

**Internal distribution code:**

- (A) [ - ] Publication in OJ  
(B) [ - ] To Chairmen and Members  
(C) [ X ] To Chairmen  
(D) [ - ] No distribution

**Datasheet for the decision  
of 26 March 2014**

**Case Number:** T 1799/12 - 3.2.07

**Application Number:** 03013108.0

**Publication Number:** 1361172

**IPC:** B65D65/46

**Language of the proceedings:** EN

**Title of invention:**  
Water soluble package

**Patent Proprietors:**  
Unilever PLC  
Unilever N.V.

**Opponents:**  
Henkel AG & Co. KGaA  
Reckitt Benckiser (UK) Limited  
The Procter & Gamble Company

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(c)  
RPBA Art. 13(1)

**Keyword:**

Late filed requests - not admitted (new main, new second auxiliary, new third auxiliary and new fifth auxiliary requests)

Amendments - extension beyond the content of the parent application as filed (new first auxiliary and new fourth auxiliary requests) - yes (selection from a list without any pointers) - see point 2

**Decisions cited:**

T 0686/99, T 0407/10, R 0001/13

**Catchword:**



Europäisches  
Patentamt  
European  
Patent Office  
Office européen  
des brevets

**Beschwerdekammern  
Boards of Appeal  
Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 1799/12 - 3.2.07

**D E C I S I O N  
of Technical Board of Appeal 3.2.07  
of 26 March 2014**

**Appellant I:** Henkel AG & Co. KGaA  
(Opponent 1) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Von Rohr Patentanwälte Partnerschaft mbB  
Patentanwälte Partnerschaft  
Rüttenscheider Straße 62  
45130 Essen (DE)

**Appellant II:** Reckitt Benckiser (UK) Limited  
(Opponent 2) Dansom Lane  
Hull Humberside HU8 7DS (GB)

**Representative:** Bowers, Craig Malcolm  
Reckitt Benckiser Corporate Services Limited  
Legal Department - Patents Group  
Dansom Lane  
Hull Humberside HU8 7DS (GB)

**Appellant III:** The Procter & Gamble Company  
(Opponent 3) One Procter & Gamble Plaza  
Cincinnati, Ohio 45202 (US)

**Representative:** Samuels, Lucy Alice  
Gill Jennings & Every LLP  
The Broadgate Tower  
20 Primrose Street  
London  
EC2A 2ES (GB)

**Respondent I:** Unilever PLC  
(Patent Proprietor 1) Unilever House  
100 Victoria Embankment  
London  
EC4Y 0DY (GB)

**Respondent II:** Unilever N.V.  
(Patent Proprietor 2) Weena 455  
3013 AL Rotterdam (NL)

**Representative:** Bristow, Stephen Robert  
Unilever Patent Group  
Colworth House  
Sharnbrook  
Bedford, MK44 1LQ (GB)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
27 June 2012 concerning maintenance of the  
European Patent No. 1361172 in amended form.**

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** K. Poalas  
E. Kossonakou

## **Summary of Facts and Submissions**

- I. Appellants I, II and III (opponents 1, 2 and 3) lodged each an appeal against the interlocutory decision of the opposition division maintaining European patent No. 1 361 172 in amended form, which had been granted on a divisional application of European patent application 00 912 519.6 (the parent application).
- II. The oppositions had been filed against the patent as a whole based on Article 100(a) EPC (lack of inventive step) and on Article 100(c) EPC (unallowable amendments in examination).
- III. The opposition division found that the subject-matters of claims 1 and 11 according to the then main request meet the requirements of the EPC.
- IV. With their letter dated 14 November 2013 the respondents (patent proprietors) requested acceleration of the present appeal proceedings "to have a hearing, and decision, before mid-2014", due to the fact that they had commenced infringement proceedings in the United Kingdom, France and The Netherlands against appellant III and that at the same time appellant III had started nullity proceedings in the above-mentioned countries against the corresponding national parts of the patent in suit. With its letter dated 20 November 2013 appellant III supported the respondents' request for acceleration of the appeal proceedings.
- V. The Board reacted by summoning the parties with its communication dated 15 January 2014 to oral proceedings scheduled for 26 March 2014. In the annex to said summons the Board gave its preliminary opinion concerning some of the amendments carried out in

- examination and the objection of lack of inventive step in respect of the respondents' main and first to eighth auxiliary requests filed with letter dated 5 March 2013 as the respondents' reply to the statement setting out the grounds of appeal.
- VI. With letter dated 14 February 2014 appellant III provided further arguments why the other amendments in examination would not hold against the ground of opposition under Article 100(c) EPC. With letter dated 20 February 2014 the respondents filed amended claims in the form of a new main request and new first to fifth auxiliary requests. With letter of 11 March 2014 appellant III objected to the allowability of the newly filed requests, in particular regarding Articles 123(2) and (3) EPC, Rule 80 EPC and Article 84 EPC.
- VII. Oral proceedings took place before the Board on 26 March 2014.
- a) The appellants requested that the decision under appeal be set aside and that the European patent No. 1 361 172 be revoked. It was also requested that the new requests filed by the respondents with letter dated 20 February 2014 not be admitted into the proceedings.
  - b) The respondents requested that the appeals be dismissed and the European patent be maintained on the basis of the new main request or one of the new first to fifth auxiliary requests, all new requests filed with letter dated 20 February 2014.
- VIII. Claim 1 according to the **new main request** is identical with claim 1 of the **new first auxiliary request** and reads as follows (the differences over claim 1 of the

parent application as filed are depicted in bold or struck through; the amendments over claim 1 of the patent as granted are depicted in italics and struck through):

"1. A water soluble package containing a ~~fluid substance~~ **laundry detergent** for release on dissolution of the package, characterised in that

- the package has a body portion for containing the ~~substance~~ **laundry detergent fluid** comprising a first sheet of a water soluble material thermoformed to form a body wall of the body portion, and a second sheet of water soluble material superposed on the first sheet and sealed thereto along a continuous region of the superposed sheets to form a ~~generally~~ **rectangular or square** base wall of the body portion, ~~and in that~~

- the body portion of the package is generally dome shaped,

- **first and second sheets of water soluble material comprise a polyvinyl alcohol or a polyvinyl alcohol derivative,**

- **the maximum height of the body wall above the base wall is less than or equal to the maximum width of the base wall,**

- **the laundry detergent is a liquid ~~or gel~~ having a viscosity of between 0,1 and 1 Pa.s (100 and 1000 centipose) when measured at 20°C and 105s<sup>-1</sup>.**

Dependent claim 2 according to the **new main request** is identical with claim 2 of the **new second auxiliary request** and reads as follows (amendments over claim 2 of the patent as granted are depicted in bold):

"2. A package according to claim 1 characterised in that the base wall is **somewhat concave or convex**".

Claim 1 of the **new third auxiliary request** differs from claim 1 according to the new main request in that the term "**generally**" before the expression "**dome shaped**" has been **deleted**.

Claim 1 of the **new fourth auxiliary request** is for a process for the machine washing of laundry by employing a package according to claim 1 of either the new main request or the new first auxiliary request, their respective claims 1 being identical.

Claim 1 of the **new fifth auxiliary request** is for a process for the machine washing of laundry by employing a package according to claim 1 of the new third auxiliary request.

IX. The arguments of the appellants, insofar as relevant for the decision, can be summarised as follows:

*Admissibility of the respondents' new requests*

The scope of the term "generally rectangular" does not overlap with the term "rectangular". The first defines shapes which are geometrically almost rectangular (e.g. those of which the opposing sides are not quite parallel) but **excludes** those which are exactly rectangular. Accordingly, the deletion of the term "generally" has changed the scope of the claim so that it now covers other embodiments. The claims 1 of all the new requests are therefore *prima facie* not in conformity with the requirements of Article 123(3) EPC.

The dependent claims 2 of the new main request and of the new second auxiliary request *prima facie* contravene the requirements of Article 84 EPC, since the introduced term "somewhat" is inherently unclear; these



requests should therefore not be admitted.

The expression "generally dome shaped" in claim 1 of the patent as granted was needed, according to the parent application as filed, to make sure that if the body portion had a base which was "generally rectangular or square" the body portion could still have a dome shape, because a true dome can only have a circular base. With the deletion of "generally" before the "dome shaped" as well as before "rectangular or square base wall" the claim now protects a different entity, namely one in which a true dome has a base shape **other** than circular.

Claims 1 of the new third auxiliary and new fifth auxiliary requests are therefore *prima facie* not in conformity with the requirements of Article 123(3) EPC.

*Claim 1 according to the new first auxiliary request - amendments over the parent application, Article 100(c) EPC*

According to claim 8 and lines 15 to 16 of page 5 of the parent application as filed, the fluid contained within the package may be a liquid, a gel or a paste, i.e. a list of three possibilities, none of which is mentioned as preferred. Only if the selection is liquid, is there a preferable viscosity mentioned in lines 16 to 21 of page 5 of the parent application as filed. The fact that there is a preferred viscosity range for liquids does not mean that liquids per se are preferred over gels and pastes.

As far as it concerns the base wall shape, the choice of rectangular or square is also from a list (of four possible shapes) none of which is mentioned as

preferred. Already because the two selections are not characterised as being preferred, there is no direct and unambiguous disclosure of the claimed combination of the features of the package.

There is also no pointer to be found in the parent application as filed, e.g. in the examples, towards this combination of features, see e.g. T 407/10, not published in OJ EPO, point 2.1.3 of the reasons.

There is nothing to be found in the parent application as filed supporting the respondents' allegation that the invention, in order to increase the rupture-resistance of a water-soluble package, started from one containing a **liquid**. The reference on pages 2 and 3 of the parent application is to fluid, not liquid and on page 9, line 4 there is a mention of a liquid detergent but that is only in combination with a circular base wall and the liquid being non-aqueous.

*Claim 1 of the new fourth auxiliary request - amendments over the parent application, Article 100(c) EPC*

The arguments presented for claim 1 of the new first auxiliary request are also applicable to claim 1 of the new fourth auxiliary request.

- X. The respondents argued essentially, in so far as relevant for the decision, as follows:

*Admissibility of the respondents' new requests*

The objection raised by the appellants based on Article 123(3) EPC against the deletion of the term "generally" before the expression "rectangular or square" is an

admissibility objection raised late and should not be taken into consideration by the Board. Said deletion was already present in the second, fourth, sixth and eighth auxiliary requests filed with the respondents' reply to the grounds of appeal.

The term "somewhat" present on page 4, line 18 of the parent application has been introduced into claim 2 of the new main and new second auxiliary requests in order to overcome the Board's objections based on Article 100(c) EPC. The term "somewhat" is a clear term defining that the base wall is not exactly concave or convex.

The expression "generally dome shaped" covers true dome shapes as well as adaptations, which will, however, still be called "dome shaped"; the deletion of the term "generally" renders the term more limited, therefore does not contravene the requirements of Article 123(3) EPC.

*Claim 1 according to the new first auxiliary request - amendments over the parent application, Article 100(c) EPC*

The claimed selection of the preferred viscosity according to page 5, lines 16 to 22 of the parent application as filed leads automatically to the selection of a liquid for the laundry detergent. This is clear from the example of the parent application mentioning on page 9, lines 4 to 5 that the package is filled with a "non-aqueous liquid detergent". This example should be read in conjunction with the teaching in page 5 about the preferred viscosity for liquids.

The only selection from a list in the present case is

the selection of the base wall shape being rectangular or square, i.e. two are selected from a list of five options. Square and rectangular are similar shapes having both two pairs of parallel sides arranged at right angles to one another, thus the selection of this "pair" from the list of five options cannot be seen as a surprising choice. There was a clear pointer in the parent application to the substitution of the circular base mentioned in the example by a square or rectangular base, still in combination with the other features of that example, by the inclusion of the various drawings in those examples, which indicate alternative shapes that the skilled person may use for the base wall. There is no teaching in the parent application as filed that any of the depicted shapes is not to be used in combination with any of the other features of claim 1. The circular shape was referred to as preferred shape for purely aesthetic reasons.

Furthermore, there is an implicit disclosure in the parent application as filed that, when dealing with the rupture resistance of water-soluble packages filled with a fluid, the most severe problem arises when the package is filled with a **liquid**. Packages filled with a fluid in the form of a gel or of a paste are not so critical. Thus, there is an implicit teaching in the parent application to fill the package with liquid and to try out such liquid filled packages with the possible base wall shapes mentioned therein. For doing so the person skilled in the art does not need any advantage to be mentioned in connection with the rectangular or square shape.

In conclusion, there is no arbitrary selection of features out of different lists in claim 1 according to the new first auxiliary request.

*Claim 1 of the new fourth auxiliary request - amendments over the parent application, Article 100(c) EPC*

The arguments presented for claim 1 of the new first auxiliary request are also applicable to claim 1 of the new fourth auxiliary request.

### **Reasons for the Decision**

1. *Admissibility of the respondents' new requests*
  - 1.1 According to Article 13(1) RPBA it is in the Board's discretion to admit and consider any amendment to a respondent's case **after** it has filed its reply to the statement of grounds of appeal. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.
  - 1.2 Since the above-mentioned "*inter alia*" makes clear that this list of criteria is not exhaustive, the jurisprudence of the Boards of Appeal has brought forward further aspects which can be taken into account in this context, in particular whether the new request with amended claims is likely (i.e. *prima facie*) to overcome the objection(s) in response to which it was filed (see R 1/13, not published in OJ EPO, reasons nr. 16.2 and Case Law of the Boards of Appeal, 7<sup>th</sup> edition, 2013, IV.E.4.2.1, 3<sup>rd</sup> paragraph).
  - 1.3 The independent claims of the new first and the new fourth auxiliary requests are identical with the corresponding claims of the second and eighth auxiliary requests filed with the respondents' reply to the

statement of grounds of appeal dated 5 March 2013. This means that there is no amendment to the respondent's case. It follows that the admission of said new requests cannot be objected to under Article 13(1) RPBA, as was also argued by the respondents.

1.4 As far as it concerns the introduction of the expression "somewhat concave" into claims 2 of the new main and new second auxiliary request after the Board had summoned to oral proceedings, the Board considers the term "somewhat" as being a relative one which does not, at least *prima facie*, clearly define the curvature boundaries of the concave or convex forms of the base wall to which it refers. Since therefore the above-mentioned amendments are not clearly allowable, the Board does not admit the new main and the new second auxiliary requests into the proceedings.

1.5 As far as it concerns the deletion of the term "generally" before the expression "dome shaped" in the claims 1 of the new third and the new fifth auxiliary requests after the Board had summoned to oral proceedings, the Board considers that this deletion raises new issues as concerns the actual object of the claims and whether this object was covered by the claims of the patent as granted. This concerns the question whether the "true dome shape" resulting from the deletion of "generally" can exist together with the body portion having a rectangular or square base wall. Since the above-mentioned amendment in these claims 1 raises new issues and is not *prima facie* allowable, the Board does not admit the new third and the new fifth auxiliary requests into the proceedings.

2. *Claim 1 of the new first auxiliary request - amendments over the parent application, Article 100(c) EPC*

2.1 Claim 1 of the new first auxiliary request is identical with claim 1 of the patent as maintained with the impugned decision, apart from the further deletion of "generally" before the term "rectangular or square base". This amendment has no effect on the reasoning that follows.

2.2 Claim 1 of the patent as granted had been objected to during the opposition proceedings under Article 100(c) EPC by appellant III as regards the features that

- a) the base wall has a "rectangular or square" shape and
- b) the fluid is a laundry detergent,

on the grounds that this amounted to making a specific choice out of two lists in the **parent application**.

Claim 1 of the patent as maintained with the impugned decision provoked a further objection of an inadmissible amendment over the **parent application**, namely of another choice from a list in the parent application, in that

- c) the laundry detergent is a liquid,

which then has the already claimed viscosity of between 0,1 and 1 Pa.s (100 and 1000 centipoise) when measured at 20°C and 105s<sup>-1</sup>.

It was in particular argued that the parent application is not a reservoir of features from which the features of the present invention could be composed at will.

2.3 The same objections were raised by appellant III in its appeal citing in support the decision T 407/10 (*supra*).

In particular for features a) and b) the objection in appeal is based on the original ground of opposition under Article 100(c) EPC, namely extension of subject-matter beyond the parent application as originally filed. For feature c) the objection is non-compliance with the requirements of Article 123(2) EPC in respect of the underlying divisional application as filed and moreover non-compliance with the requirements of Article 76(1) EPC in respect of the parent application.

- 2.4 It is undisputed that the above-mentioned features a), b) and c) can be found separately, but not in combination with each other in the parent application as originally filed.

In order to determine in the present case whether or not the subject-matter of a claim extends beyond the content of the **parent application** as originally filed, it has to be examined whether that claim comprises technical information which a skilled person would not have **clearly** and **unambiguously** derived from that application.

Appellant III refers specifically to T 407/10 (*supra*), point 2.1.3 of the reasons, which refers in turn to the established jurisprudence on amendments arrived at by selecting features from different lists (now Case Law of the Boards of Appeal, 7<sup>th</sup> edition 2013, chapter II.E. 1.1.5, page 371).

The Board finds that this jurisprudence establishes that such a selection in principle violates Article 123(2) EPC. The premise is that the original application is not simply a reservoir from which the necessary features need only to be "tapped".



However, the jurisprudence and this decision correctly refer to further circumstances that need to be taken into account, such as **pointers** to that selection or combination in the description and in the examples, for instance the fact that the features in question have been mentioned in the description as "preferred". Further, the circumstance that the list consists of **equivalent alternatives** could also play a role (see Case Law of the Boards of Appeal, 7<sup>th</sup> edition 2013, chapter II.E.1.7, page 408, more in particular T 686/99, not published in OJ EPO, points 4.3.1 to 4.3.3 of the reasons).

2.5 Feature a) (the base wall has a rectangular or square shape)

As feature a) is determining the outcome, features b) and c) can be left aside.

The passage of the description of the parent application as filed mentioning the above-mentioned feature a) (the base wall has a rectangular or square shape) reads as follows:

"The base wall is preferably generally circular but other dome shaped body portions according to the invention are envisaged. For example, dome shapes having rectangular, oval, square and triangular bases are envisaged", see page 4, lines 13 to 15.

Packages provided with the five above-mentioned base wall shapes are depicted in figures 1a to 5d of the parent application as filed.

However, the fact that the figures illustrate the various possible base shapes is not particularly

relevant in the present case, since the figures merely illustrate all the five base shapes mentioned in the description, without prioritising rectangular or square base wall shapes over any other shape.

- 2.6 To the contrary, according to the above-mentioned passage on page 4 of the description the base wall is preferably generally circular. This shape is also used in the description of how the package is formed in the forming die, see page 8, lines 8 to 11. In the claims (3 and 4) only a generally circular base wall and a generally oval base wall are mentioned.
- 2.7 In the experiments i) (pages 10 and 11) the five base wall shapes mentioned on page 4, lines 13 to 16 of the parent application are grouped as follows: circular or oval shapes having no corners (called "domes"), triangular shapes having three straight lines and three corners and rectangular or square shapes having four straight lines and four corners (called "cubes"). In these experiments, the thinning of the base material during the thermoforming (drawing by vacuum into a mould cavity) is measured. As a result, it was concluded that the dome shape, i.e. the one with a circular or oval base wall, has a uniform thickness and so is less thinning at the corresponding test points than the "triangle" or the "cube", the latter having more thinning at the corners than the former. This is already a pointer in favour of the dome shape, i.e. **not** the triangle or the cube shape.

In the following experiments ii) (pages 12 and 13) the impact testing is performed again on "dome", "triangle" and "cube". Here again, the "dome" shows a higher impact resistance than the "triangle" or "cube", the latter being worse off.

- It is therefore not a surprise that the final experiments iii) (pages 13 and 14) continue only with the "dome" and the "triangle", resulting again in favour of the "dome" over the "triangle".
- 2.8 From the above the Board concludes that for the skilled person, in the parent application not only is there no pointer available towards the choice of a square or rectangular base wall shape, but that there is a clear pointer in the opposite direction, namely towards base wall shapes without any corners ("generally circular" or "oval"). By the same token, the five possible shapes are not equivalent alternatives. The possible conditions in favour of allowing the presently claimed selection (see point 2.4 above) are therefore not fulfilled.
- 2.9 Support for the respondents' argument that there is an implicit disclosure in the parent application as filed that the circular shape was preferred only for purely aesthetic reasons and that the most severe problem when dealing with the rupture resistance of water-soluble packages filled with a fluid is when the package is filled with a liquid, cannot be found in the parent application as filed.
- 2.10 In the light of the preceding considerations of points 2.7 and 2.8 above, also the respondents' further arguments, concerning the absence of a "negative" pointer for not combining any disclosed shape with any of the other features of claim 1 or the submission that the selection of the pair of rectangular and square shapes cannot be seen as a surprising pairing, cannot help further.

2.11 For the above-mentioned reasons the ground for opposition under Article 100(c) EPC holds against claim 1 of the new first auxiliary request.

3. *Claim 1 of the new fourth auxiliary request - amendments over the parent application, Article 100(c) EPC*

3.1 Since claim 1 of the new fourth auxiliary request concerns a process for the machine washing of laundry by employing a package with the features according to claim 1 of the new first auxiliary request, the arguments as presented above for claim 1 according to the first auxiliary request are also applicable here.

3.2 Accordingly, the subject-matter of claim 1 of the new fourth auxiliary request extends beyond the content of the parent application as filed and the ground for opposition under Article 100(c) EPC holds against said claim.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated