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**Datasheet for the decision
of 17 April 2008**

Case Number: T 1566/05 - 3.2.06

Application Number: 98956668.2

Publication Number: 0955837

IPC: A46B 9/04

Language of the proceedings: EN

Title of invention:
Toothbrush

Patentee:
GILLETTE CANADA COMPANY

Opponents:
GLAXO GROUP LIMITED
Colgate-Palmolive Company

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 84
RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Main request - not allowed - Article 123(2) EPC"
"First auxiliary request - not admitted"
"Second auxiliary request - allowed"

Decisions cited:
T 0962/98, T 0907/90, T 1151/00, T 0784/99

Catchword:
-



Case Number: T 1566/05 - 3.2.06

DECISION
of the Technical Board of Appeal 3.2.06
of 17 April 2008

Appellant: GLAXO GROUP LIMITED
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
6 December 2005 concerning maintenance of
European patent No. 0955837 in amended form.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: M. Harrison
K. Garnett

Summary of Facts and Submissions

I. In its interlocutory decision posted on 6 December 2005, the opposition division found that European patent number 0 955 837 in its amended form met the requirements of the European Patent Convention.

The opponent OI (appellant) filed an appeal against the decision, requesting revocation of the patent.

II. In its reply, the respondent (proprietor) requested dismissal of the appeal.

III. Having summoned the parties to oral proceedings, the Board issued a communication listing several features of claim 1 for which a disclosure in the content of the originally filed application could not be identified, contrary to Article 123(2) EPC. In particular, certain features of claim 1 appeared only to be found in the specific context of the single embodiment disclosed.

IV. During the oral proceedings of 17 April 2008 before the Board, the respondent filed a first and a second auxiliary request for maintenance of the patent in an amended form.

The appellant maintained its request for revocation of the patent.

Opponent OII although duly summoned was not present at the oral proceedings, nor did Opponent OII make any submissions during the procedure.

V. Claim 1 of the main request reads as follows:

"A toothbrush (10) having a head (14) with a frontal free end and a rearward section followed by a handle (12), comprising tufts of bristles (32, 34, 36, 38) arranged in longitudinal rows (42, 44) on the rearward section of the head (14) and having different lengths, with tufts of bristles having either a first greater length or a second smaller length, with tufts of bristles (32, 34, 36, 38) of the first and second length being provided in every longitudinal row (42, 44) and adjacent tufts of bristles (32, 34, 36, 38) of a longitudinal row (42, 44) alternatingly having the first and the second length, characterized in that tufts of bristles (32, 34) in a longitudinal row (42) are tilted in a first direction (D) towards the free end of the head (14) and tufts of bristles (26, 38) of another longitudinal row (44) are tilted towards a second direction opposite of the first direction (D) and forming an acute angle with the surface (30) of the head (14), and by a further tuft of bristles (28) being secured to the frontal free end of the head (14) and being tilted only towards the first direction (D) and having the first greater length."

VI. Claim 1 of the first auxiliary request reads as follows:

"A toothbrush (10) having a head (14) with a frontal free end and a rearward section followed by a handle (12), comprising tufts of bristles (32, 34, 36, 38) arranged in one inner and two outer longitudinal rows (42, 44) on the rearward section of the head (14) and having different lengths, with tufts of bristles having either a first greater length or a second smaller length, with tufts of bristles (32, 34, 36, 38) of the

first and second length being provided in every longitudinal row (42, 44) and adjacent tufts of bristles (32, 34, 36, 38) of a longitudinal row (42, 44) alternately having the first and the second length, characterized in that all the tufts of bristles (32, 34) in the outer longitudinal rows (42) are tilted in a first direction (D) towards the free end of the head (14) and all the tufts of bristles (26, 38) of the inner longitudinal row (44) are tilted towards a second direction opposite of the first direction (D) and forming an acute angle with the surface (30) of the head (14), and by a single further tuft of bristles (28) being secured to the frontal free end of the head (14) and being angled only towards the first direction (D) and having the first greater length, wherein the angle of all of the tufts on the head (14) are angled by about 81 degrees or less relative to an imaginary line which is tangent to or co-planar with a surface (30) of the head (14) through which the tufts are secured to the head, all of the tufts including tufts with at least five different types of cross-section."

VII. Claim 1 of the second auxiliary request reads as follows:

"A toothbrush (10) having a head (14) with a frontal free end and a rearward section followed by a handle (12), comprising tufts of bristles (32, 34, 36, 38) arranged in one inner and two outer longitudinal rows (42, 44) on the rearward section of the head (14) and having different lengths, with tufts of bristles having either a first greater length or a second smaller length, with tufts of bristles (32, 34, 36, 38) of the first and second length being provided in every

longitudinal row (42, 44) and adjacent tufts of bristles (32, 34, 36, 38) of a longitudinal row (42, 44) alternately having the first and the second length, characterized in that all the tufts of bristles (32, 34) in the outer longitudinal rows (42) are tilted in a first direction (D) towards the free end of the head (14) and all the tufts of bristles (26, 38) of the inner longitudinal row (44) are tilted towards a second direction opposite of the first direction (D) and forming an acute angle with the surface (30) of the head (14), and by a single further tuft of bristles (28) being secured to the frontal free end of the head (14) and being angled only towards the first direction (D) and having the first greater length, wherein the angle of all of the tufts on the head (14) are angled by about 81 degrees or less relative to an imaginary line which is tangent to or co-planar with a surface (30) of the head (14) through which the tufts are secured to the head, and wherein the single further tuft has a cross-sectional tufted area of about 0.2406 cm^2 (0.0373 square inches); the outer longitudinal rows consist of between 8 and 12 tufts with a round cross-sectional area of 0.0290 cm^2 (0.0045 square inches) and of between 8 and 12 tufts with a rectangular shaped cross-sectional tufted area of 0.0174 cm^2 (0.0027 square inches); and the inner longitudinal row consists of between 4 and 6 tufts with a rectangular-shaped cross-sectional tufted area of 0.0258 cm^2 (0.0040 square inches) and of between 4 and 6 tufts with a rectangular-shaped cross-sectional tufted area of 0.0542 cm^2 (0.0084 square inches)."

VIII. The arguments of the appellant may be summarised as follows:

The subject matter of the main request did not fulfil the requirements of Article 123(2) EPC. In the application as filed there were three independent claims with respective dependent claims covering, very broadly, three separate aspects. Further, the application disclosed a single preferred embodiment, the description of which mentioned certain aspects of the embodiment which were open to variation. Claim 1 of the main request however defined longitudinal rows with tufts of different lengths whereby the tufts were slanted in one direction or the other at an acute angle, whereas the sole embodiment was disclosed with a large single tuft at one end and further tufts arranged in three longitudinal rows with specific alternating cross-sectional area shapes and sizes together with particular angles and directions of inclination. These features together gave the intended cleaning effect and thus dictated the head configuration. It was not unambiguously derivable that only some of the features of the tuft/head arrangement disclosed in the embodiment should be selected for inclusion in claim 1 whilst others need not be. Although the respondent alleged that the application had to be read in a special way due to having been drafted with only a single specific embodiment and very broad claims, the simple fact was that the application did not provide an unambiguous basis for picking single features from the sole embodiment and combining these selected features to form specific subject matter. Claim 1 was simply an unallowable intermediate generalisation of the original disclosure. The criteria applied *inter alia* in decision T 0962/98 (see Reasons 2.6.5) applied equally to this case.

In regard to claim 1 of the first auxiliary request, its subject matter lacked a definition of the only types of bristles that were disclosed in the sole embodiment and failed therefore to meet the requirements of Article 123(2) EPC.

In respect of the subject matter of claim 1 of the second auxiliary request, this was an unallowable intermediate generalisation of the original disclosure since it contained no mention of the specific materials nor the lengths of the various tufts, nor the specific colours of particular tufts. At least the length and materials were technically linked to the tuft cross-sectional areas and the colouring was important as being a wear indicator. It was not disclosed that any one of these features was preferable.

The subject matter of claim 1 also lacked clarity (Article 84 EPC) since the terminology "about 81 degrees" was indefinite.

IX. The arguments of the respondent may be summarised as follows:

In terms of the main request and the requirements of Article 123(2) EPC, it was important that the application as filed was read from the point of view of a skilled person. Page 1 of the filed application started with a general statement indicating that the invention related to toothbrushes for improved cleaning, and then mentioned three cleaning problems to be overcome. The solution to these problems was given separately in the three independent claims 1, 11 and 21

as filed. On page 2, first sentence it was however disclosed that the invention was directed to solving "one or more" of those problems, and not only to three separate aspects. Thus the skilled person was taught at the outset that aspects of one, two or all three solutions could be combined for different cleaning needs. Further, in the sentence bridging pages 2 and 3, it was explained that objects and features could be understood not only by reference to the preferred embodiment and drawings, but also by reference to the claims. This was an instruction to a skilled person to select the required features from either the claims or the embodiment for any particular aspect to be addressed. The fact that partial aspects of the three solutions could be mixed was also confirmed by the claim structure (e.g. claim 6 was dependent on claim 1, whereby claims 1 and 6 involved aspects of two of the problems). The application as filed also contained several sections which indicated that features of the preferred embodiment were open to variation, such as on page 5, lines 15 to 17, mentioning variation in lengths, cross-sectional shapes and areas. Consequently it was evident that not all aspects shown in the preferred embodiment were required when defining the invention in a more limited fashion than that in the filed independent claims. The skilled person in this area was also aware that cross-sections, materials and angles were features which were variables. When looking at the drawings of the preferred embodiment, a skilled person would immediately be aware that several aspects depicted were only preferable, not least because they related to features which appeared in dependent claims as filed. Claim 11 of the filed application was the starting point for claim 1 of the main request. This

encompassed two or more tufts with differing characteristics, *inter alia* length and/or cross-section. In dependent claim 20, angling of tufts was defined without specifying any angle of inclination for example. Claim 11 also allowed variation of the tuft length, as did dependent claim 26. The definition of differing lengths of tufts and angling of the same as in claim 1 of the main request was justified based on e.g. claim 4 as filed which defined both angled tufts of different length, as well as on claim 6 as filed which defined angled tufts of different cross-section. Thus, the disclosure was clearly not limited to specific sets of tufts being angled in a particular manner, nor was there a requirement for specific tufts in any specific rows to be of a greater or lesser length in the precise way depicted in the preferred embodiment. The cross-sections of the tufts could further be varied as required, as was evident from page 5, lines 15 to 17 and claim 11. Although "rows" were defined in claim 1 of the main request, it was clear from the claims as filed that the presence of more than one tuft implied the use of rows. Thus, any definitions or rules defined in the filed claims which applied to a plurality of tufts applied equally to rows of such tufts. It was wrong to interpret the preferred embodiment in isolation from the claims, because terms in the claims were related to the various corresponding aspects in the embodiment.

Additionally, there was no technical link between those features included in present claim 1 and those features of the preferred embodiment which required the inclusion of further features, since the function of the features now in claim 1 was evident.

Decision T 0907/90 (see "Reasons", item 2.2) explained that in order to correctly take account of the skilled person's knowledge it was incorrect to interpret the application only as literally worded, since such would disregard the skilled person's ability for abstract thought.

If a novelty test were applied, the subject matter in claim 1 would not be new compared to the content of the original application. This confirmed that the subject matter of claim 1 was within the content of the application as filed.

Contrary to the appellant's allegation, no "conscious choice" (in the sense of T 1151/00, "Reasons", item 7) to select a specific combination of features was needed to arrive at a new combination of features in the present case, but instead a constant choice was present in line with the original claims and in accordance with the disclosed information.

The position in the present case was also similar to the case in T 0784/99 (see "Reasons", item 3.2), which clarified that the skilled person should not lose sight of the invention when determining whether a clear and unambiguous disclosure was present. A limitation to all the features of a preferred embodiment was here seen as unjustified. In the present case, a more limited definition of the row and tuft arrangement was not required in order to meet the requirements of Article 123(2) EPC, since the skilled person would directly and unambiguously arrive at the feature

combination claimed without need for further limitations.

In claim 1 of the first auxiliary request, the specific arrangement of rows and the angling of all the tufts had now been defined. It was not necessary to define the cross-sections of the tufts, since independent claim 21 had originally only defined tufts with at least five cross-sections, without specifying the cross-sections. This feature of filed claim 21 could thus be combined with the other features in claim 1 of the first auxiliary request. Likewise, claim 6 as filed defined a requirement to have only two different unspecified cross-sections. Further, page 3, lines 26 to 30, disclosed the brush as merely including five different types of tuft each having a different cross-section, again without specifying any particular cross-sectional shape, while page 5, lines 15 to 17 disclosed that the cross-sectional areas could even be varied between tufts.

In claim 1 of the second auxiliary request, it was not necessary to include details of materials or colours of the tufts, as these were disclosed as being merely preferable, and the skilled person anyway knew that differences could be adopted while maintaining the same effects. Also, while a value of length had been stated in the description for each tuft type, it was evident (e.g. from page 5, lines 15 to 17 of the filed application) that the precise length of each tuft was open to significant variation.

The clarity requirement of Article 84 EPC in regard to the terminology "about 81 degrees" was met, due to the context in which the angle was quoted.

Reasons for the Decision

1. *Main request*

Claim 1 defines an arrangement of tufts of bristles in "longitudinal rows on the rearward section of the head" including tufts of bristles of "the first and second length being provided in every longitudinal row and adjacent tufts of bristles of a longitudinal row alternately having the first and second length", and that "tufts of bristles in a longitudinal row are tilted in a first direction" and "tufts of bristles of another longitudinal row are tilted towards a second direction opposite to the first direction".

The feature of "rows" of tufts, whilst appearing repeatedly in claim 1 with respect to the arrangement of the tufts, is not found in any of the claims as filed nor in the description. Instead, the only disclosure of rows of tufts is in the drawings of the preferred embodiment. In particular, while claim 11 as filed, which is alleged to form the starting point for claim 1 of the main request, defines a "plurality of tufts of bristles" two of which are "at an acute angle...", this claim is so general that any tufts could be meant, not specifically two tufts forming a row. Likewise in claim 15 a third tuft is mentioned, but this refers to a tuft at the outer free end of the head and not a further tuft forming a longitudinal row

with another tuft. Additionally, in claim 20, the angling of two tufts in different directions does not imply that the tufts are in the same or even different rows; two tufts can be placed anywhere on a toothbrush head without being arranged in a longitudinal row.

If claim 1 as filed were to be considered as the starting point for arriving at the subject matter of claim 1 of the main request, this notably defines features relating to the tuft at the distal end of the head, whereby the tuft is angled at about 81 degrees or less to the surface of the head. This claim cannot therefore provide a basis for the set of features in claim 1 of the main request, as the features relating to the angle of the end tuft are not even defined in claim 1 of the main request. Claims 4 and 6 mentioned by the respondent are themselves dependent on claim 1, and the Board concludes that features from these claims cannot arbitrarily be combined with other features without including at least all the features of claim 1 on which they are dependent. It is notable also that dependent claims 4 and 6 as filed each define the end tuft and two other tufts, but are also totally silent as to the location or arrangement of these tufts on the head.

Turning to independent claim 21 as filed, this also fails to define any rows, but merely defines a head with "at least five different types of cross-sections". Similarly to claim 1 therefore, this also cannot provide a disclosure of the combination of features of claim 1 of the main request.

Even when combining features from one claim as filed with those of another independent or dependent claim as filed, which the respondent alleges to be a disclosure within the content of the filed application, there is no direct and unambiguous disclosure of tufts arranged in longitudinal rows, let alone a general definition to the effect that the tufts in longitudinal rows have, generally, an alternating height between adjacent (yet unspecified) tufts.

The Board thus finds that an arrangement of tufts in rows is only derivable from the preferred embodiment, and more particularly from the embodiment as depicted, since "rows" of tufts are not mentioned in the description of the embodiment.

In the depicted embodiment, there are indeed not only "any" number and type of rows of tufts (as covered by claim 1 of the main request), but specifically there are three longitudinal rows of tufts, one inner row and two outer rows, together with a further single tuft at the outer free end. Furthermore these tufts are arranged such that all the tufts in the outer rows are angled in one direction and all the tufts in the single inner row are angled in the opposite direction. Still further, these rows of tufts contain tufts of a particular cross-section as depicted and as described on page 3, line 31 to page 5, line 7.

No disclosure can be found in the filed application which would indicate that the arrangement of the tufts in exactly three longitudinal rows, whereby all the tufts of each row are angled in a particular direction, or the cross-sectional shapes thereof, was merely a

preferable feature which could be omitted when defining longitudinal rows.

Although the respondent relies on the knowledge of the skilled person in being able to make such a conclusion when being aware of the function of the various tufts, the Board finds that the description, apart from giving three separate problems related to the solutions in the independent claims, lacks information as to the technical importance or functional inter-relationship of the various rows of tufts depicted.

In this regard, page 2 of the filed application states the following at lines 21 to 24:

"Providing angled tufts which vary in their length, cross-section, color, materials or combinations thereof, allows such angled tufts to clean more than one part of the teeth".

This statement is however entirely general and does not provide a disclosure of an arrangement of tufts of any (undefined) cross-sections in rows with (at least some) adjacent bristles of alternating length. Merely because very broad independent claims have been used in the filed application together with a general statement as quoted above relating to further properties of angled tufts, does not mean that there is a direct and unambiguous disclosure of the generalised arrangement of tufts defined in claim 1, which lies somewhere between the general disclosure and the specific embodiment.

Thus, for this reason alone, the Board concludes that the definition of "rows" in claim 1, without defining e.g. the number of rows and the direction and angles of tilt of all the tufts in the rows, is an unallowable generalisation of the subject matter disclosed in the application as originally filed.

The respondent argues that the "two tufts" defined in e.g. dependent claim 20 would be understood as implying tufts forming a row, because the skilled person would know that tufts were laid out in rows on toothbrushes and longitudinal rows were shown in the preferred embodiment. The Board however finds this argument unconvincing since tufts in toothbrushes may be arranged in many different ways and furthermore a broad definition of two tufts, even if *arguendo* being in a row, provides no disclosure of where such a row might be arranged on the head.

The respondent's argument that a skilled person reading the filed application would be aware that a special reading of the application would be required which would allow the skilled person to arrive at the combination of features in claim 1 also does not convince the Board. The mere fact that the description contains a general statement (joining pages 2 and 3) to the effect that other features "will be more clearly understood and appreciated from a review of the following description of the preferred embodiments and appended claims, and by reference to the accompanying drawings" does not result in a clear and unambiguous disclosure of the combination of features in present claim 1; instead this sentence fails to identify any particular combinations of features at all. For the

purpose of Article 123(2) EPC, it is not a question of what features the skilled person could combine together should he choose to do so, but a question of what features are explicitly or implicitly disclosed unambiguously in combination (see also decision T 0962/98, Reasons 2.6.5).

The respondent is correct in stating that the preferred embodiment is open to variation and indeed several passages of the description of the preferred embodiment allow for such variation, such as page 5, lines 15 to 17, which states that "the bristles within a tuft and between tufts can have varying lengths, diameters, cross-sectional shapes, cross-sectional area, colours and be made of differing materials", but where such statements appear, they are not related to the aspect of the arrangement of the rows nor the specific types of tufts disclosed in each of the depicted rows.

In terms of the respondent's argument that there is no technical link between the features defined in claim 1 and those features in the preferred embodiment which were not included in claim 1, no supporting evidence has been supplied for this argument. Moreover the cleaning action attributable to tufts of a toothbrush is related to several factors including their relative cross-sections, numbers of rows and the relative lengths of all the adjacent tufts and the angle thereof within a row. In the preferred embodiment only a very particular arrangement of tufts has been disclosed and the effect of choosing a different arrangement of tufts in a row and a different row arrangement or different cross-sectional area in relation to other cross-sectional areas of the tufts is not explained in the

filed application. The skilled person cannot therefore unambiguously deduce that the disclosure of three rows each having all tufts being of alternating height and all being slanted in a certain direction is merely a preferred feature. In other words, merely because the application as filed is silent about a particular functional relationship does not necessarily imply that no such relationship exists.

The respondent relies in part also on T 0970/90, "Reasons", item 2.2, stating essentially that a disclosure is not limited to its literal wording. The Board does not question such an approach, but this does not remove the underlying requirement for subject matter of a claim to be based on an unambiguous disclosure, in this case specifically the requirement for an unambiguous disclosure of only the combination of elements defined in claim 1. For example, the generally defined presence of longitudinal rows of tufts in claim 1 includes within its scope any number of rows (e.g. only two, or four or more) with only some (and not all) tufts of bristles slanted in a certain direction. This is not a matter of the literal wording of the application, but in the present case exemplifies the gap between the very general disclosure and the very limited preferred embodiment having only a limited number of described variation possibilities.

The respondent also argued that a "novelty test" could be applied and that this confirmed that the subject matter was within the content of the application as filed. Applying a novelty test (i.e. comparing the claimed subject matter with the content of the application as filed to see whether novel matter is

present) in the present case would involve comparing whether the specific combination of features defined in claim 1 is disclosed in the filed application. Since the defined features are however only disclosed in a particular combination with other features (i.e. in the preferred embodiment) this test is not related to a question of whether the combination of features in claim 1 is present at all in some way in the application, but whether the features are present in their general form in which they are defined in claim 1. Applying the test in this way thus brings no difference to the Board's previous findings.

The respondent has further argued that a "constant" choice of features is being made from the available disclosure, rather than a conscious choice in the sense of T 1151/00, "Reasons", item 7. The Board disagrees. The definition of any plurality of longitudinal rows (i.e. two or more rows) is not something which is expressly or implicitly disclosed in the original application, let alone constantly disclosed. Where rows of tufts are concerned, only the preferred embodiment discloses rows and then only three rows of a particular type. The only way that a skilled person could arrive at a combination of the features in claim 1 is therefore by making a conscious choice to select only certain features from the specific combination of features disclosed in the preferred embodiment; no guidance is provided by the content of the application towards such a choice.

Lastly, the considerations made in T 0784/99 (see "Reasons", item 3.2) do not change the foregoing conclusions reached by the Board. Whilst it is accepted

that a skilled person should not lose sight of the invention when considering the disclosure provided by a preferred embodiment, it needs to be borne in mind that in order for only certain features of a disclosed embodiment to be selected, a skilled person requires technical information either implicitly or explicitly on the functional interrelationship to allow a selection of appropriate features. No such information is present in the application in this case which could enable a skilled person to select, from the disclosed embodiment, only those features defined in claim 1 of the main request without at the same time selecting others. Thus, whilst it is immediately recognisable to a skilled person that features of the brush handle (for example), which are shown and described as part of the preferred embodiment, are not functionally interrelated to the brush head and thus need not be included in claim 1 when including features of the head arrangement, the same cannot be said for the row arrangement disclosed in the embodiment.

At least for the reasons given above, the subject matter of claim 1 does not fulfil the requirement of Article 123(2) EPC and the main request is therefore not allowable.

2. *First auxiliary request*

In claim 1 of this request, there is no definition of the cross-sectional areas of the tufts. However, according to the description on page 4, lines 15 and 16 for example, the tufts of the second type in the outer rows specifically have a round cross-section and are notably present in a certain number of between 8 and 12.

For the second to fifth types of tuft, similar disclosures of the cross-sectional shapes and number of tufts of that type are given. It is not stated that the cross-section or the number of tufts are simply preferable features.

Claim 21 as filed merely requires a multiplicity of tufts with at least five types of cross-section and page 2, lines 25 to 28 confirms this to be a specific feature of the third aspect of the invention. Additionally, page 3, at lines 26 to 30, describes the preferred embodiment as allowing five different types of tufts each having a cross-section which differs in area and shape to the other tufts. Claim 6 as filed also discloses that two tufts may have different cross-sections. However when considering the three longitudinal rows of tufts as defined in claim 1, these rows are only disclosed in a very specific manner, *inter alia* together with a disclosure of their cross-sectional shape. Page 5, lines 15 to 17 was cited by the respondent as a disclosure showing that the cross-sectional area of the tufts could be varied. However the text in this passage concerns the cross-sectional areas and shapes of the bristles and not the tufts, whereby it is clear that the cross-sectional area of the bristles can change without altering the cross-sectional area of the tufts in which the bristles are present.

Since the cross-sectional shape of the tufts is not defined in claim 1, the first auxiliary request is not clearly allowable in view of Article 123(2) EPC. As the request is also a late-filed request (arriving first during oral proceedings before the Board), the Board

exercised its discretion not to admit the request into proceedings (see also the Rules of Procedure of the Boards of Appeal, Article 13(1)).

3. *Second auxiliary request*

3.1 *Article 84 EPC*

The terminology "by about 81 degrees" has been introduced into the claim. Although the terminology is objected to as being indefinite by the appellant, it is observed that the terminology "approximately 81 degrees" was already present in claims 4 and 5 as granted. The Board finds that the words "about" and "approximately" have the same meaning in this context and therefore that the objection under Article 84 EPC is nothing more than an objection under Article 84 EPC against the granted claims and thus not a ground of opposition. It is therefore not available to the appellant in respect of this feature of claim 1 of the second auxiliary request because the objection has not arisen as a result of an amendment.

3.2 *Article 123(2) EPC*

The appellant has objected to the fact that the length of the tufts, the material of the tufts and the colour of the tufts has not been defined in claim 1, even though the description of the preferred embodiment includes these features.

As regards the length of the tufts, the description on page 5, lines 15 to 17, refers to the lengths of the bristles in a tuft and between tufts and it is stated

that these may vary. In this aspect, as opposed to the cross-sectional shape of the tuft, the length of the bristles necessarily defines the length of the tuft. Since the bristle length may vary, so may the tuft length.

As regards the material of the tufts, the description on page 5, lines 10 to 11, states that "although specific materials were described above from which the bristles of each tuft are made, other materials can be used." The next sentence names three materials and cites these as being "for example". The materials cited in the description of the embodiment are thus clearly preferable.

Concerning the colour of the tufts of bristles, the colour blue is mentioned (see page 4, lines 8 to 11 of the filed application) in respect of the second type of bristles as being a wear indicator, the bristle being made up of 6.12 nylon of an indicating type. It is however immediately evident to a skilled person that the colour of the bristles is not linked to their position and shape in the specific longitudinal row. Further, the skilled person has been informed (see the preceding paragraph of this decision) that the materials can be varied.

The Board thus concludes that a skilled person would immediately recognise from the application as filed that the length, material and colour of the tufts described for any of the tuft types are preferred features only and that such features may be omitted from claim 1.

The requirements of Article 123(2) EPC are thus met.

3.3 *Novelty and inventive step*

No objections were raised against the novelty or inventive step of the claims of the second auxiliary request by the appellant.

In the Board's own examination of the claims for novelty and inventive step, the Board also finds no basis in the prior art cited in the appeal for an objection to the subject matter of the claims. In particular, when starting from the closest prior art as disclosed in US-A-4 672 706, from which the combination of features according to the preamble of claim 1 is known, and being aware of the further documents cited in the appeal procedure, no hint can be found which would lead a skilled person to optimise the known toothbrush in a way that would result in the combination of features defined in claim 1 of the second auxiliary request.

The requirements of Articles 54 EPC and 56 EPC are thus met in respect of the cited prior art.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted back to the opposition division with the order to maintain the patent on the basis of:
 - (a) claims 1 to 7 according to the second auxiliary request filed during the oral proceedings of 17 April 2008,
 - (b) the description consisting of columns 1 to 6 as filed during the oral proceedings of 17 April 2008,
 - (c) figures 1 to 7 as granted.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau