Internal distribution code:

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

Datasheet for the decision of 13 September 2016

Case Number: T 0595/13 - 3.3.06

Application Number: 06794654.1

Publication Number: 1941019

IPC: C11D11/00, C11D3/37, C11D3/00, C11D3/39, C11D17/04, C11D3/395

Language of the proceedings: EN

Title of invention:
CHEMICAL COMPOSITION AND USES

Patent Proprietor:
Reckitt Benckiser N.V.

Opponent:
Henkel AG & Co. KGaA

Headword:
Two-compartment product / Reckitt Benkiser N.V.

Relevant legal provisions:
EPC Art. 52(1), 54(3)
RPBA Art. 12(4)

Keyword:
Novelty (Main Request) - no
Late-filed requests (1st to 5th Auxiliary Requests) - not admitted: no convincing justification for not filing such requests in the first instance proceedings despite being given the opportunity

Decisions cited:

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 0595/13 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 13 September 2016

Appellant: (Patent Proprietor)	Reckitt Benckiser N.V. Siriusdreef 14 2132 WT Hoofddorp (NL)
Representative:	Bowers, Craig Malcolm Reckitt Benckiser Corporate Services Limited Legal Department - Patents Group Dansom Lane Hull HU8 7DS (GB)
Respondent: (Opponent)	Henkel AG & Co. KGaA Henkelstrasse 67 40589 Düsseldorf (DE)
Representative:	Henkel AG & Co. KGaA CLI Patents Z01 40191 Düsseldorf (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 13 February 2013 revoking European patent No. 1941019 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	B. Czech
Members:	P. Ammendola
	C. Heath

Summary of Facts and Submissions

I. This appeal is against the decision of the Opposition Division revoking European patent No. 1 941 019.

II. Claim 1 of the patent as granted (below **claim 1**) reads as follows:

"*1. A product comprising separate first and second compartments, the first compartment containing a first component of a composition in a stable environment, the second compartment containing a second component of the composition in a stable environment, wherein, in use, the said two components are combined together to form said composition, and wherein the temperature of said composition is elevated when compared to the temperature of the components prior to said combination, wherein the product comprises a low molecular weight polymer, wherein the low molecular weight polymer has a molecular weight of up to 15,000, and wherein the low molecular weight polymer is a polycarboxylate.*".

III. The patent had been opposed on the grounds of, *inter alia*, lack of novelty (Article 100(a) EPC) over document

D2 = WO 2007/025665

that is prior art under the provisions of Article 54(1) and (3) EPC.

In the minutes of the oral proceedings before the Opposition Division, it is indicated that the Chairman, after having announced the conclusion of the Opposition

Division that the subject-matter of claim 1 lacked novelty over D2, "inquired whether the patent proprietor would submit an amended request, to which he replied that he had no further submission to make" (page 1, penultimate paragraph, of the minutes of oral proceedings).

IV. According to the Opposition Division's decision D2 takes away the novelty of the subject-matter of claim 1 at issue because this document discloses in particular:

- in claim 6, a combination product of two liquid cleansers or detergents separated from each other in a packaging, wherein the pH of the first liquid cleanser or detergent differs from that of the second one by at least two pH units and wherein both liquid cleansers or detergents comprise a builder,

and

- several alternative suitable builders including, specifically, polyacrylate builders having a molecular weight from 2000 to 10,000 g/mol specifically mentioned in the last paragraph on page 5.

The Opposition Division took into account that it was undisputed that when combining such two liquid cleansers or detergents "having a different pH, a neutralization reaction will take place, which causes a temperature elevation" (see page 4, first paragraph, of the reasons of the decision under appeal).

V. In its statement of grounds of appeal the Appellant (Patent Proprietor) defended the patent as granted (Main Request). With the statement, it nevertheless filed five sets of amended claims as First to Fifth Auxiliary Requests.

VI. The Board summoned the Parties to oral proceedings, which were held on 13 September 2016. The Parties were heard regarding novelty of claim 1 over document D2 and regarding the admissibility of the Appellant's Auxiliary Requests into the proceedings.

The Chairman asked the Appellant why these Requests had not already been filed at the oral proceedings before the Opposition Division although it had explicitly been given the opportunity to do so. The Appellant stated to have no submission to make in this regard.

VII. Requests

The Appellant requested that the decision under appeal be set aside and the patent be maintained as granted (Main Request) or, in the alternative, that the patent be maintained in amended form on the basis of the claims according to one of the First to Fifth Auxiliary Requests filed with the statement of grounds of appeal.

The Respondent (Opponent) requested that the appeal be dismissed.

VIII. The submissions of the Appellant may be summarised as follows.

Novelty - claim 1 as granted

In order to arrive at the subject-matter of claim 1, the person skilled in the art had to mosaic at least the three following selections within the various alternatives disclosed in document D2:

i) The choice, as liquid components A and B, of components differing by at least two pH units as

disclosed e.g. in claim 6, rather two components as defined in e.g. claim 1 (and many corresponding passages in the specifications) of D2, which could both have a same pH of about 9 and would, thus, not produce heat when combined.

ii) The choice of low molecular weight polyacrylate polymers as mentioned in the last paragraph of page 5, out of a long list of possible builders (page 2, third paragraph, to page 7, fifth paragraph.

iii) The choice of the possibility disclosed in D2 (page 53, second paragraph 2; page 56, third paragraph) to simultaneously dose the two components (e.g. in a dishwasher) rather than the other disclosed possibility to dose them separately (sequentially) (pages 57 and 58).

The latter selection iii) would be necessary because, when dosed separately, the components would not come in contact with each other and no neutralisation and, thus, no generation of heat could occur. Considering claim 1 mentioned combining the two components and the (resulting) elevated temperature of the composition, claim 1 was "not a pure/simple product claim" and the dosing of the composition was "a limiting feature of the claim" (see e.g. page 3 of the statement of grounds of appeal, sixth and seventh paragraph).

Moreover, D2 provided no significant incentive for the person skilled in the art to make these selections i) to iii). In particular, D2 was totally silent as to components generating heat when combined. Thus, only with hindsight, i.e. having knowledge of the present

invention, could the skilled person reading D2 arrive at subject-matter according to claim 1.

Hence, the subject-matter (product) of claim 1 as granted was not anticipated in D2.

Admissibility into the appeal proceedings of the First to Fifth Auxiliary Requests

The Auxiliary Requests had been filed with the statement of grounds of appeal, i.e. at the beginning of the appeal proceedings as required by Article 12(1) RPBA. They had been filed in reaction to the finding of the Opposition Division in the decision under appeal.

IX. The counter-arguments of the Respondent may be summarised as follows.

Novelty - claim 1 as granted

In view of claim 6 of D2, the only "selection" that had to be made within this document in order to arrive at subject-matter falling within the ambit claim 1 at issue, was the choice, as builder ingredient, of the specific low molecular weight polyacrylate builder(s) explicitly disclosed in D2 (page 5, fourth paragraph). Hence, a product according to claim 6 of D2 also comprising such builder(s) was part of the direct and unambiguous disclosure of this prior art document.

It was irrelevant for the assessment of novelty of claim 1 as granted that D2 also suggested the possibility of separately dosing the two liquid components. Claim 1 at issue was a product claim and the reference to the method for using such product only imposed that the two components had the property to

produce heat upon being combined, but no further in terms of the method of dosing.

It was also irrelevant that in D2 it was neither expressly indicated that components A and B had to have the ability to release heat upon being combined, nor for which purpose the components according to claim 6 of D2 had to have respective pH values differing by two units. It was sufficient for (accidental) novelty anticipation that the two components directly and unambiguously disclosed in D2 had a chemical composition being such that upon their mixing they heat would necessarily be generated.

Hence, the Opposition Division had correctly established that claim 1 as granted was not novel in view of D2.

Non-admissibility into the appeal proceedings of the First to Fifth Auxiliary Requests

The pending Auxiliary Requests were filed for the first time with the statement of grounds of appeal in an attempt to overcome the novelty objection in view of D2. However, this particular objection had already been debated in writing and orally before the Opposition Division. Such auxiliary requests could and should thus have been filed at latest at the first instance oral proceedings, when the Chairman had explicitly offered to the Appellant an occasion to do so.

Accordingly, the Board should not admit these request in to the proceedings.

Reasons for the Decision

Main Request (patent as granted)

1. Novelty: claim 1

1.1 Construction of claim 1

1.1.1 Claim 1 as granted (wording under II, *supra*) defines a product comprising two separate compartments, each containing one component of a composition in a stable environment. The claim further requires
(a) that, "*in use*", the "*two components are combined together to form the composition*";
(b) that "*the temperature of the said composition is elevated in comparison to the temperature of said components prior to said combination*" , and
(c) that the product comprises a "*polycarboxylate with a molecular weight of up to 15,000* is comprised in the product.

1.1.2 The Board notes that the requirements "(a)" and "(b)" actually relate to the use of the product (i.e. to circumstances occurring e.g. during dosing).

1.1.3 However, the presence, in a claim directed to a product, of features relating to the use of that product does not necessarily imply a change in the nature or type of the claimed subject-matter, which in the present case is, despite the presence of use-related features, that of a product, i.e. of an aggregation of matter, and not that of an activity or some hybrid of the two. Indeed, such use-related features may only be considered to be limiting in terms of the product claimed in as far as they necessarily

imply further requirements in terms of e.g. properties the product itself.

1.1.4 The Board holds, however, that in the present case, the requirements "(a)" and "(b)" of claim 1 only imply a difference in the chemical composition of the two components which must be such that when(ever) the two components are combined, some significant amount of heat is generated.

1.1.5 Accordingly, the Board concludes that upon proper interpretation of the wording of claim 1, the latter defines a two-compartment product stably containing two separate components and being moreover characterised in that

(i) the chemical composition of these two components must be such that heat is spontaneously generated when they are combined and

(ii) one or both component(s) must comprise a polycarboxylate with a molecular weight of up to 15,000.

1.2 Prior art status of D2

It is not in dispute that D2 belongs to the state of the art to be considered under the provisions of Article 54(3) EPC.

1.3 Relevant disclosure - document D2

1.3.1 D2 directly and unambiguously discloses in claim 6 and in the description (page 17, line 7, to page 18, line 1) a product ("Kombinationsprodukt") comprising a packaging means with two compartments separated from each other, in which two liquid components A and B

(described as cleansers or detergents) are placed, respectively. These liquid components A and B comprise (unspecified) builder ingredients. The product according to dependent claim 6 of D2 is more specific than the product of claim 1 of D2 insofar as the pH of the first liquid component must differ from the pH of the second component by least two pH units.

1.3.2 D2 also directly and unambiguously discloses (page 5, last paragraph) that polyacrylates (i.e. polycarboxylate polymers) with a molecular weight of 2000 to 10,000 g/mol are a possible builder ingredient (amongst several others) generally suitable for being incorporated into the products disclosed in this document.

1.3.3 In view of the above, the Board concludes that D2 also directly and unambiguously discloses *inter alia* a product according to claim 6 of D2, wherein the builder ingredient is a polyacrylate with a molecular weight of 2000 to 10,000 g/mol as referred to on page 5 of D2.

1.3.4 Moreover, it is undisputed that due to the difference in pH of at least two units, heat would inevitably be generated upon combining the two liquid components A and B of the product of claim 6 of D2.

1.3.5 The Board concludes therefore that the product disclosed in D2 by claim 6 read together with the indication regarding low molecular weight polyacrylate as builder (page 5, last paragraph) necessarily has all the (product) features of the product of claim 1 at issue as construed by the Board (1.1.5, *supra*).

1.4 The Appellant's argument that the person skilled in the art needed to mosaic several selections within the

alternatives disclosed in D2 in order to arrive at a product having all the features of claim 1, is not convincing for the following reasons.

1.4.1 Everything that a pre-published document discloses directly and unambiguously to the skilled person reading it forms part of the prior art. The fact that one and the same document discloses (even directly and unambiguously) further different embodiments of the general teaching given therein is of not particular relevance in this respect.

1.4.2 Accordingly, the fact stressed by the Appellant that D2 also discloses (e.g. in claim 1) embodiments in which the two liquid components need not have pH values differing by two units has no bearing on the fact that claim 6 discloses more specific two-compartment products containing two liquid components A and B that do display a difference in pH of at least two nits.

1.4.3 The Appellant also stressed that D2 describes (page 2, paragraph 3, to page 7, paragraph 5) many other alternative builders that may be used.

1.4.4 However, this has no bearing on the fact D1 discloses that each of these builder alternative may generally be used in the products taught by D2.

1.4.5 Completing the disclosure by claim 6 of D2 by choosing and retaining said polyacrylates as the builder component requires only one choice among a plurality of equally disclosed options. For the Board, the resulting more specific product is also directly and unambiguously disclosed by D2.

1.5 Finally, the fact, also stressed by the Appellant, that D2 at pages 57 and 58 suggests, *inter alia*, the possibility of dosing sequentially the two components contained in a two-compartment product, i.e discloses a method of using such product where heat is not necessarily generated (no combining of the products), is also of no relevance for the novelty assessment.

1.5.1 In particular, a two-compartment product according to D2 complies with feature "(i)" of claim 1 at issue (see 1.1.5 and 1.3.4, *supra*) whenever the liquid components A and B separately contained therein differ in terms of their pH value by at least two units, irrespective of any conceivable subsequent use of said two-compartment product and, thus, also irrespective of whether or not heat generation actually occurs due to combining liquid components A and B during such use.

1.6 On the basis of the above considerations, the subject-matter of claim 1 as granted is thus not, in the Board's judgement, novel over D2 (Articles 52(1), 54(1) and (3) EPC).

1.7 Hence, the Appellant's Main Request is not allowable.

First to Fifth Auxiliary Requests

2. Admissibility (Article 12(4) RPBA)

2.1 The First to Fifth Auxiliary Requests have all been filed for the first time with the statement of grounds of appeal.

2.2 According to Article 12(4) RPBA the Board has the discretionary power to hold inadmissible, *inter alia*, requests filed with the statement of grounds of appeal

which could have been presented in the first instance proceedings.

2.3 The Board noted the following undisputed facts:

- These Auxiliary Requests were presented to overcome the novelty objection based on D2.

- This objection had been on file since the beginning of the opposition proceedings and had been discussed in writing and in oral proceedings before the Opposition Division.

- At these oral proceedings the Appellant had also been informed that the Opposition Division had come to the conclusion that D2 anticipated the subject-matter of claim 1 and had been offered the possibility to react at such finding.

- The Appellant had, however, answered to the enquiry of the Chairman as to whether it intended to file amended requests by expressly stating that it had no further submissions to make.

- Neither in the statement of ground of appeal nor during the oral proceedings before the Board did the Appellant present any argument possibly justifying why it had not submitted such Auxiliary Requests when the Opposition Division had offered it the possibility to do so.

The Board therefore concluded that these requests could and should have been filed already before the first instance and that there was no other reason possibly justifying their filing only at the appeal stage.

2.4 Hence, the Board, in the exercise of its discretionary power under Article 12(4) RPBA, decided not to admit the First to Fifth Auxiliary Requests into the proceedings in view of their belated filing.

Conclusion

3. 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