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**Datasheet for the decision  
of 2 February 2007**

**Case Number:** T 0054/04 - 3.3.06

**Application Number:** 93924593.2

**Publication Number:** 0668754

**IPC:** A61K 7/50

**Language of the proceedings:** EN

**Title of invention:**  
WASHING COMPOSITION

**Patentee:**  
UNILEVER PLC, et al

**Opponents:**  
HENKEL KGaA  
KPSS-Kao Professional Salon Services GmbH

**Headword:**  
Washing compositions/UNILEVER

**Relevant legal provisions:**  
EPC Art. 123(2)

**Keyword:**  
"Added subject-matter (yes)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 0054/04 - 3.3.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.06  
of 2 February 2007

**Appellants:**  
(Patent Proprietors)

UNILEVER PLC  
Unilever House  
Blackfriars  
London EC4P 4BQ (GB)

and

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**Representative:**

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**Respondent I:**  
(Opponent I)

HENKEL KGaA  
VTP (Patente)  
D-40191 Düsseldorf (DE)

**Respondent II:**  
(Opponent II)

KPSS-Kao Professional Salon Services GmbH  
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D-64297 Darmstadt (DE)

**Decision under appeal:**

Decision of the Opposition Division of the  
European Patent Office posted 28 October 2003  
revoking European patent No. 0668754 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** P.-P. Bracke  
**Members:** P. Ammendola  
A. Pignatelli

## Summary of Facts and Submissions

- I. This appeal is from the decision of the Opposition Division to revoke the European patent No. 0 668 754 granted on the European patent application 93 924 593.2 (international publication WO 94/10975).
- II. The Opponents I and II had sought revocation of the patent in suit on the grounds of, *inter alia*, lack of novelty (Article 100(a) in combination with Articles 52(1) and 54 EPC). Although Article 100(c) EPC was not originally cited as a ground of opposition, during the opposition procedure Opponent II objected that subject matter extending beyond the content of the application as filed was added by the amended viscosity ranges present in some of the granted claims.
- III. The Opposition Division had revoked the patent for lack of novelty. In its decision it had however also concluded that the subject-matter of the granted claims complied with the requirements of Article 123(2) EPC since the amended viscosity ranges were based on the disclosure of some examples in the application as filed.
- IV. The Patent Proprietors (hereinafter Appellants) have lodged an appeal against this decision and filed with the grounds of appeal several sets of amended claims as auxiliary requests.
- V. Both Opponent I (hereinafter Respondent I) and Opponent II (hereinafter Respondent II) have replied in writing to the grounds of appeal. However, the reply of Respondent I, although regularly faxed at the EPO, did

not reach the Board and, thus, no copy thereof was forwarded to the other parties.

- VI. The parties have been summoned to oral proceedings scheduled for 2 February 2007 and received a communication of the Board (enclosed to the summons) indicating, *inter alia*, that Article 123(2) EPC of the auxiliary requests was going to be discussed at the forthcoming hearing.
- VII. With their reply of 18 January 2007 the Appellants have finally informed the Board that they would not attend the oral proceedings and filed a set of amended claims labelled as sole request that was identical to the first of the auxiliary requests filed with the grounds of appeal. In this letter the Appellants also withdrew any preceding requests.
- VIII. For the present decision it is sufficient to consider claim 6 of the sole request. This claim is as granted and reads:

"6. *Composition according to claim 1 comprising:*

- a) *10-15%wt of an ethoxylated anionic surfactant,*
- b) *5-10%wt of a 3-6 carbon alcohol ester of a fatty acid having 10-20 carbon atoms,*
- c) *1-5%wt of a C8-C16 fatty acid monoglyceride polyglycol ether with an ethoxylation value of 1-5,*
- d) *1-5%wt of an alcohol ethoxylate having a chain length of C10-C16 and an ethoxylation value of 3-7,*
- e) *1-4%wt electrolyte, and,*

*f) 0.01-1% of a cationic polymer,*

*said composition being in the form of a clear, aqueous gel having a viscosity of 6.02-11.40 Pas at a shear rate of one reciprocal second, measured using a Haake rotary viscometer using the standard method."*

- IX. At the beginning of the oral proceedings before the Board, held as scheduled in the announced absence of the Appellants, Respondent I provided a copy of its written reply to the grounds of appeal. However, it did not afterwards rely on any argument mentioned in this reply, as this latter is totally silent on the sole issue which was discussed at the hearing, i.e. the allowability under the provisions of Article 123(2) EPC of the viscosity ranges present in the claims of the Appellants' sole request.
- X. The Appellants have presented no argument relevant to the allowability under the provisions of Article 123(2) EPC of the claimed viscosity ranges, since they have only argued on serious procedural violations allegedly made by the Opposition Division and on the novelty of the claimed subject-matter.

The Respondents have argued instead that the application as filed provides no disclosure of a generally applicable viscosity range as that described in claim 6, and that the Opposition Division has erred in presuming that a sufficient basis for such range could be represented by the individual disclosure in two specific examples of the application of each of the two end values of this viscosity range.

XI. The Appellants have requested

- that the decision of the first instance be set aside, that the Board establish that the subject-matter of the claims according to the request filed under cover of the letter of 18 January 2007 is novel and remit the case to the first instance for deliberation on inventive step, and
- that the appeal fee be reimbursed.

The Respondents have requested that the appeal be dismissed.

### **Reasons for the decision**

1. *Admissibility of the Respondents' objections under Article 123(2) EPC*

In view of the facts mentioned above at sections II, III and VI of the Facts and Submissions it is apparent that the Appellants should, at the moment in which they have decided not to be represented at the hearing before the Board, have been well aware that the allowability under Article 123(2) EPC of the claims of their sole request was going to be discussed at the hearing and, thus, that it could also be disputed by the Respondents in respect of the features which had already been objected to for added matter during the opposition proceedings.

Therefore, at the oral proceedings that took place in the announced absence the Appellants the Board has

found admissible the Respondents' objections under Article 123(2) EPC to the sole Appellants' request, inclusive of the objection to the viscosity range of "6.02-11.40 Pas" present in claim 6 of the current request which had already been contested by Respondent II before the Opposition Division.

2. *Allowability of the Appellants' request under Article 123(2) EPC*

2.1 Claim 6 (see above point VIII) differs from claim 6 of the application as originally filed only in that the viscosity range "6.02-11.40 Pas" replaces the original range "3000-7000 Mpas".

The only basis for this amendment is found in the table at page 14 of the application as internationally published, reporting viscosity values for a group of six out of eleven specific examples of the invention and wherein the two most different viscosities values are "6.02" and "11.4" Pas given for, respectively, example 8 and 10.

Hence, in the present case, there is no explicit disclosure in the application as originally filed of the viscosity range given in claim 6, but only of specific embodiments displaying values falling in this range or ending it.

2.2 The Opposition Division has explicitly referred in the decision under appeal (see point 2 of the reasons) to a (similar) viscosity range present in claim 5 as granted, wherein, however, the reported lower end value of the viscosity range is "6.2", whereas in granted claim 6 it

is rather "6.02" (at least in the published English version of the granted claims 5 and 6). Regardless of any consideration as to whether during the opposition proceedings the Opposition Division and the parties were aware of this difference between the viscosity ranges present in claims 5 and 6, it is evident that the reasoning given at point 2 of the decision under appeal with reference to granted claim 5 is necessarily the same that has convinced the Opposition Division that also the (similar) viscosity range in granted claim 6 complied with Article 123(2) EPC.

However, this reasoning appears to the Board manifestly erroneous. Indeed, the Opposition Division was satisfied that the considered range would not constitute added matter simply because the end values of the range were *prima facie* reported in the examples of the application.

Instead according to the jurisprudence of the Boards of Appeal of the EPO (see e.g. the Case Law of the Boards of Appeal, 4<sup>th</sup> Edition 2001, III.A.1.1, page 199) it is insufficient for a generalization of features to have only formal support in the application as filed, if the feature's general applicability was not evident to the skilled person.

- 2.3 Hence, in the opinion of the Board, the amended viscosity range in claim 6 could only comply with the requirements of Article 123(2) if it was apparent to the skilled reader of the application as filed that the two relevant viscosity values reported in the cited table were not only present in isolated specific embodiments of the invention or a specific group



thereof, but were part of a (preferred) feature of the invention **in general** and, thus, equated to the implicit disclosure of a whole range of viscosities possibly present in combination with any other feature of the invention and, hence, also in combination with the other features mentioned in claim 6.

In the present case, however, no element derivable from the application as filed suggests that similar viscosity ranges are possibly present in all preferred embodiments of the invention in general, or in particular in the sub-group thereof for which the application as filed initially disclosed (e.g. in claim 6 as originally filed and internationally published) the replaced viscosity range of "3000-7000 *Mpas*".

On the contrary, all the examples whose viscosities are reported in the cited table have a specific chemical composition, e.g. in that they all have been prepared by using 13 wt% of a specific nonionic surfactant and 10 wt% of a specific oily ingredient.

Already for this reason it is not apparent to the Board why these examples could have implied the disclosure of a preferred viscosity range generally applicable to the whole subject-matter of claim 6, wherein e.g. the anionic surfactant may be any anionics and be present in an amount of 10 to 15 wt% and wherein the oily ingredient may be any oils and be present in an amount of 5 to 10 wt%.

Accordingly, the Board concludes that no basis is to be found in the patent application as filed for the

amendment of original claim 6 whereby the originally disclosed viscosity range "of 3000-7000 Mpas" is replaced by "of 6.02-11.4 Pas".

2.4 Hence, the Board finds that the subject-matter of claim 6 according to the sole request of the Appellants does not comply with the requirements of Article 123(2) EPC and, thus, that this request is not allowable.

3. *Reimbursement of the appeal fee*

Under Rule 67 EPC, the reimbursement of the appeal fee shall be ordered where the Board of Appeal deems an appeal to be allowable.

Since the present appeal is not allowed, the request for reimbursement of the appeal fee cannot be allowed either.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke