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**Datasheet for the decision
of 14 November 2006**

Case Number: T 0381/06 - 3.3.06

Application Number: 01911733.2

Publication Number: 1265981

IPC: C11D 17/00

Language of the proceedings: EN

Title of invention:

Extrudable multiphase composition comprising lamellar phase inducing structurant in each phase

Applicant:

UNILEVER PLC, et al

Opponent:

-

Headword:

Extrudable multiphase lamellar structured composition/UNILEVER

Relevant legal provisions:

EPC Art. 83, 111(1), 123(2)

Keyword:

"Added subject-matter (no)"

"Sufficiency of disclosure (yes): teaching of the description enabling the skilled person to carry out the invention without undue burden within the whole ambit of the claim"

"Remittal (yes)"

Decisions cited:

T 0409/91, T 0435/91

Catchword:

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Case Number: T 0381/06 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 14 November 2006

Appellant:

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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 10 October 2005
refusing European application No. 01911733.2
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: P.-P. Bracke
Members: L. Li Voti
A. Pignatelli

Summary of Facts and Submissions

- I. This appeal lies from the decision of the Examining Division to refuse European patent application no. 01 911 733.2, relating to an extrudable, multiphase aqueous lamellar structured liquid cleansing composition.
- II. In its decision, the Examining Division found that
- the experimental data submitted by the Applicants with the letter of 12 August 2005 showed that phase A of the composition of example 1 and phase B of the composition of example 3 had a viscosity as required in claim 1; on the contrary, neither phase B of the composition of example 1 nor phase A of the product of example 3 had the required viscosity;
 - therefore, the skilled person would have been able to prepare a product as claimed by combining, for example, phase A of the composition of example 1 with phase B of the composition of example 3; the application thus described at least one way for carrying out the claimed invention;
 - however, phase B of the composition of example 1 and phase A of the composition of example 3, though not having a viscosity as required in claim 1, comprised amounts of surfactants and structurant in accordance with the invention and similar to those of the other phases of the compositions of examples 1 and 3 having a viscosity in accordance with the claims;

- moreover, the description did not teach which features were essential for obtaining a viscosity as required in claim 1 and for performing the invention in the whole range claimed (reference was made to the decisions T 409/91 (OJ EPO 1994, 653) and T 435/91 (OJ EPO 1995, 188));

- therefore, the application did not comply with the requirements of Article 83 EPC for the then pending main and first and second auxiliary requests.

III. An appeal was filed against this decision by the Applicants (Appellant).

The Appellant filed with the statement of the grounds of appeal three sets of claims as main and, respectively, first and second auxiliary requests.

With the letter of 6 October 2006 the Appellant withdrew the previous main and first auxiliary requests and made the second auxiliary request to its main request.

IV. Claim 1 according to the main request reads as follows:

"1. A stable, extrudable, multiphase aqueous lamellar structured liquid cleansing composition, comprising : at least two aqueous lamellar structured phases which abut each other; wherein each of the lamellar phases comprises a surfactant system comprising 5-60% by weight of the composition and comprising; (i) a surfactant selected from amphoteric, zwitterionic, or mixtures thereof; (ii) an anionic surfactant; and a lamellar structurant present in each lamellar phase of

the liquid composition, selected from lauric acid, oleic acid, isostearic acid, linoleic acid, linolenic acid, ricinoleic acid, elaidic acid, arachidonic acid, myristoleic acid, palmitoleic acid, propylene glycol isostearate, propylene glycol oleate, glyceryl isostearate, glyceryl oleate, polyglyceryl diisostearate and tryhydroxystearin; and wherein each of the lamellar phases has a minimum low shear viscosity value of 80,000 cps at 25°C."

Claim 2 relates to a composition according to claim 1 having a maximum low shear viscosity value of 300K cps at 25°C.

V. The Appellant submitted in writing that

- the claimed invention did not consist in the preparation of lamellar phase structured liquid compositions of specific viscosity but in the combination of such compositions to offer a multiphase product which could be stably stored in a single compartment and subsequently dispensed;

- the description of the present application taught that it was known from the prior art, e.g. from

document (1): US-A-5952286,

how to prepare a lamellar phase structured liquid composition having a viscosity as required in the present application; moreover, the description taught that the viscosity of a lamellar phase structured liquid composition could be increased by increasing the amount of structurant contained (page 7, lines 4 to 5);

- therefore, the skilled person, following the teaching of the description, would have been able to increase the viscosity of a lamellar structured phase to a value within the claims by adding a greater amount of structurant within the limits suggested in the application;

- no serious reasons had been given by the Examining Division for believing that the invention could not be carried out within the whole ambit of claim 1;

- therefore the claimed invention was sufficiently disclosed.

VI. The Appellant requests that the decision under appeal be set aside and that the case be remitted to the first instance department for further prosecution on the basis of the claims according to the main request.

Reasons for the Decision

1. *Main request*

1.1 Article 123(2) EPC

The Board is satisfied that the claims according to the main request, being a combination of original claim 1 and of original claim 2, respectively, with the description of the application as originally filed (page 7, lines 13 to 17 in combination with page 9, lines 21 to 23; page 10, lines 18 to 19 and page 21,

lines 9 to 20), comply with the requirements of Article 123(2) EPC.

1.2 Article 83 EPC

1.2.1 Claim 1 relates to a stable, extrudable, multiphase aqueous lamellar structured liquid cleansing composition comprising at least two aqueous lamellar structured phases which abut each other, wherein each of these phases have a minimum low shear viscosity of 80,000 cps at 25°C and comprise a surfactant system comprising an amphoteric and/or a zwitterionic surfactant in combination with an anionic surfactant, and a lamellar structurant selected from a list.

1.2.2 The present application teaches on page 6, lines 21 to 30, that it was already known to prepare lamellar structured liquid cleansing compositions based on a surfactant system as in claim 1 by adding the specific structurants known from document (1).

The structurants disclosed in this prior art document are of the same type as those listed in present claim 1 (see column 3, line 57 to column 4, line 12 and column 8, lines 19 to 52; column 10, lines 13 to 37 of document (1) and claim 1 in point IV above).

Moreover, the description of the present application teaches that the viscosity of such a lamellar structured liquid composition can be increased by increasing the amount of the lamellar structurant (see page 7, lines 1 to 5).

Therefore, the Board finds that the skilled person would have been able to prepare a lamellar phase structured liquid composition comprising a surfactant system and a structurant as in claim 1 and having the required viscosity by following the teaching of the present application, i.e. by using the method of preparation described in document (1) and, in case that the prepared lamellar phase structured composition would not show the desired viscosity, by increasing the amount of lamellar structurant within the limits suggested in the description of the present application (see page 10, lines 3 to 5).

Therefore, even though, according to the experimental data submitted by the Applicants with the letter of 12 August 2005, neither phase B of the composition of example 1 of the present application nor phase A of the composition of example 3 have a viscosity as required in present claim 1, the skilled person would have been able to adjust the viscosity of these compositions to a value within the ambit of claim 1 by following the teaching of the description, i.e. by increasing the amount of structurant within the limits suggested.

There is thus no reason to believe that this teaching would not be applicable to any composition comprising a mixture of surfactants as claimed.

- 1.2.3 As regards the viscosity required for each lamellar structured phase of the product of claim 1, methods for the measurement of the initial viscosity of a structured liquid composition were well known to the skilled person at the priority date of the present application. Moreover, the skilled person would have

had no difficulty in following the method specified in the description of the present application, which required the use of a conventional viscometer with a specified spindle at a specified rotational speed and temperature (page 10, lines 7 to 11 in combination with page 31, line 1 to page 32, line 18).

The control of the viscosity of each composition by such a method of measurement for verifying its compliance with present claim 1 cannot thus be considered to amount to an undue burden for the skilled person.

- 1.2.4 The decision under appeal refers in its reasoning to the decisions T 435/91 and T 409/91.

According to the decision T 435/91, the disclosure of an invention relating to a composition of matter, a component of which is defined by its function (in that case an additive capable of forcing the detergent composition into a specific physical phase), is not sufficient if the patent discloses only isolated examples but fails to disclose any technical concept fit for generalisation which would enable the skilled person to achieve the envisaged result without undue difficulty within the whole ambit of the claim (see head note and point 2.2.1 of the reasons for the decision).

The Board finds that this decision does not apply to the present case since present claim 1 does not relate to a composition containing a component defined by its function and, moreover, the description of the present application contains a technical teaching fit for

generalisation which can be applied without undue burden to the whole ambit of the claims.

The decision T 409/91 concerned the case wherein the state of the art did not disclose how to prepare the claimed fuel oils containing wax crystals smaller than a specified size. Moreover, by following the teaching of the application, the size of the wax crystals obtained in identical fuel compositions varied substantially and was dependent on unknown factors so that the skilled person could prepare a fuel oil having wax crystals of the claimed size only by trial and error; therefore, it was not possible for the skilled person to prepare a fuel oil as claimed without undue burden (see points 2 and 3.4, in combination with 3.5, of the reasons for the decision).

The Board finds that this decision also does not apply to the present case since the description of the present application contains a technical teaching explaining which measures have to be taken in order to obtain the desired result, in the present case the increase of the viscosity by adding a structurant, which teaching can be applied without undue burden to the whole ambit of the claims.

- 1.2.5 Therefore, the Board finds that it was possible for the skilled person, by following the teaching of the present application, to prepare without undue burden, for any combination of surfactant encompassed by claim 1, a lamellar phase structured liquid composition having the viscosity required in claim 1.

Furthermore, the skilled person would have been able to prepare a stable, extrudable product as claimed, comprising two aqueous lamellar structured phases which abut each other, by combining at least two lamellar structured phases having the viscosity required in claim 1; for example, by combining phase A of example 1 with phase B of example 3 or by combining two identical phases A or B, as also envisaged by the present application (see page 7, lines 22 to 23).

The claimed invention could thus be carried out in its entirety by following the teaching of the description.

Therefore the Board concludes that the requirements of Article 83 EPC are complied with.

2. *Remittal*

In the present case the decision under appeal was based on the ground of lack of sufficiency of disclosure only.

Therefore, it has still to be assessed whether the claims satisfy the other requirements of the EPC, for example, whether the claims are novel and an inventive step is involved.

The Board thus finds that in order not to deprive the Appellant of the opportunity to argue the remaining issues at two instances, as explicitly requested in the statement of the grounds of appeal (page 1, 4th full paragraph), it is appropriate in the present case to make use of its powers under Article 111(1) EPC to remit the case to the department of first instance for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution on the basis of the 2 claims according to the main request (i.e. the second auxiliary request submitted with the grounds appeal).

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke