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D E C I S I O N
of 27 October 2005

Case Number: T 0528/03 - 3.3.02

Application Number: 92310168.7

Publication Number: 0545556

IPC: A61K 7/46

Language of the proceedings: EN

Title of invention:
Perfume composition

Patentee:
QUEST INTERNATIONAL B.V.

Opponents:
Henkel KGaA
The Procter & Gamble Co.

Headword:
Perfume compositions/QUEST INTERNATIONAL

Relevant legal provisions:
EPC Art. 54, 56, 123(2)

Keyword:
"Main request, first, second, third, fourth, fifth and sixth auxiliary requests: the use as deodorant is not novel in the light of the prior art"
"Seventh and tenth auxiliary requests: they contravene Article 123(2)"
"Eight and ninth auxiliary requests: the perfume compositions are obvious, since the comparative tests cannot be considered for the definition of the problem"

Decisions cited:
T 0190/99, T 0273/92

Catchword:
-



Case Number: T 0528/03 - 3.3.02

D E C I S I O N
of the Technical Board of Appeal 3.3.02
of 27 October 2005

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 18 March 2003
rejecting the opposition filed against European
patent No. 0545556 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: U. Oswald
Members: M. C. Ortega Plaza
J. Willems
H. Kellner
P. Mühlens

Summary of Facts and Submissions

I. European patent No. EP-B-0545 556, based on application No. 92 310 168.7 was granted on the basis of 20 claims.

Independent claim 1 as granted read as follows:

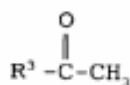
"1. A perfume composition in which at least 50% by weight of the composition is constituted by at least four of the following five categories:

a) at least 0.2% of one or more ethers of general formula



in which the groups R^1 and R^2 are connected only through the ether oxygen atom, and are aliphatic or aromatic groups such that the ether has a molecular weight of 150 to 200;

b) at least 5% of one or more aromatic methyl ketones of general formula



in which R^3 is an aromatic group such that the molecular weight of the ketone is from 170 to 300;

c) at least 5% of one or more alcohols of general formula



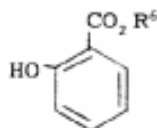
in which R⁴ is an aliphatic group, optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group, such that the molecular weight of the alcohol is in the range 130 to 180;

d) at least 2% of one or more esters which are acetates or propionates of the general formula



in which the group R⁵ is an aliphatic group optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group such that the molecular weight of the ester is in the range 180 to 210;

e) at least 2% of one or more salicylates of general formula



in which R⁶ is an aliphatic group, optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group, such that the molecular weight of the salicylate is in the range 190 to 230;

with the proviso that the categories which are present include:

(i) both category (a) which is the said ethers and category (b) which is the said aromatic methyl ketones with category (a) then containing from 0.2 to 6% by weight of one or more ethers in which the group R¹ is phenyl or naphthyl, optionally substituted with alkyl; and/or (ii) both category (a) which is the said ethers and category (e) which is the said salicylates;

all the above percentages being by weight of the whole perfume composition."

Independent claims 12, 14 and 15 as granted read as follows:

"12. A detergent composition for washing textiles comprising at least 0.01% by weight of a perfume composition according to any one of the preceding claims, together with detergent active and detergency builder."

"14. A method of treating textiles to render them capable of reducing body malodour, which method comprises exposing the textiles to a composition according to claim 12 or claim 13."

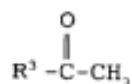
"15. Use, as a deodorant, of a perfume composition in which at least 50% by weight of the composition is constituted by at least four of the following five categories:

a) at least 0.2% of one or more ethers of general formula



in which the groups R^1 and R^2 are connected only through the ether oxygen atom, and are aliphatic or aromatic groups such that the ether has a molecular weight of 150 to 200; but not over 6% of ether from the group consisting of methyl naphthyl ether and ethyl naphthyl ether;

b) at least 2% of one or more aromatic methyl ketones of general formula



in which R^3 is an aromatic group such that the molecular weight of the ketone is from 170 to 300;

c) at least 2% of one or more alcohols of general formula



in which R^4 is an aliphatic group, optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group, such that the molecular weight of the alcohol is in the range 130 to 180;

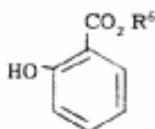
d) at least 2% of one or more esters which are acetates or propionates of general formula



in which the group R^5 is an aliphatic group optionally containing not more than one olefinic double bond, and

optionally bearing an aromatic substituent group such that the molecular weight of the ester is in the range 180 to 210;

e) at least 2% of one or more salicylates of general formula



in which R⁶ is an aliphatic group, optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group, such that the molecular weight of the salicylate is in the range 190 to 230;

all the above percentages being by weight of the whole perfume composition."

Independent claims 18 to 20 as granted read as follows:

"18. A fabric conditioning composition for treating textiles during rinsing or drying, including at least 0.01% by weight of a perfume composition as defined in any one of the claims 1 to 11."

"19. A composition for personal washing, incorporating at least 5% by weight of detergent active, and at least 0.01% by weight of a perfume composition as defined in any one of the claims 1 to 11."

"20. A composition for application to human skin comprising at least 0.01% by weight of a perfume

composition as defined in any one of claims 1 to 11 in a cosmetically acceptable carrier."

II. The following documents are relevant for the present decision:

- (PD1) EP-A-0 299 561
- (PD2) US-A-4 304 679
- (PD3) US-A-4 278 658
- (PD4) EP-A-0 404 470
- (PD20) Römpp Chemie Lexikon, 9th edition, vol. 2 (1990), Georg Thieme Verlag, pages 897-898
- (B1) "Cosmetics and Toiletries. Development, Production and Use", Ellis Horwood Limited, 1991, page 125

III. Oppositions were filed and revocation of the patent in its entirety was requested pursuant to Article 100(a) EPC on the grounds of lack of novelty and lack of inventive step.

IV. The appeal lies from the decision of the opposition division rejecting the oppositions under Article 102(2) EPC.

V. The opposition division considered that the subject-matter according to claim 1 as granted was novel.

According to the opposition division's findings the patentee had not contested that the products Schwanweiss, INTO and PILAX were publicly available before the priority date of the patent in suit. However, since the documents relating to the perfume composition were not publicly available, it had to be decided

whether or not the commercialised products could be reliably and accurately analysed by the skilled person.

Basically, the opposition division considered that it had not been possible to accurately analyse the perfume composition present in the commercialised products (detergent and cleaners) before the priority date of the patent in suit.

The opposition division considered that the subject-matter claimed in claim 15 was novel. According to the opposition division's findings, document PD1 disclosed perfume compositions falling within the definition of claim 15. However, document PD1 did not disclose any deodorant effects. In the opposition division's view there was a difference between the use as conferring a pleasant effect and the use as deodorant.

As regards the assessment of inventive step the opposition division considered that the problem to be solved concerned the provision of a well-balanced perfume with deodorant effects.

The opposition division developed two alternative approaches considering either document PD4 or document PD1 as closest prior art and came to the conclusion that the claimed subject-matter involved an inventive step.

- VI. The opponent 2 (appellant) lodged an appeal against said decision and filed grounds of appeal.

- VII. The respondent (patentee) filed with its letter of 11 December 2003 ten sets of claims as auxiliary requests 1 to 10.
- VIII. A communication by the board was sent as an annex to the invitation for oral proceedings.
- IX. The appellant announced with its letter of 23 May 2005 that it would not be attending the oral proceedings.
- X. Opponent 1, which is a party to the present proceedings, announced with its letter of 19 August 2005 that it would not be attending the oral proceedings.
- XI. The respondent filed with its letter of 23 September 2005 ten sets of claims as auxiliary requests 1 to 10 and withdrew the previously filed auxiliary requests.
- XII. Oral proceedings were held before the board on 27 October 2005.
- XIII. During the oral proceedings, the respondent confirmed its previous main request (set of claims as granted) and auxiliary requests 1 to 8 and 10, and filed an amended auxiliary request 9 in order to replace auxiliary request 9, filed with its letter of 23 September 2005.

Claim 14 of the first, third and fourth auxiliary requests, and claim 13 of the second, fifth and sixth auxiliary requests are identical to claim 15 of the main request.

Claim 15 of the seventh auxiliary request and claim 14 of the tenth auxiliary request merely differ from claim 15 of the main request in that the expression "to inhibit human body malodour" has been introduced after the word "deodorant".

Claim 1 of the eighth auxiliary request is identical to claim 1 of the main request and claim 14 merely differs from claim 15 of the main request in that it contains the provisos of claim 1.

Claim 1 of auxiliary request 9 read as follows:

"1. A perfume composition in which at least 50% by weight of the composition is constituted by at least four of the following five categories:

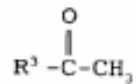
a) at least 0.2% of one or more ethers of general formula



selected from the following ethers with a molecular weight of 150 to 200 in which R¹ and R² are connected only through the ether oxygen atom:

phenylethyl isoamyl ether, phenylethyl n-butyl ether
benzyl isoamyl ether, methyl 4-propyl phenyl ether
diphenyl oxide, p-tert-butyl phenyl ether
ethyl naphthyl ether, methyl naphthyl ether;

b) at least 5% of one or more aromatic methyl ketones of general formula



in which R³ is an aromatic group such that the molecular weight of the ketone is from 170 to 300;

c) at least 5% of one or more alcohols of general formula



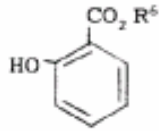
in which R⁴ is an aliphatic group, optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group, such that the molecular weight of the alcohol is in the range 130 to 180;

d) at least 2% of one or more esters which are acetates or propionates of the general formula



in which the group R⁵ is an aliphatic group optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group such that the molecular weight of the ester is in the range 180 to 210;

e) at least 2% of one or more salicylates of general formula



in which R⁶ is an aliphatic group, optionally containing not more than one olefinic double bond, and optionally bearing an aromatic substituent group, such that the molecular weight of the salicylate is in the range 190 to 230;

with the proviso that the categories which are present include:

(i) both category (a) which is the said ethers and category (b) which is the said aromatic methyl ketones with category (a) then containing from 0.2 to 6% by weight of one or more ethers in which the group R¹ is phenyl or naphthyl, optionally substituted with alkyl; and/or

(ii) both category (a) which is the said ethers and category (e) which is the said salicylates, with category (e) present in an amount which is at least 20%; and/or

(iii) all five categories (a) to (e)

all the above percentages being by weight of the whole perfume composition."

XIV. The appellant's written submissions may be summarised as follows:

The perfume compositions according to claim 1 as granted lacked novelty in view of the prior use concerning the products Schwanweiss, INTO, PILAX and

Ariel Automatic, since the commercialised products contained perfume compositions encompassed by claim 1. Claim 1 as granted also lacked novelty vis-à-vis the perfume compositions disclosed in document PD1.

The use according to claim 15 as granted was not novel vis-à-vis the contents of document PD1 since the perfumes according to document PD1 were used for masking malodour and hence as deodorants. Document PD20, which represented the general knowledge of the skilled person at the priority date, showed that deodorants were agents which masked odours, removed odours or destroyed odours.

Document PD1 represented the closest prior art since it concerned the same technical field and addressed substantially the same objective as the opposed patent. The problem addressed by the patent in suit was much broader than the problem defined by the opposition division as providing a well-balanced perfume with deodorant effects. The opposed patent related to perfume compositions which were added, *inter alia*, to detergent and other products. According to page 8, lines 21 to 23 of the patent in suit the perfume compositions should also satisfy a Bleach Stability Test.

In view of document PD1 the objective problem was to be defined as providing alternative perfume compositions. The claimed solution was obvious, since the use of phenyl or naphthyl ethers in perfume or deodorant compositions was already known in the prior art (document PD2, deodorant composition 2 in column 21 or

document PD3, deodorant component β -naphthyl methyl ether of class 4 in column 28).

The solution concerning the addition of salicylates also lacked an inventive step since these were well known components of perfume compositions (PD1, PD2, PD3, PD4).

Therefore, in the appellant's view, the subject-matter of claims 1, 15, 12, 14 and 18 to 20 as granted lacked an inventive step.

XV. The respondent's arguments may be summarised as follows:

The respondent disputed in its written submissions that the perfume compositions contained in the commercialised products Schwanweiss, INTO, PILAX and Ariel Automatic were made available to the public before the priority date of the patent in suit.

During the oral proceedings the respondent acknowledged that the perfume compositions A and B disclosed in document PD1 were encompassed by the definitions of the perfume composition according to claim 15 as granted and that the key issue was only to determine the definition of the word "deodorant". The respondent agreed with the opposition division's analysis and stated that document PD1 only disclosed the use of perfume compositions for olfactory benefit, i.e. either for conferring a pleasant smell when opening the bottle or in the treated washed product. In the respondent's opinion, there was no disclosure in document PD1 about a deodorant effect relating to putting the perfume product onto the skin. The respondent also argued that

general books and dictionaries such as documents PD20 and B1 were to be discarded when interpreting the claim's wording and that the claim should be interpreted in the light of the description. In this context the respondent cited Article 69 EPC and the unpublished decision T 190/99 of 6 March 2001. The respondent also stated that document PD20 was a German dictionary and that document B1 related to deodorant products for direct application to the body. The respondent stated that the masking of odour concerned both the masking of human body malodour and the mixing with the product odour.

The respondent also referred to the analysis of background art - in particular of documents PD2 and PD3 - made on page 2, lines 6 to 8, of the patent in suit. On page 2, exhibiting deodorant action was used as a synonym for inhibiting human body malodour.

The respondent further stated that the patent in suit related to the development of a perfume either to apply directly to the skin or to add to a detergent for fabrics. In the respondent's opinion, claim 15 was a second non-medical use claim and, if the use as perfume and the use as deodorant were the same, claim 15 would relate to a meaningless tautology which the skilled person would disregard.

With respect to the basis for the amendment introduced in claim 15 of the seventh auxiliary request, the respondent mentioned page 1, lines 11 and 12, of the application as originally filed.

With respect to the assessment of the inventive step of claim 1 of the eighth auxiliary request the respondent disagreed that document PD1 represented the closest prior art since, in its opinion, the said document addressed a different technical problem to the patent in suit, namely that of providing perfumes suitable as components for bleach compositions, and it did not mention the deodorant activity. The components of the perfume compositions of document PD1 should not contain alkenyl or alkynyl groups and have a PSV (peracid stability value) of at least about 65%. In the respondent's opinion, the closest prior art was either document PD2 or document PD3 since they related to compositions conceived for achieving the same purpose as those claimed in the patent in suit. In this context the respondent cited the Case Law of the Boards of Appeal of the European Patent Office, 4th edition 2001, I.D.3.2 and the unpublished decision T 273/92 of 18 August 1993.

The problem to be solved was defined by the respondent as to develop a perfume which is an efficacious deodorant, has a more pleasant smell and is more stable.

The respondent further stated that the claimed perfume compositions were inventive, even if document PD1 were considered as the closest prior art, in view of their beneficial effect according to the improved malodour reduction values. In this context the respondent pointed to the additional data submitted with its letter of 11 December 2003 concerning the malodour reduction value of composition A according to PD1 and to table 2 on page 13 of the patent in suit.

Additionally, the respondent put forward that the solution as defined in claim 1 required either an aromatic ether or a salicylate as components of the perfume composition. The solution was not obvious in the light of the prior art. Moreover, document PD1 pointed away from using such components in view of the required bleach stability.

With respect to the reasons for the introduction of new independent claim 9 in the ninth auxiliary request, the respondent stated that this was due to the restrictions undertaken in claim 1 as granted which led to the necessity of splitting the subject-matter into two independent product claims, claims 1 and 9.

The respondent stated that the arguments put forward in relation to the inventive step of claim 1 of the eighth auxiliary request also applied to the subject-matter of claim 1 of the ninth auxiliary request. Additionally, the scope of the claim had been restricted with respect to the nature of component (a). Hence the skilled person would have not been motivated to go in that specific direction.

The respondent stated that it did not wish to add any further comments with respect to the tenth auxiliary request.

XVI. The appellant (opponent 2) requested in writing that the decision under appeal be set aside and that the European patent No. 0 545 556 be revoked.

The respondent (patentee) requested that the appeal be dismissed and that the patent be maintained as granted

(main request) or, alternatively, on the basis of one of the sets of claims filed as auxiliary requests 1-8 or 10, filed with letter of 23 September 2005 or as auxiliary request 9, filed during the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. The sets of claims filed as auxiliary requests 1 to 8 and 10 with the respondent's letter of 23 September 2005 are admissible since they represent a direct response to the communication from the board sent as an annex to the invitation to oral proceedings, and the amendments are clear and simple.

The above reasoning also applies to the set of claims of auxiliary request 9, filed during the oral proceedings, since the amendment introduced during the oral proceedings merely relates to the correction of an error in the wording of the amendment introduced during the written proceedings.

3. *Prior art*

The appellant raised in its written submissions filed as grounds of appeal an objection of lack of novelty in view of an alleged public prior use concerning the products Schwanweiss, INTO, PILAX and Ariel Automatic, since, in its opinion, the commercialised products contained perfume compositions encompassed by claim 1.

The respondent disputed the validity of the evidence brought forward, *inter alia* on the grounds that it was not possible at the priority date to accurately analyse the commercialised products - in particular with respect to the perfume components -.

Additionally, the appellant left unanswered the questions concerning the public availability of the perfume compositions of the commercialised products which were raised in the communication from the board sent as an annex to the invitation to oral proceedings.

However, there is no dispute between the parties concerning the existence of the prior art documents PD1 to PD4 as part of the state of the art within the meaning of Article 54(2) EPC.

In the board's view, these documents, and in particular document PD1, are highly relevant for the ruling of the present case. Thus, it can be left open whether or not the prior use is proven, as the case can be decided on the basis of the documents PD1 to PD4.

4. *Use claim 15 as granted*

4.1 Claim 14 of the first, third and fourth auxiliary requests, and claim 13 of the second, fifth and sixth auxiliary requests are identical to claim 15 of the main request (set of claims as granted).

4.2 The respondent has acknowledged that the perfume compositions A and B disclosed on pages 10 and 11 of document PD1 are encompassed by the definition of the perfume composition according to claim 15 as granted.

In the respondent's view the novelty establishing feature is the specification of the use "**as a deodorant**".

The wording of claim 15 corresponds to the so-called second or further non-medical use claim and the claim relates to the use of a known composition for a particular purpose, "as deodorant". Therefore, it should be investigated whether or not this purpose corresponds to a novelty bringing functional technical feature.

Document PD1 discloses the compositions A and B on pages 10 and 11 as "Examples of **perfume** compositions satisfying the requirements of the present invention" (page 10, lines 37 to 38) (emphasis added).

According to document PD1, "Perfume is added to a bleach composition, in particular a detergent composition, to provide an olfactory benefit in the product during use and to enhance the olfactory properties of the treated surface." (page 2, lines 17 to 18).

This second use disclosed in document PD1 for the perfume compositions corresponds to masking and reducing malodour which is the main function of the use of a substance as deodorant. Therefore, the use claim 15 as granted encompasses the use disclosed in document PD1 for the perfume compositions A and B disclosed therein.

Consequently, claim 15 as granted lacks novelty vis-à-vis document PD1.

Correspondingly, the main request and the first, second, third, fourth, fifth and sixth auxiliary requests fail for lack of novelty of the use claim 15, 14 or 13 respectively (see point 4.1 above) (Article 54(2) and (4) EPC).

- 4.3 The respondent's submissions that the use of a substance as perfume merely corresponds to producing a pleasant smell does not take into account the disclosure of document PD1 which refers to "enhanc[ing] the olfactory properties of the treated surface". This expression clearly encompasses, as mentioned above, masking and reducing malodour in the treated surface.
- 4.3.1 As regards the respondent's argument that the use as deodorant should be interpreted in the light of the description as inhibiting human body malodour, it has to be said that, contrary to the respondent's submission, the description of the patent in suit cannot serve to restrict the claimed scope which, although broad, is technically meaningful.
- 4.3.2 Moreover, the passage mentioned by the respondent corresponds to a comment in respect of the perfume compositions of *inter alia* documents PD2 and PD3 and states that these prior art perfume compositions "exhibit a deodorant action (i.e. inhibit development of human body malodour) either when applied to human skin or when included in a detergent product or fabric conditioning product used in laundering or textile" (page 2, lines 7 to 9 of the patent in suit).

However, the only use to inhibit development of human body malodour which appears to be disclosed in the patent in suit with respect to the perfume compositions of the claims corresponds to the effect of masking and reducing malodour and not necessarily to a direct inhibition of human body malodour when, for example, applied to the human skin.

Additionally, when further considering the description of the patent in suit, it is specifically disclosed that the claimed perfume compositions are components of (bleaching) detergent compositions for washing fabrics on which the malodour reduction value test is performed (page 8, lines 11 to 20 and page 9, lines 33 to 34).

The perfume compositions disclosed in document PD1 are also used as components of bleach compositions (page 2, lines 36 to 38).

5. *Use claim 15 of the seventh auxiliary request and use claim 14 of the tenth auxiliary request*
- 5.1 Claim 15 of the seventh auxiliary request and claim 14 of the tenth auxiliary request are identical and differ from claim 15 of the main request only in that the expression "to inhibit body malodour" has been introduced after the word "deodorant".
- 5.2 The respondent has stated as the basis for this amendment the passage in the application as originally filed (page 1, lines 11 to 15) corresponding to the passage quoted in paragraph 4.3.2 above. As becomes evident from the analysis made in that paragraph, there is not a clear and unambiguous disclosure of the

technical effect linked to the expression "to inhibit body malodour", since there are several possibilities encompassed by the expression "to inhibit development of human body malodour". However, within the context of the description of the application as originally filed, only the effect of masking and reducing malodour can be considered to be disclosed.

5.3 Therefore, claim 15 of the seventh auxiliary request and claim 14 of the tenth auxiliary request do not meet the requirements of Article 123(2) EPC.

6. *Product claim 1 of the eighth auxiliary request*

6.1 Claim 1 of the eighth auxiliary request is identical to claim 1 as granted.

6.2 Claim 1 relates to a perfume composition constituted, in an amount of at least 50% by weight, by at least four of the five listed categories. Claim 1 contains at its end two provisos linked by the terms and/or.

6.3 The perfume composition A of document PD1 (pages 10 to 11) contains in the appropriate amounts one ether of category (a) (Anther), one aromatic methyl ketone of category (b) (Traseolide), several alcohols of category (c) (decanol, phenylpropyl alcohol, tetrahydrolinalol, phenylethylalcohol), and two acetates of category (d) (dimethylbenzylcarbinyl acetate and p-terbutylcyclohexyl acetate).

When the second proviso applies, novelty is given with respect to the perfume composition A of document PD1

since the claimed composition contains a salicylate (category (e)).

When the first proviso applies, novelty is given because the ether component of category (a) includes at least a phenyl or naphthyl ether derivative, i.e. if Anther is present, category (a) contains at least another ether. Such an ether derivative is not contained in perfume composition A.

An analogous analysis applies with respect to the perfume composition B of document PD1 (page 11). This perfume composition contains in the appropriate amounts one ether of category (a) (Anther), one aromatic methyl ketone of category (b) (Traseolide), two alcohols of category (c) (decanol, phenylethylalcohol), three acetates of category (d) (dimethylbenzylcarbiny acetate, p-terbutylcyclohexyl acetate and tetrahydrolinalyl acetate).

In view of the above, the perfume compositions claimed in claim 1 are novel over the perfume compositions disclosed in document PD1.

Moreover, none of the perfume compositions disclosed in documents PD2 to PD4 contains all the required components defined in claim 1.

Therefore the subject-matter of claim 1 is novel vis-à-vis documents PD1 to PD4. This has not been disputed by the parties.

6.4 Document PD1, which relates to a perfume composition containing at least four components of the categories

(a) to (d) and its use as component of bleach detergent compositions, represents the closest prior art.

In the light of the prior art the problem to be solved is to provide further perfume compositions.

The solution relates to compositions which have a further ether component, namely a phenyl or naphthyl ether derivative.

The board is satisfied that the problem has been solved in the light of the description, in particular in the light of the examples.

It has now to be assessed whether the proposed solution appears to be obvious in the light of the prior art.

Starting from the teaching of document PD1 the skilled person looking for further perfume compositions is aware of other well known perfume components belonging to the classes building up the perfume composition such as β -naphthyl methyl ether. This component is commonly used in perfume compositions for use in detergent and toiletry products as shown by documents PD2 (column 11, line 20 and PD3 (column 28, class 4).

Therefore, the skilled person has an incentive to incorporate this perfume component when providing further perfume compositions.

The fact that β -naphthyl methyl ether may be a sensitive component when the perfume composition is added to bleaching detergent compositions (PD4, page 8, line 19) would not deter the skilled person from providing an

initial, different, pleasant odour and, after the bleaching process takes place, an analogous effect to the known perfume compositions of PD1, since all other components are bleach resistant. Moreover, the skilled person, in the light of documents PD2 and PD3, would also be inclined to use these further perfume compositions in other alternative (non bleaching) detergent and toiletry products. Consequently, the subject-matter of claim 1 lacks an inventive step (Article 56 EPC).

- 6.5 The respondent denied that PD1 represented the closest prior art because it related to perfume compositions useful as components of bleaching detergent products, whereas documents PD2 and PD3 related to perfume compositions with a deodorant effect.

Firstly, the patent in suit also deals with the use of the perfume compositions as components of bleaching detergent products (page 8, lines 11 to 16).

Secondly, there is no technical prejudice to deter the skilled person from using the perfume compositions of document PD1 as components of other toiletry products. Moreover, claim 1 is a product claim which is not limited by a certain purpose.

Thirdly, the perfume compositions A and B disclosed in document PD1 are in their constitution the closest of the known perfume compositions to the claimed perfume compositions.

The respondent also submitted that in the event that document PD1 were to be considered the closest prior art, then the problem to be solved was to be seen in the provision of perfume compositions with improved malodour reduction values as shown by the comparison between the compositions 3 and 4 appearing on page 10 of the patent in suit (malodour reduction values on page 13) and the composition A of document PD1 (malodour reduction value submitted with the letter of 11 December 2003).

However, the comparison between the composition A and the compositions 3 or 4 of the patent in suit does not represent the closest approximation possible, since the compositions 3 and 4 not only differ from the composition A in the presence of Nerolin (a naphthyl alkyl ether derivative) additionally to Anther, but also in the constitution of components (b) (the aromatic methyl ketone is Musk ketone and not Traseolide), (c) (phenyl propyl alcohol not present), (d) (different acetate derivatives).

Therefore, from the comparison put forward by the respondent it cannot be concluded whether or not the closest claimed perfume compositions displayed improved malodour reduction values than the known compositions of PD1.

Therefore, the problem to be solved had to be defined in a less ambitious way.

7. *Product claim 1 of the ninth auxiliary request*

- 7.1 The specification contained in the definition of component (a) finds its basis in the description as originally filed (page 5). Therefore the requirements of Article 123(2) and (3) are met.
- 7.2 The analysis made above in point 6.3 to 6.6 for claim 1 of the eighth auxiliary request applies *mutatis mutandis* to claim 1 of the ninth auxiliary request, since the only difference is the more restricted definition of the ether component (a). The perfume compositions according to claim 1 of the ninth auxiliary request may comprise Anther (phenylethyl isoamyl ether) as well as the compositions A and B of document PD1. The only difference is the additional presence of a phenyl ether or naphthyl ether derivative.
- 7.3 Consequently, the ninth auxiliary request fails for lack of inventive step of claim 1 (Article 56 EPC).

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:

A. Townend

U. Oswald