitted.

Claim 3 of the 2<sup>nd</sup> auxiliary request differs from claim 4 of the 1<sup>st</sup> auxiliary request only in that the expression "*a detergent*" has been replaced by "*a nonionic detergent*".

VII. The Appellants have submitted the following arguments.

The prior art under Article 54(2) EPC disclosed in Document (3) would lead away from the present invention and, hence, examples 12, 14 and 16 thereof would amount to an accidental anticipation of the patented compositions. Accordingly, the feature defined by the wording "*with the proviso that the compositions do not contain 1 to 30% by weight of acylcyanamide salts.*" introduced in claim 4 of the main request would represent an admissible disclaimer of this accidental overlap with the prior art.

VIII. The Opponent (hereafter Respondent) refuted these submissions of the Appellants maintaining that the prior art disclosed in Document (3) could not be considered an accidental anticipation. In particular, this prior art would be so relevant to represent the most appropriate starting point for the assessment of inventive step.

With regard to the lack of novelty of claim 4 of the 1<sup>st</sup> auxiliary request and of claim 3 of the 2<sup>nd</sup> auxiliary request they submitted that the compositions of the examples 12, 14 and 16 of Document (3) disclosed composition containing 1.8 wt% of the cationic dye fixing agent Stabifix™. It argued that for the person skilled in the art the expression "*cationic dye fixing agents*" as used in the patent in suit encompassed also those strongly basic compounds that, although *per se* not containing any cation, were the inevitable precursors of the actually cationic dye fixing species in the sense that these strongly basic compounds would be necessarily protonated by the water when they would be added to the aqueous solution required for the dye fixing process. It stressed that the patent specification confirmed such interpretation by defining as "*the dye fixing agents of the invention*" that "*are cationic species*" a nonionic compound such as "*an aliphatic polyamine*" (see page 3, line 4 of the patent description). The Respondent finally observed that water was also present in the examples 12, 14 and 16 of Document(3) and, hence, that the initially nonionic Stabifix™ had necessarily been protonated, i.e. transformed into the actual cationic dye fixing agent upon forming these prior art compositions.

IX. The Appellants requested in that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the claims of the main request, or alternatively of the 1<sup>st</sup> or 2<sup>nd</sup> auxiliary request.

X. The Respondent requested that the appeal be dismissed.

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

## **Reasons for the Decision**

### *Main request*

1. Admissibility of claim 4 in view of Article 123(2) EPC

1.1 This claim (see above item VI) defines a composition useful to reduce dye release during wet treatments of coloured fabric. As it is confirmed in the patent in suit (see page 2, lines 3 to 4) the wet treatments considered are, for instance, washing and rinsing processes.

1.2 Article 123(2) EPC prohibits amendments of a European patent that result in the extension of its subject-matter beyond that of the application as filed. However, an amendment to a claim by the introduction of a disclaimer may not be refused under Article 123(2) EPC for the sole reason that neither the disclaimer nor the subject-matter excluded by it from the scope of the claim have a basis in the European patent application as filed (see the decision G 1/03 of the Enlarged Board of Appeal, OJ EPO 2004, p.413, headnote I)

1.3 The proviso introduced in claim 4 lacks clearly any basis in the European patent application as filed. This fact is also undisputed by the Appellants.

- 1.4 The latter have argued, however, that this previously undisclosed feature amounted to an admissible disclaimer of the prior art under Article 54(2) EPC disclosed in Document (3).

The Appellants have maintained that Document (3), although addressing a technical problem "*similar*" to that considered in the patent in suit, was focused on the use of acylcyanamide salts and, hence, taught away from the present invention, wherein no such salt was mandatory (see item 2.3 in the statement of the grounds of appeal). Therefore, the previously undisclosed proviso introduced in present claim 4 represented a disclaimer aiming at removing an accidental overlap with prior art, in particular the overlap between examples 12, 14 and 16 of Document (3) and the definition of the compositions of the invention given in the portion of claim 4 preceding the proviso.

- 1.5 In the decision G 1/03, the Enlarged Board of Appeal (see item 2.2.1 of the reasons) established that the introduction of a previously undisclosed disclaimer removing overlap with an accidental anticipation of the invention does not change the subject-matter of a patent application (or of an opposed patent) in the sense of Article 123(2) EPC. This decision has also found (see G 1/03 item 2.2.2 of the reasons, as well as in item II.1 of the headnote) that an anticipation may only be regarded as accidental when it is so **unrelated and remote** that the person skilled in the art would never have taken it into consideration when working on the invention. In other words, an anticipation is accidental only when it appears from the outset to have



nothing to do with the invention (compare G 1/03 item 2.3.4 of the reasons).

- 1.6 Document (3) deals with detergent compositions containing certain components to prevent the transfer of dyes from coloured fabrics to those light-coloured or white during the washing process (see Document (3) column 1, lines 7 to 13). It is therefore evident that this prior art is closely related to invention defined in present claim 4 (see above item 1.1).

The existence of a close relation between the present invention and the prior art disclosed in Document (3) is also confirmed by the Appellants' concession that this citation described a different solution to a technical problem at least "*similar*" to that considered in the patent in suit (see above at item 1.3).

The Appellants' allegation that the person skilled in the art would have extracted from Document (3) a teaching leading away from the present invention, actually hypothesises what the person skilled in the art would have done **after** having taken Document (3) into consideration. For an anticipation to be accidental it is instead necessary that the skilled person would have **never** taken this prior art into consideration when working on the invention.

Thus, Document (3) cannot be considered an accidental anticipation in the sense of G 1/03 for the compositions of the invention suitable for washing or rinsing coloured fabrics

1.7 Since the previously undisclosed proviso introduced in claim 4 does not amount to an admissible disclaimer of an accidental anticipation, this claim evidently violates Article 123(2) EPC. Therefore, the Appellants' main request is found not to be admissible.

*1<sup>st</sup> auxiliary request*

2. Novelty of the subject-matter of claim 4 (Article 100(a) EPC in combination with Articles 52(1) and 54 EPC).

2.1 In the letter dated 4 December 2001 providing its reply to the Appellants' statement setting out the grounds of appeal, the Respondent has maintained the objection, raised already during the preceding opposition proceedings, that the subject-matter of this claim lacked novelty vis-à-vis the prior art disclosed in Document (3) (see item 4.2 of this letter). In particular, it has pointed to the washing compositions of examples 12, 14 and 16 of this citation.

2.2 The Appellants have provided no comment in writing to such objection and have not attended the oral proceedings before the Board on 3 November 2004.

2.3 The Board observes that present claim 4, similarly to claim 4 of the main request, requires the presence of a cationic dye fixing agent, a detergent active compound and a cationic fabric softening compound. However, in the former the range given for the amount of the cationic dye fixing agent (i.e. of "*between 1 and 25% by weight*") is narrower than that in the latter (i.e. "*between 0,01 and 25% by weight*", see above item VI).

Since:

- the Appellants' submissions (already reported above at item 1.3) imply the recognition of an overlap between examples 12, 14 and 16 of Document (3) and the compositions of the invention as defined in the portion of claim 4 of the main request preceding the proviso, and
- examples 12, 14 and 16 of Document (3) evidently comprise a detergent active compound and a cationic fabric softening compound (see Table V of Document (3) and the explanation at column 10 of the symbols "OA-EO", "PA-EO" and "DMDSTAC" used therein),

the Board concludes that the assessment of novelty of the subject-matter of present claim 4 in respect of these examples of the prior art boils down to establishing whether or not these latter comprise also between 1 and 25% by weight of a cationic dye fixing agent.

2.3.1 The Board observes that the patent in suit defines the dye fixing agents of the invention only as "*cationic species*", without any further generic specification, and provides some examples thereof (see page 3, lines 3 to 11). In particular also the reference to Document (13) starts at line 5 of page 3 with the wording "**Other cationic dye fixing agents...**" (emphasis added by the Board), indicating as not exhaustive the lists or the definitions of these compounds possibly given in this citation.

Therefore, the skilled reader of the patent in suit would conclude that such vague expression encompasses any positively charged compound known to improve the fastness of dyes to fabrics.

However, the Board observes also that the aftertreatments of dyed fabrics with colour fixing agents are normally carried out in aqueous solution and notes that even the patent specification defines as a preferred example of the dye fixing agents that "*are cationic species*" also strongly basic, but *per se* non positively charged compounds, such as "*an aliphatic polyamine*" (see page 3, line 4 of the patent description). Therefore, the Board concurs with the Respondent that the expression "*cationic dye fixing agent*" is used in the patent in suit to indicate not only those dye fixing agents which actually contain cations, but also their nonionic precursors: i.e. also the strongly basic nonionic compounds that are protonated by reaction with the water contained in the aqueous aftertreatment solutions, thereby producing the actual cationic dye fixing compounds.

- 2.3.2 The examples 12, 14 and 16 of Document (3) comprise 1.8% by weight of Stabifix™ (see Document (3) Table V and column 10, lines 51 to 53) a dicyanodiamide-formaldehyde condensate. This *per se* nonionic compound is explicitly disclosed in Document (13) as dye fixing agent (see from page 76, line 11 from the bottom of the right column, to page 77, the first 8 lines after the chemical reaction scheme in the left column) carrying strongly basic groups, so that even under the strongly alkaline conditions possibly occurring in aqueous

washing solutions this condensate should give stable "*cation-anion complexes*".

Therefore, it is apparent that the washing compositions disclosed in these examples of the prior art comprise 1.8% by weight of a "*cationic dye fixing agent*" according to the above-established meaning of this expression in the patent in suit. Hence, this prior art examples anticipate the subject-matter of claim 4 under consideration.

- 2.3.3 The Board wishes to stress that, even if, for the sake of argument, one would arbitrarily disregard the explicit mention in the patent in suit of the nonionic "*aliphatic polyamine*" and hypothesised that the expression "*cationic dye fixing agent*" identified therein exclusively the actual cationic species known to produce dye fixing, still the Stabifix™ ingredients would ensure the presence of positively charged dye fixing agents in the compositions of examples 12, 14 and 16 of Document (3).

This is evident when considering:

- that the compositions of these prior art examples comprise water, at least as part of the component labelled "RK" (that is an aqueous solution of a polyamine, compare Table V with column 10, lines 42 to 44), and
- that, according to the explicit teaching of Document (13) recalled above ( i.e. that stable cation-anion pairs are formed by the reaction of the strongly basic dicyanodiamide-formaldehyde

condensate in the aqueous washing solution), the Stabifix™ used in the examples of Document (3) must have reacted with the water contained therein and formed the cation-anion species actually responsible for the dye fixing.

As it is further evident to the person skilled in the art, this reaction can only amount to a protonation of the strongly basic dicyanodiamide-formaldehyde condensate, protonation that renders the weight of the cationic species slightly superior to that of their nonionic precursor.

Therefore, examples 12, 14 and 16 of Document (3) necessarily comprise slightly more than 1.8% by weight of the cationic species derived from the reaction of water with Stabifix™, cationic species that are known from Document (13) to act as dye fixing agents in aftertreatments of dyed fabrics.

Hence these examples of the prior art anticipate the subject-matter of present claim 4 also when arbitrarily assuming that the expression "*cationic dye fixing agent*" encompassed exclusively positively charged species.

- 2.4 In view of all the above reasons, the Board concludes that the subject-matter of claim 4 does not comply with the requirements of Articles 52(1) and 54 EPC. Therefore, the 1<sup>st</sup> auxiliary request of the Appellants is not allowable.

*2<sup>nd</sup> auxiliary request*

3. Novelty of the subject-matter of claim 3 (Article 100(a) EPC in combination with Articles 52(1) and 54 EPC).

The subject-matter of this claim differs from that of claim 4 of the 1<sup>st</sup> auxiliary request only in that it is further limited to compositions wherein the detergent active compound is nonionic (see above item VI).

Since in examples 12, 14 and 16 of Document (3) the detergent active compounds are manifestly nonionic (see the definitions at column 10 of the components indicated by "OA-EO" and "FA-EO" in Table V) and since the reasons given above at item 2 in respect of claim 4 of the 1<sup>st</sup> auxiliary request apply to all remaining features of present claim 3, the Board finds that the latter is anticipated by the cited examples of Document (3).

Therefore, also present claim 3 does not comply with the requirements of Articles 52(1) and 54 EPC and, hence the 2<sup>nd</sup> auxiliary request of the Appellants is not allowable.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P. Krasa