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**Datasheet for the decision
of 19 November 2014**

Case Number: T 2229/11 - 3.3.06
Application Number: 02797107.6
Publication Number: 1444318
IPC: C11D17/00, C11D17/04, C11D3/37
Language of the proceedings: EN

Title of invention:

AUTOMATIC DISHWASHING COMPOSITION IN UNIT DOSE FORM COMPRISING
AN ANTI-SCALING POLYMER

Patent Proprietor:

THE PROCTER & GAMBLE COMPANY

Opponents:

RECKITT BENCKISER plc
Henkel AG & Co. KGaA
Dalli-Werke Wäsche-und Körperpflege GmbH & Co KG
UNILEVER NV

Headword:

Dishwashing unit dose with anti-scale polymer and builder/
Procter & Gamble

Relevant legal provisions:

EPC Art. 52(1), 56, 114(2)
RPBA Art. 12(4)

Keyword:

Inventive step (Main Request) - no: obvious alternative
Late-filed auxiliary request - not admitted

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 2229/11 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 19 November 2014

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 9 August 2011
revoking European patent No. 1444318 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman B. Czech
Members: P. Ammendola
J. Geschwind

Summary of Facts and Submissions

I. This appeal lies from the decision of the Opposition Division to revoke European patent no. 1 444 318.

II. Four Opponents had sought revocation of the patent, *inter alia* on the grounds of lack of inventive step.

III. The Opponents had referred, *inter alia*, to documents

D1 = CA 2,166,277 A1

and

D1a = DE 43 21 429 A1,

belonging to the same patent family.

Hereinbelow, reference is only made to the relevant passages of D1, which undisputedly provides the same relevant disclosure as D1a.

IV. During the opposition proceedings the Patentee had filed with a letter of 20 June 2011 seven sets of amended claims labelled 1st to 7th Auxiliary Requests.

At the oral proceedings before the Opposition Division the Patentee had:

a) replaced the previously filed 2nd to 7th Auxiliary Requests by a new set of amended claims labelled 2nd Auxiliary Request, and

b) stated not to wish to file any further auxiliary request in order to respond to the objections on inventive step.

V. Claim 1 of said (final) 2nd Auxiliary Request filed at the oral proceedings before the Opposition Division reads

"1. *An automatic dishwashing composition in unit dose form for delivery into the main-wash cycle of an automatic dishwashing machine, wherein the unit dose form provides from 10 to 40g of the dishwashing detergent composition into the main wash cycle, the composition comprising a precipitating builder which is carbonate and a sequestering builder which is a phosphate or non-phosphate detergency builder and from 3% to 6% by weight of the composition of a sulfonated anti-scaling polymer sufficient to provide at least 125 ppm of polymer by weight of the wash liquor, wherein the ratio of sequestering builder to precipitating builder is from 10:1 to 1:1.*"

VI. The Opposition Division found in the decision under appeal that none of the then pending sets of claims was allowable. In particular, the **automatic dishwashing composition in unit dose** form (below **ADC unit dose**) according to claim 1 of the 2nd Auxiliary Request was found, *inter alia*, to be an obvious alternative form of the granular composition disclosed in Example "C" of document D1.

VII. The Appellant (Patent Proprietor) filed with its statement of grounds of appeal five sets of claims as 1st to 5th Auxiliary Requests, the one according to the 2nd Auxiliary Request being identical to the one according to the 2nd Auxiliary Request refused by the Opposition Division.
Claim 1 of the 4th Auxiliary Request filed by the Appellant differs from claim 1 of the 2nd Auxiliary

Request refused by the Opposition Division in that it contains the following appended wording:

"and wherein the sulfonated anti-scaling polymer is a copolymer of acrylic acid and 2-acrylamido-2-methylpropane sulfonate".

- VIII. Respondents 2 and 3 (Opponents 2 and 3) replied in writing to the statement of grounds of appeal, raising objections against all claims requests filed by the Appellant, *inter alia* on the grounds of Article 123(2) EPC and lack of inventive step.
- IX. The parties were summoned to oral proceedings.
- X. In a letter of 7 August 2014 Respondent 3 disputed the admissibility into the appeal proceedings of, *inter alia*, the 4th Auxiliary Request filed with the statement of grounds of appeal.
- XI. In its letter of 5 November 2014, the Appellant rebutted the objections of the Respondents. With said letter it also filed some claims sets as further auxiliary requests. Then, with letter of 14 November 2014, it filed eight sets of claims labelled Main Request and 1st to 7th Auxiliary Request, in replacement of all the previously pending requests. The set of claims according to the **Main Request** filed with letter of 14 November 2014 is identical to the one according to 2nd Auxiliary Request refused by the Opposition Division and re-filed with the statement of grounds of appeal (see V and VII *supra*), and the **2nd Auxiliary Request** filed with the same letter is identical to the 4th Auxiliary Request filed with the statement of grounds of appeal (see VII *supra*).

XII. At the oral proceedings held before the Board on 19 November 2014, the Appellant withdrew its pending Auxiliary Requests 1, and 3 to 7.

XIII. The Appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the claims according to the Main Request or, in the alternative, of the claims according to the 2nd Auxiliary Request, both Requests filed with letter of 14 November 2014.

Respondents 1 to 4 requested that the appeal be dismissed.

XIV. The submissions of the Parties of relevance here, i.e. concerning inventive step regarding claim 1 of the Main Request and the admissibility of the 2nd Auxiliary Request into the proceedings, can be summarised as follows.

The **Appellant** disputed the finding of the Opposition Division as to the lack of inventive step of the ADC unit dose now forming the subject-matter of claim 1 of the Main Request, *inter alia* because it considered that this finding was based on the erroneous assumption that the closest prior art could be represented by the granular machine dishwashing detergent described in Example "C" of document D1.

In its opinion, the technical problem of the prior art specifically addressed in the patent in suit was a specific drawback in terms of scale build-up of the ADCs in unit dose forms. This would be apparent to the skilled reader of the patent in suit as whole and, in particular, of paragraphs [0002], [0003], [0015] and [0017] therein, since:

- the advantages of the unit dose forms for the ADCs were explicitly recalled in paragraph [0015] of the patent in suit;
- paragraphs [0002] and [0003] of the patent in suit reminded the reader that filming and spotting had long been known to be problems which arose in an automatic dishwashing process and that these problems tended to be worse where the wash liquor was underbuilt;
- an underbuilt wash liquor was known to arise early in the main-wash cycle when a unit dose product was being used, because such products tended to take longer to dissolve into the wash liquor than granular products;
- as a result, scale build-up, leading to spotting and filming on glasses and other washed items, started early in the main wash process when using (unspecified) "standard" ADCs in unit dose forms of the prior art;
- moreover, once started, it was difficult to inhibit the scale build-up and, therefore, spotting and filming tended to be worse when using such standard ADCs in unit dose forms;
- accordingly, also paragraph [0017] explicitly stated that the claimed ADC unit doses resulted in *"inhibiting the formation of calcium phosphate and calcium carbonate scale with consequent reduction of filming of the washed articles and improved shine"* of the washed glasses.

Hence, only an ADC in unit dose form (and not the

granular ADC of Example "C" of document D1) represented an appropriate starting point for the assessment of inventive step.

In the Appellant's opinion, the closest prior art disclosed in document D1 was thus represented by the general disclosure on pages 7 to 8 of the same citation of tablets made of the machine dishwashing detergent disclosed in D1, i.e. the machine dishwashing detergent defined in claim 1 of this document.

The inventors of the patent in suit had solved the addressed technical problem also vis-à-vis this prior art, by providing an ADC unit dose which comprised:

i) a relatively high (but not excessive) level, 3% to 6% by weight of the whole ADC, of a sulfonated anti-scaling polymer, that level being also sufficient to provide at least 125 ppm sulfonated anti-scaling polymer by weight in the wash liquor during the main-wash cycle,

and

ii) a sequestering builder and carbonate (precipitating builder) at an amount ratio in the range of from 10:1 to 1:1.

The "*excellent shine*" of the washed glasses observed in all patent examples further supported the statement in paragraph [0017] that the claimed levels of sulfonated anti-scaling polymer into the main-wash liquor produced the aimed improvement of anti-scale benefits.

Since neither document D1 nor the other available prior art anticipated the occurrence of such improvement of anti-scale benefits when using the specific levels of

sulfonated anti-scaling polymer and/or specific amount ratios between the sequestering builder and the carbonate, a skilled person would have no reason to expect that the posed problem could be solved, for instance, by selecting among the tablets generally disclosed in document D1, those having a composition more similar to that of the granular composition of Example C than to that of Example A in the same citation. Hence, the available prior art did not justify any expectation that the posed problem could be solved by tablets according to claim 1 at issue. Thus, this latter was based on an inventive step.

As to the admissibility into the appeal proceedings of the 2nd Auxiliary Request filed with letter of 14 November 2014, the Appellant stressed that it was identical to the 4th Auxiliary Request filed with the statement of grounds of appeal, on the substance of which Respondents 2 and 3 had already commented in writing in their replies to the statement.

Moreover, the Appellant emphasised that it had been confronted with several different attacks on inventive step during the opposition proceedings and it was only after having read the reasons of the decision under appeal that it could identify possible restrictions of the claimed subject-matter for further distinguishing the latter from the prior art considered most relevant. For these reasons, some of the amended sets of claims that had been filed with the statement of grounds of appeal contained a new restriction.

At the oral proceedings, the Appellant acknowledged that the combination of features contained in claim 1 of the 2nd Auxiliary Request was neither explicitly given as such in the patent application as originally filed nor reflected in any of the invention examples. However, this claim combined teachings of the original

application that were all "directed", i.e. based on alternative features of the invention qualified as preferred, with the sole exception of the choice of the specific sulfonated ant-scaling polymer now required according to claim 1 of the 2nd Auxiliary Request. Thus, the 2nd Auxiliary Request filed with letter of 14 November 2014 was admissible into the appeal proceedings.

The **Respondents** rebutted the Appellant's reasoning on the inventiveness of claim 1 of the Main Request, disputing the allegation of the Appellant, that they considered to be unsupported, that there would be a drawback in terms of scale build-up specifically associated to the alleged slow dissolution of the ADCs in unit dose forms of the prior art. They also stressed that this unsupported allegation was neither mentioned or implied in the patent in suit, nor supported by subsequently filed experimental evidence, nor plausible. Indeed, even in case ADC tablets of the prior art containing carbonate and phosphate builders actually dissolved more slowly than corresponding formulations in granular forms, such slow dissolution inevitably implied initially reduced concentrations in the wash liquor also of the carbonate and phosphate compounds which actually produced exactly the scale formation constituting the alleged drawback.

Hence, it was not credible that the prior art ADC unit doses suffered of such drawback and, thus, that the subject-matter of claim 1 of the Main Request represented an improvement also vis-à-vis the prior art disclosed in document D1. It rather represented a further embodiment of this prior art, since in this citation the combination of claims 1, 4 and 5 already explicitly motivated the skilled formulator of ADCs to

use in combination citrate and carbonate, and Example "C" disclosed specific amounts of these two ingredients and of the sulfonated copolymer that were in agreement with the corresponding requirements in claim 1 at issue.

Thus, already document D1 *per se* rendered obvious the subject-matter of claim 1 of the Main Request.

As to the admissibility into the appeal proceedings of the amended set of claims according to the 2nd Auxiliary Request, the Respondents stressed that the restriction contained in claim 1 of this request as to the nature of the sulfonated anti-scaling polymer had never been the subject of any of the original or amended claims filed during the proceedings preceding the present appeal. Moreover, during the oral proceedings before the Opposition Division the Appellant had been expressly offered the possibility to file further auxiliary requests in order to respond to the objections on inventive step.

Furthermore, they considered that there was apparently no basis in the patent application as filed for the combination, in the ADC unit dose according to claim 1 at issue, of said restriction regarding the sulfonated polymer to be used with the requirement that the ratio of sequestering builder to carbonate had to be within the range defined in claim 1.

Thus, the 2nd Auxiliary Request was not admissible into the proceedings because it had been filed unjustifiably late, because claim 1 thereof comprised a new and surprising restriction, and because the combination of features in this claim was not even implicitly disclosed in the application as originally filed (Article 123(2) EPC).

Reasons for the Decision

Main Request

1. Admissibility of the request

The set of claims filed as Main Request with letter of 14 November 2014 is identical to the set of claims according to the 2nd auxiliary request decided upon by the Opposition Division. The admissibility of the Main Request at issue is thus beyond question.

2. Inventive step - Claim 1

2.1 The Invention

The invention concerns an ADC unit dose for delivery into the main-wash cycle of automatic dishwashing machines. The ADC unit doses according to the invention are supposed to provide "*excellent shine benefits*" (paragraph [0001] of the patent in suit). In particular, they are stated to be "*effective in inhibiting the formation of calcium phosphate and calcium carbonate scale with consequent reduction of filming of the washed articles and improved shine*" (paragraph [0017] of the patent in suit).

2.2 The closest prior art

2.2.1 For the Board, the closest prior art is represented by document D1. This was not, as such, contested by the Appellant.

2.2.2 D1 discloses low-alkali detergents for dishwashing machines which comprise a (carbohydrate) builder and a sulfonated copolymer and aim, *inter alia*, at a reduced formation of scales (see in document D1, claim 1 in combination with page 1, lines 1 to 3, 15 to 19 and 26 to 30).

Moreover, as correctly observed by the Appellant, the sole embodiments disclosed in D1 that undisputedly are in the form of unit doses in the sense of claim 1 at issue are the tablets preferably having a weight of 15 g to 40 g, which are described in general in D1 (page 7, line 32, to page 8, line 16). Said tablets are obtainable, e.g. by tableting in a conventional tablet press, the components according to claim 1 of D1, i.e. a low-alkali machine dishwashing detergent which contains, *inter alia*, water-soluble builder components a builder and a copolymer derived from, *inter alia*, a 2-alkylallyl sulfonic acid or 2-arylallyl sulfonic acid monomer.

It was common ground among the Parties that these generally defined tablets are built ADC unit doses for the main-wash cycle that comprise a sulfonated anti-scaling polymer.

2.2.3 Thus, the Board considers it appropriate to start the assessment of inventive step from the disclosure in document D1 which relates to said unit doses in form of tablets, rather than from the granular composition "C" (as done by the Opposition Division).

2.3 Technical problem solved according to the Appellant

2.3.1 According to the Appellant (see XIV *supra*) the claimed ADC unit doses were improved compared to (unspecified) "standard" ADC unit doses of the prior art and, thus, presumably also compared to the ones disclosed in the closest prior art D1. The claimed unit doses resulted in a reduced formation of calcium carbonate scale and, in the presence of a phosphate builder, of calcium phosphate scale and, thus, in reduced filming of the washed articles and improved shine of the washed glasses.

2.3.2 Accordingly, the Appellant held that the technical problem consisted in the provision of ADC unit doses showing an **improved** level of these anti-scale benefits.

2.4 Proposed solution

In the Appellant's opinion, this problem was solved by the ADC unit doses according to claim 1 of the Main Request (wording under point V *supra*), which are characterized in particular in that they comprise

"from 3% to 6% by weight of the composition of a sulfonated anti-scaling polymer sufficient to provide at least 125 ppm of polymer by weight of the wash liquor"

and

"a precipitating builder which is carbonate and a sequestering builder which is a phosphate or non-phosphate detergency builder ... wherein the ratio of sequestering builder to precipitating builder is from 10:1 to 1:1."

2.5 Alleged success of the solution

2.5.1 The Appellant considered that it could be gathered from the overall information contained in the patent in suit and, in particular, from the content of paragraphs [0002], [0003], [0015] and [0017], that the "*excellent shine*" of the washed glasses observed in the patent examples was improved vis-à-vis the prior art and resulted from the specific concentration of the sulfonated anti-scaling polymer (in the unit dose as well as in the main-wash liquor) and from the ratio of sequestering to carbonate builder defined in claim 1 at issue.

In the Appellant's opinion, the skilled reader of the patent in suit would indeed understand that these features of the unit dose resulted in overcoming a specific drawback associated to the slow dissolution of (unspecified) "standard" ADC unit doses of the prior art (see XIV *supra*) containing carbonate and phosphate builders, namely an irreversible early formation of calcium carbonate and calcium phosphate scale that occurred in the initially underbuilt main-wash liquor that was formed during the slow initial dissolution of these ADC unit doses of the prior art.

2.5.2 For the Board, however, none of the description passages and examples invoked by the Appellant corroborates this view:

- The alleged drawback in terms of scale formation of ADCs of the prior art in unit dose form is neither mentioned nor implicitly acknowledged. In particular, also the general description of the advantages of the invention in the passage (in paragraph [0017]) that reads "*It has been found that builder-containing compositions which deliver*

certain levels of sulfonated anti-scaling polymer into the main-wash liquor are effective in inhibiting the formation of calcium phosphate and calcium carbonate scale with consequent reduction of filming of the washed articles and improved shine", does **not** refer expressly to unit doses i.e. its content appears to allege in general an advantage the ADCs of the invention in any form.

- Said passages and examples neither refer to, let alone contain, any comparative experimental data supporting the criticality alleged in paragraph [0017] of the "*certain levels*" of sulfonated anti-scaling polymer in view of the aimed anti-scale benefits.
- They do not demonstrate, theoretically justify or even merely allege that also the claimed ratio of sequestering builder to carbonate is critical for achieving the wanted anti-scale benefits.
- They do not contain any other information that allows to identify in comparison to which ADC of the prior art (in unit dose or another form) the level of filming of the washed articles and the shine of the washed glasses have been found or possibly just presumed to be improved as stated in paragraph [0017].
- Finally, they neither refer, explicitly or implicitly, to the speed of dissolution of e.g. ADCs in unit dose forms of the prior art, nor do they address considerations related to the level of dissolved builder in the washing liquor when these tablets are not yet fully dissolved.

Hence, for the Board, the patent in suit does not convincingly establish that the claimed ADC unit doses actually overcome the alleged drawback in terms of scale build-up occurring when using (unspecified) "standard" ADC unit doses of the prior art. Moreover, the patent contains no element of information rendering plausible that the alleged drawback was also to be expected when using the tablets according to the closest prior art, which already contain a sulfonated anti-scaling polymer.

2.5.3 The Board considers it appropriate to also stress in this connection that

- the Appellant did not provide additional evidence demonstrating or suggesting the existence of the alleged drawback of the prior art ADC unit doses,

and that

- the Respondents (see XIV *supra*) disputed the plausibility of this drawback.

Indeed, the Board finds convincing the Respondents' argument that in case a prior art ADC tablet dissolves more slowly than the corresponding formulation in granular form, this also inevitably implies a reduction (*vis-à-vis* the granular ADCs) of the initial concentration/s in the wash liquor of the carbonate and, if present, of the phosphate compounds, i.e. also a reduced initial concentration of the compounds which are responsible for the alleged carbonate and phosphate scale build-up.

Hence, the drawback alleged by Appellant to be associated to (unspecified) "standard" ADC unit doses

of the prior art not only fails to be mentioned in the patent in suit, but is also disputed, deprived of any supporting evidence and not plausible *per se*.

2.5.4 If only for these reasons, the Board concludes that the vague statement in paragraph [0017] and the vague disclosure of an "excellent shine" of the washed glasses in the patent example are not sufficient to render credible that e.g. the observed level of produced "shine" should (at least reasonably be expected to) be superior to the (observed or predicted) level of "shine" produced by (unspecified) "standard" ADCs in unit dose forms of the prior art. Thus, the content of the patent specification does also manifestly not sufficiently justify any prediction as to whether the "shine" provided by the claimed ADC unit doses was also likely to be superior to that to be specifically expected for the tablets of the closest prior art D1.

2.5.5 In conclusion, the Appellant did not present any convincing element on the basis of which it could be concluded that the level of anti-scale benefits obtained when using the unit doses according to claim 1 at issue is actually improved in respect to that observed or expected when using tablets according to the closest prior art. Thus, the Appellant did not convincingly show that the claimed subject-matter actually solved the stated technical problem (point 2.3.2 *supra*).

2.6 Reformulation of the technical problem

Considering the above findings, the technical problem must be reformulated in a less ambitious manner. In the light of the closest prior art (see 2.2.3 *supra*), it

can be seen in the provision of further ADC unit doses for the main-wash cycle, i.e. in the provision of an alternative to the prior art.

2.7 Success of the solution

The Board sees no reason for calling into question that ADC unit doses according to claim 1 at issue solve this problem. This was also not disputed by the Respondents.

2.8 Obviousness

Thus, it remains to be assessed whether the claimed solution was obvious in the light of the prior art.

2.8.1 It is to be noted that according to the wording of claim 1 at issue (see V *supra*) the claimed ADC unit dose comprises, in one alternative, a "*sequestering builder*" which is a "*non-phosphate*" builder, such as, for instance, a citrate (paragraph [0043] of the patent in suit).

2.8.2 Regarding obviousness of the claimed subject-matter, a key question is thus whether the skilled person seeking to solve the technical problem posed and trying to put into practice the general teaching of D1 concerning tablets would be induced to take those four measures which lead to a unit dose tablet falling within the terms of claim 1 at issue, namely

- 1) add a citrate ingredient,
- 2) add a carbonate ingredient,

3) choose relative amounts of these two builders such that their ratio is in the range of "10:1 to 1:1" defined in claim 1 at issue,

and

4) choose an amount of the sulfonated polymer that also satisfies the further conditions defined in claim 1 at issue, i.e. representing from 3% to 6% by weight of the ADC and resulting in a concentration of at least 125 ppm in the main-wash liquor.

2.8.3 For the Board, each of these measures belongs to possible measures suggested to the skilled reader of D1 seeking to implement embodiments of the ADCs described therein.

In particular, claim 5 of this citation, in combination with the claims 1 and 4 on which it depends, represents, for the Board, a manifest pointer to the incorporation of preferably 5 to 50% by weight carbonate together with preferably 20 to 50% by weight citrate. The combination of claims 1, 4 and 5 of D1 thus suggests the above-listed modifications "1)" and "2)".

Moreover, a skilled reader of document D1 would also be induced to make the above-listed modifications "3)" and "4)" for the following reasons:

i) It is immediately evident from the Table at page 11 of D1, and undisputed among the Parties, that in the composition according to the example "C" of D1 the ratio of citrate (sequestering builder) to carbonate builder is in the range of from 10:1 to 1:1 defined in

claim 1 at issue, irrespective of whether or not the bicarbonate component is also taken into account. The skilled person would consider working at ratios comparable to the ones exemplified in D1, e.g. in example "C".

ii) It is also common ground among the Parties that according to the examples of D1 the cleaning performance is determined in a main wash cycle using a dosage of (granular) detergent and a specified amount of water (see page 11, paragraph "Cleaning performance": "dosage of 30g in 7.0 l of water") such as to generate concentrations of the sulfonated copolymer (as used in compositions "A" and "C") well above 125 ppm.

iii) Moreover, the amount of sulfonated copolymer in one of the two examples (Example "C") is 5.0 % by weight of the whole detergent, i.e. well within the range of "3% to 6% by weight of the composition" defined in claim 1 at issue.

It is also to be stressed that the disclosure of document D1 contains no explicit or implicit indication that any of the above-listed measures "1)" to "4)" could result in difficulties when trying to provide, in tablet form, a unit dose having a composition similar to those of the granular ADCs exemplified in this citation.

Furthermore, the Appellant submitted no specific argument or evidence concerning technical reasons which would possibly keep the skilled person from envisaging any of the above four modifications.

2.8.4 Hence, in the Board's judgement, providing a unit dose ADC tablet with a composition resulting from the above-

listed measures "1)" to "4)", each of them being suggested as such by D1, is one of several equally obvious solutions to the posed technical problem which are readily available to the skilled person. Thus, to arrive at the claimed subject-matter only requires choosing one rather than other of these equally obvious solutions.

2.9 Therefore, the subject-matter of claim 1 at issue does not involve an inventive step (Articles 52(1) and 56 EPC).

2.10 Thus, the Appellant's Main Request is not allowable.
Non-admissibility of the 2nd Auxiliary Request

3. The set of claims according to this request was filed for the first time with the statement of grounds of appeal (initially labelled 4th Auxiliary Request).

3.1 The Appellant considered justified to file this request at that initial stage of the appeal proceedings because it had been confronted with several different attacks on inventive step during the opposition proceedings. Only after having read the reasons given in the decision of the Opposition Division it was in a position to identify possible restrictions of the claimed subject-matter allowing to further distinguish the latter from the prior art considered most relevant.

Moreover, claim 1 of the 2nd Auxiliary Request expressed, in combination, teachings of the original application that were all "directed" (i.e. based on alternative features of the invention qualified as preferred), with the sole exception of the requirement for the presence of the specific sulfonated anti-scaling polymer.

Finally, at least Respondents 2 and 3 had already expressed in their replies to the statement of grounds of appeal their objections as to the patentability of this amended set of claims.

3.2 In the assessment of the admissibility of this request, the Board also took into account the following aspects:

- The Appellant had filed several versions of the patent claims as Auxiliary Requests already during the opposition proceedings, also in reply to the inventive step objections of the Opponents.
- At the hearing before the Opposition Division (see minutes, point 21), prompted by the Chair, it had stated not to wish to file any further auxiliary request in response to the inventive step objections.
- A feature now contained in claim 1 of the 2nd Auxiliary Request, i.e. the restriction to a specific sulfonated anti-scaling polymer ingredient, was not present in any of the original or granted claims or of the amended claims filed before the Opposition Division.
- Said feature was neither qualified as preferred in the original patent application nor present in any of the patent examples.
- The specific combination of features according to claim 1 at issue was not explicitly mentioned in the patent application as originally filed. Hence, the assessment of the compliance of the so amended claim 1 with the requirements of Article 123(2) EPC required considering the additional issue of

the implicit disclosure of this combination of features, possibly derivable from the combination of some "directed" teachings with one "non-directed" teaching in the original patent application.

- 3.3 The Board, considering all the above circumstances, decided not to admit to into the proceedings this request which could and should already have been presented during the first instance proceedings, pursuant to Article 114(2) EPC and Article 12(4) RPBA.

Conclusion

None of the Appellant's requests is both admissible and allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



D. Magliano

B. Czech

Decision electronically authenticated