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**Datasheet for the decision
of 22 September 2020**

Case Number: T 0084/17 - 3.3.06

Application Number: 08804202.3

Publication Number: 2195407

IPC: C11D3/38, C11D3/386, A61Q19/00

Language of the proceedings: EN

Title of invention:

IMPROVEMENTS RELATING TO FABRIC TREATMENT COMPOSITIONS

Patent Proprietor:

Unilever PLC
Unilever N.V.

Opponents:

Henkel AG & Co. KGaA
THE PROCTER & GAMBLE COMPANY

Headword:

Fabric treatment with probiotics /UNILEVER

Relevant legal provisions:

EPC Art. 54
RPBA Art. 12(4)
RPBA 2020 Art. 25(2)

Keyword:

Novelty (granted claims) - no

Late-filed requests (Auxiliary Requests 1 to 4) - not admitted

Decisions cited:

G 0007/93, T 2415/13, T 0129/12, T 0151/05, T 0463/95,

T 1485/08, T 0544/12

Catchword:

If the arguments in the appealed decision show that for the discretionary decision taken in the first instance some criteria weighed so heavily that other criteria cannot outweigh them, it is not always necessary that all criteria that could theoretically influence a discretionary decision concerning the admittance of a late filed request are discussed in the appealed decision (point 2.2.3)

If the need to file amended requests does not arise owing to the submission of additional documents that are merely confirming the arguments on file but had existed before, the filing of such additional documents cannot always justify the filing of new (belated) requests (point 2.3).



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Case Number: T 0084/17 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 22 September 2020

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 October 2016
revoking European patent No. 2195407 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: P. Ammendola
 J. Hoppe

Summary of Facts and Submissions

- I. The patent proprietor (appellant) appealed against the decision of the opposition division revoking European patent No. 2 195 407, claim 1 of which reads:
- "1. A fabric treatment composition for use in a laundering process which comprises:*
- a) a surfactant selected from the group consisting of anionic surfactant, nonionic surfactant, cationic surfactant and mixtures thereof,*
 - b) a probiotic particle, and*
 - c) a deposition aid."*
- II. During the first instance oral proceedings, after the chairman had announced the conclusion that granted claim 1 lacked novelty, the patent proprietor submitted four sets of amended claims labelled as auxiliary requests 1 to 4. The opposition division used its discretion not to admit any of them.
- III. In the contested decision, the fabric treatment composition ("FT composition") of granted claim 1 was held to be anticipated, *inter alia*, by the prior art disclosed in Example 1 of D3 (WO 2004/106481) and D8.
- IV. With its statement of grounds of appeal, the appellant resubmitted auxiliary requests 1 to 4 and filed a new document (D12: declaration of Nigel Bird, Technology Manager at Unilever PLC/ Unilever N.V.). Both opponents 1 and 2 (respondents 1 and 2) objected, *inter alia*, to the admittance of auxiliary requests 1 to 4.

V. At the end of the oral proceedings, the appellant requested that the decision under appeal be set aside and that the European patent be maintained as granted (main request) or, as an auxiliary measure, in amended form on the basis of the claims of one of auxiliary requests 1 to 4, filed with the grounds of appeal.

Respondents 1 and 2 requested that the appeal be dismissed and that the European patent be revoked.

Reasons for the Decision

1. *Main request (patent as granted) - novelty*

1.1 The appellant contested the findings of the opposition division and argued that the random copolymer of acrylic acidic and dimethyldiallylammonium chloride in the composition of Example 1 of D3 ("the E1-polymer") would not necessarily be a "*deposition aid*" in the sense of ingredient "c)" of claim 1 as granted.

1.2 Before concluding on this issue, the board considers it appropriate to establish what the skilled reader of granted claim 1 would have understood under the definition of ingredient "c)".

1.2.1 As explicitly acknowledged by the appellant and confirmed in its expert opinion (see points 8 and 9 of D12), it would have been self-evident to any skilled chemist that whether an ingredient of a chemical composition for treating a given substrate can function as a "*deposition aid*" requires considering:

- the entity to be deposited on;
- the nature of the substrate onto which the deposition should occur;

- the conditions used to treat the substrate with the chemical composition.

It is also undisputed (see e.g. points 10 and 11 of D12) that the skilled person reading the definition of ingredient "c)" of granted claim 1 could only have reasonably concluded that such a definition (in terms of the function required to be performed by that ingredient of the patented FT composition) identifies the group of chemical compounds able to favour the deposition of the probiotic particle on fabric when the fabric is treated with the composition in a laundering process.

1.2.2 However, even when correctly construed in this manner, the functional definition of ingredient "c)" remains *per se* ambiguous as it neither directly identifies which specific chemical compounds actually possess such a function nor describes how it is possible to identify them.

1.2.3 Nor would this functional definition in claim 1 have been rendered clearer to the skilled person in view of its common general knowledge. This is because there appears to exist no common general knowledge:

- as to which specific chemical compounds are indeed able to promote the deposition of probiotic particles on fabric in laundry processes;

and/or

- on standard or generally accepted tests for verifying the occurrence of that specific function.

In other words, the definition of ingredient "c)" is apparently a new functional definition of a group of chemical compounds.

The board further stresses that the lack of a corresponding common general knowledge means that such a new functional definition would not have been clear for the skilled person simply because (as instead proposed by the appellant) other functional definitions of groups of chemical compounds - such as the functional definitions of "*surfactants*" also used for describing ingredient "a)" in present claim 1 - are conventionally used in patent claims. Indeed, any skilled chemist knows that hundreds of specific compounds explicitly qualified as "*cationic, anionic and nonionic surfactants*" for laundry compositions can be found in a plethora of handbooks, textbooks, commercial chemical product catalogues, encyclopedias, patents, etc. A similar additional source of disclosure of chemical compounds falling under the functional definition is, however, not available for "*deposition aid*" for probiotic particles in laundry compositions.

- 1.2.4 Finally, the construction of ingredient "c)" indicated in 1.2.1 above would have also remained ambiguous for the skilled reader of granted claim 1 also when considering the relevant disclosure in the reminder of the patent in suit, namely in view of the classes of polymers recited in claims 7, 9 and 10 as those within which the "*deposition aid*" can be "*selected*" (although the patent does not disclose how to perform any such selection) and which are also recited to comprise "*suitable examples*" of this ingredient in paragraphs [0033] to [0051].

It is of relevance in this case that polyacrylates and several very broad classes of cationic polymers are mentioned in the above claims and further specified in paragraphs [0034] to [0036], which read as follows:

"[0034] *Polymers suitable for the deposition of particles are disclosed in WO9709406 in which high MW polyethylene oxides (PEO) are used to deposit clay particles in the main wash; EP0299575B1 and WO9527037, where high MW PEO, polyacrylates, polyacryl amides, poly vinyl alcohol and poly ethylene imines are used to deposit clay particles in the main wash; and EP0387426B1 which utilizes a similar list of polymers as well as guar gums.*

[0035] WO 01/07546 A1 discloses suitable rinse stage polymeric deposition aids for emulsion droplets including cationic guar polymers, cationic polyacrylamides, cationic potato starch, and cationic cellulose derivatives.

[0036] Suitable examples of cationic polymers include cationic guar polymers such as Jaguar (ex Rhone Poulenc), cationic cellulose derivatives such as Celquats (ex National Starch), Flocaid (ex National Starch), cationic potato starch such as SoftGel (ex Aralose) and cationic polyacrylamides such as PCG (ex Allied Colloids). Low charge density cationic polymeric aids are preferred where the composition of the invention is a detergent containing anionic surfactants. Suitable low charge density cationics include the modified potato starch Softgel BDA and Softgel BDA CS range (ex Avebe)."

Hence, the relevant disclosure provided in the whole patent amounts to specific examples of "deposition aids" (be it the mention of a few specific commercial products or groups of polymers defined in cited patents) and the additional vague information that - not further specified - "suitable examples" are comprised within many very broad classes of polymers.

The board considers it appropriate to also mention that the already stressed absence of any indication in the patent in suit of the test conditions for determining the occurrence of the function of "*deposition aid*", as well as the fact that the claim under consideration does not set, for instance, any specific value for the amount of ingredient "*c*", further confirm that the new functional definition of this ingredient is not even meant to correspond to a particularly large increment of the deposition of the probiotic particle: i.e. in theory, any even minimal increment of deposition of probiotic particles detectable via an unspecified comparison test on an unspecified fabric substrate would appear to satisfy the new functional definition.

Hence, the definition of ingredient "*c*" remains ambiguous even when taking into consideration the remainder of the patent disclosure.

- 1.2.5 According to the established case law of the Boards of Appeal, an ambiguous text must be construed broadly in favour of the person on whom it is legally imposed, i.e. the members of the public (see T 151/05, unpublished; Reasons, point 3.2.2).
- 1.2.6 Thus, in the board's opinion, the skilled reader of claim 1 who broadly interpreted the definition of ingredient "*c*" in view of the vague patent disclosure outlined above would have concluded that any polymer belonging to the broad classes described in the patent in suit might be expected to display to some extent the required function and thus fall under the definition of ingredient "*c*".
- 1.2.7 The appellant, also making reference to its expert opinion (points 12 and 13 of D12), disputed this

conclusion by arguing that any skilled chemist would instead have expected that the performance as a "*deposition aid*" of the polymers belonging to the classes listed in the patent in suit would depend on its structural features (such as the molecular weight, the comonomer ratio in the case of copolymers and the density of charge in case of cationic polymers). Thus, it would have been apparent to any skilled person that only certain polymers within each of the classes listed in the patent in suit could perform as a "*deposition aid*", namely those that had appropriate structural characteristics, such as appropriate molecular weight and monomer distribution. For instance, as also explicitly taught in the above-cited paragraph [0034] of the patent, only polyacrylates with a sufficiently high molecular weight would perform as a "*deposition aid*".

- 1.2.8 The board concurs with the appellant that the performance as a "*deposition aid*" of the polymers listed in the patent in suit must plausibly depend on their structural features. However, this only necessarily implies that the extent to which the polymers belonging to the classes listed in the patent favour the deposition of the probiotic particles changes when changing the molecular weight, the comonomer ratio in the case of copolymers, the density of charge in case of cationic polymers, etc. Such dependence does not necessarily imply instead that, for example, certain molecular weights, comonomer ratios and/or charge densities normally encountered in, for example, polyacrylates or in cationic polymers would necessarily result in the complete loss of any ability to favour the probiotic particles' deposition. This is all the more the case when, as underlined above in point 1.2.4, such ability could in theory correspond to

any even minimal increment of deposition of the probiotic particles.

1.2.9 The board also notes that the appellant (as well as its expert in point 13 of D12) appears to equate the disclosure in paragraph [0034] (see 1.2.4 above) as additionally implying that all the "*deposition aids*" belonging to the classes of polymers mentioned in the patents cited in that paragraph must have a high molecular weight to be "*suitable*" as ingredient "c)". However, the teaching in that paragraph is only that the high molecular weight polymers disclosed in the cited patents are "*suitable*" as ingredient "c)". Hence, this paragraph does not necessarily also justify the conclusion that similar polymers of lower molecular weight should instead be unsuitable as ingredient "c)".

1.2.10 The board concludes therefore that the skilled reader of the patent as a whole would have broadly interpreted the definition of ingredient "c)" of claim 1 as granted as encompassing any polymer of the broad classes mentioned in the patent specification. Since, as underlined in 1.2.4 above, the patent cites polyacrylates as well as several very broad classes of cationic polymers, the board concludes that ingredient "c)" is to be broadly construed as also encompassing any polyacrylates and any cationic polymers.

1.3 The E1-polymer of the cleaning composition of Example 1 of D3 being indisputably a cationic polymer and also in part a polymer of acrylic acid (i.e. falling under a broad construction of the term "*poly(acrylate)*" in the patent in suit), this polymer is found to fall under the above-discussed broad construction of the definition of ingredient "c)" of claim 1 of the patent.

As set out in point 3.2.2 of the appealed decision and not disputed by the appellant, the other features of claim 1 as granted are disclosed in D3 as well. Hence, the board concurs with the finding of the opposition division that this prior art anticipates the patented subject-matter.

1.4 Accordingly, the main request is found objectionable for lack of novelty (Article 100(a) EPC in combination with Articles 52(1) and 54 EPC) and, thus, not allowable.

2. *Non-admittance of auxiliary request 1*

2.1 This request, submitted during first-instance oral proceedings, had not been admitted by the opposition division.

The appellant requested that this decision be overturned for improper exercise of discretion and further that auxiliary request 1 be admitted into the appeal proceedings as it was an appropriate response to the decision at least for the reason that the decision was based in part on the late filed documents D9, D10 and D11.

The appellant in essence argued that the opposition division had exercised its discretion not to admit this and the other belated auxiliary requests not in accordance with the right principles because it only considered the timeliness of the filing of the auxiliary requests without also considering the substance of the amendments introduced. In this context, it referred to the (unpublished) decisions T 463/95, T 1485/08, T 544/12, T 2415/13 and T 129/12.

In its opinion, the opposition division failed to consider the *prima facie* allowability of these requests and the reasonable expectation that the other parties could familiarise themselves with the proposed amendments in the time available at the oral proceedings. The appellant pointed out that the number of requests was not high, that the amendments were not complicated and that they were based on the granted dependent claims. Moreover, the amendments clearly addressed the attacks on file concerning patentability and were thus an appropriate response to the late filed documents D9, D10 and D11.

- 2.2 The board, however, concludes that the opposition division exercised its discretion in a reasonable way and used the correct principles as set out in G 7/93 (OJ 1994, 775, Reasons 2.6, referred to in T 2415/13, Reasons 1.3 and T 129/12, Reasons 1.1).
- 2.2.1 On page 8, point 4, of the appealed decision, the opposition division correctly stressed that the auxiliary requests had been filed very late without appropriate justification, although the underlying objections had been on file since the notice of opposition and their pertinence had been commented on in the annex to the summons. This conclusion is absolutely correct. In particular, under point 2.2 of the opposition division's communication of 27 January 2016, the attention of the parties was drawn to the "crucial" issue of "whether particular ingredients mentioned in documents D3 and D8 may be regarded as deposition aids as defined in the present patent" and that "the term deposition aid in the patent may be open to broad interpretation". The need to respond with auxiliary requests further specifying the deposition aid had thus already arisen and was clearly

highlighted by this statement in the communication. Therefore, the appellant could and should have filed its auxiliary requests at the latest in response to that communication.

2.2.2 Moreover, contrary to the appellant's submissions, the opposition division did not merely consider the late filing but also took into account the substance of the amendments in the auxiliary requests. Point 4 of the decision under appeal comprises clear indications that the opposition division specifically considered the substance of the amendment introduced with auxiliary request 1. In particular, the board understands the reasons given in point 4 of the decision under appeal as the conclusion that during the oral proceedings the other parties could not be expected to deal with the restriction of the claimed subject-matter specifically proposed in auxiliary request 1. This conclusion is based in particular on the passage on page 9 reading "...the four Auxiliary requests do not represent a foreseeable restriction to subject-matter defined in dependent claims, which the opponents could still be expected to discuss notwithstanding their filing as late as during the oral proceedings... [m]oreover, the Auxiliary request 1 restricts the definition of the deposition aid by incorporation [of] the definitions of granted dependent claims 7-9 in independent claim 1, wherein the term "poly(acrylate)" is still deleted...". In other words, the opposition division's decision to not admit auxiliary request 1 is not exclusively based on considerations on the unjustified lateness of the filing of the request but also on the finding that the opponents could not be expected to deal with the specific restriction of subject-matter introduced with this auxiliary request, i.e. the opposition division also considered the substance of the amendments in the

belated request and came to the conclusion that it implied a further reason for not admitting this auxiliary request.

2.2.3 These considerations show that the opposition division exercised its discretion in accordance with the right principles, i.e. used the correct criteria in a reasonable way. In the given circumstances, there was no need to discuss all criteria that could theoretically influence the discretionary power in the appealed decision. Rather, if the arguments in the particular case show that some criteria weighed so heavily that other criteria cannot outweigh them, it is not necessary to discuss all criteria that could theoretically influence a discretionary decision concerning the admittance of a late filed request. In the appealed decision, the opposition division had made clear that considering the unreasonable late filing of auxiliary request 1 combined with the not foreseeable amendments, the opponents could not have been expected to discuss the new requests. Under these circumstances, it is clear that even if the auxiliary request had been *prima facie* allowable, it would not have changed the division's discretionary decision. Thus, there was no need to further discuss *prima facie* allowability in the appealed decision.

2.2.4 The board stresses that none of the decisions cited by the appellant contradicts this finding.

First, none of these decisions states or implies that the right principles for exercising the discretion require always assessing the *prima facie* allowability of a new request.

Second, the decisions encompass case constellations incompatible with the present case:

T 463/95 is not comparable because in that case - contrary to the case on file - the requests were not unreasonably late filed. Rather, the proprietor became aware of the need for amendments only at a late stage of the proceedings.

T 1485/08 relates to a very specific constellation in which merely the translation of a document was late filed whereas the document as such had been filed in due time. Moreover, in that case - contrary to the case on file - the opposition division did not at all consider the substance of the late filed submissions or the impact of the late filing on the other parties.

In T 544/12, the board merely concluded that "a bare assertion of lack of *prima facie* relevance" without further reasoning why the late filed submissions were not *prima facie* relevant was not sufficient reasoning for not admitting late filed documents. Thus, in that case, the board overturned the opposition division's discretionary decision because of insufficient reasoning of the conclusion on *prima facie* relevance. This is not comparable to the case on file in which the opposition division did not rely on *prima facie* relevance.

- 2.3 It follows therefrom that, contrary to the appellant's arguments, the late filing of auxiliary request 1 was not an appropriate response to the submission of documents D9, D10 and D11 which were filed in response to the opposition division's communication.

The opponents merely filed these documents to corroborate their arguments based on D3 and D8 which had been on file since the notices of opposition. The need to respond with amended requests thus did not arise owing to the submission of the additional documents but had existed before owing to arguments that had also been stressed in the opposition division's communication.

Consequently, also the opposition division's finding in the decision under appeal is based on the broad interpretation of "the term deposition aid in the patent" announced in that communication. This follows, in particular, from the passage on page 7, third paragraph, of the decision reading: "In fact, the term "deposition aid" as used in the claims merely defines the relevant agent by its function. The patent does not present any specific quantitative test for determining the suitability of an agent for this function. Instead, the patent presents in par. 33-51 a discussion of polymer aided deposition referring to a great variety of suitable polymers, including acrylates (par. 34) and including any polymeric soil release agent typically having both hydrophilic segments and hydrophobic segments (par. 44)". Accordingly, the content of documents D9 to D11 is considered (in the subsequent passage of the decision) to merely "further" confirm the broad interpretation already supported by the patent description, i.e. the admittance of these documents in the opposition proceedings does not result in the introduction of new arguments that could justify the late filing of the auxiliary requests.

- 2.4 The appellant further complained that the opposition division should also have commented on its further request to admit auxiliary request 1 as a single

request after the opposition division concluded not to admit auxiliary requests 1 to 4 into the proceedings.

- 2.4.1 The board does not accept this argument because the opposition division's reasoning on the unreasonable late filing and the specific amendment in auxiliary request 1 (see above 2.2 and 2.3) also applies to this request being filed as a single request. Thus, the division correctly stated on page 9 of its decision that its considerations were not affected by the proprietor's subsequent request to consider the auxiliary request 1 as its sole request.
- 2.4.2 Consequently, the board needs not to decide whether an additional reasoning as regards considerations on the substance of the admittance of such a "refiled" request was necessary at all what would seem to be highly questionable because once the opposition division had concluded not to admit that specific request into the proceedings, the "refiling" of the same request, even if isolated from subsequent requests (here without auxiliary requests 2 to 4), is inadmissible for procedural reasons alone.
- 2.5 Hence, the board is satisfied that the opposition division exercised its discretion not to admit the belated auxiliary request 1 in a reasonable manner and in accordance with the right principles. Thus, it does not consider it justified to overrule the finding of the opposition division, and it exercises its own discretion under Article 12(4) RPBA 2007, Article 25(2) RPBA 2020 not to admit auxiliary request 1 into the appeal proceedings.

3. *Non-admittance of auxiliary requests 2 to 4*

3.1 These auxiliary requests, filed with the statement of grounds of appeal, had already been submitted during oral proceedings in the opposition proceedings and had not been admitted by the opposition division.

The board notes that in the above-cited passage in page 9 of the decision under appeal, auxiliary requests 2 to 4 have also been qualified as not representing a foreseeable restriction which the opponents could be expected to discuss if confronted with for the first time during the oral proceedings. The board notes further that also in the subsequent passages on the same page the opposition division discussed the amendments in auxiliary requests 2 to 4 and found that these amendments went in quite different directions. Thus, they are not convergent.

Accordingly, the board finds that the opposition division's decision to not admit auxiliary requests 2 to 4 is also not exclusively based on considerations on the unjustified lateness of the filing of such requests but rather is also based upon the consideration of the substance of the belated requests. Thus, in view of the nature of the amendments in auxiliary requests 2 to 4, the opposition division came to the conclusion that the substance of such requests could not be dealt with by the other parties at the oral proceedings and that they were also not admissible in view of their divergent content, which would have gone against procedural economy at such a late stage of the proceedings.

3.2 Hence, the board is satisfied that the opposition division exercised its discretion to also not admit any of the other belated auxiliary requests 2 to 4 in a

reasonable manner and in accordance with the right principles. Under these circumstances, the board does not need to decide on the implications of the proprietor's auxiliary request to admit auxiliary request 1 as its sole request on the further lower ranking auxiliary requests 2 to 4, i.e. whether they thus had been implicitly withdrawn at the end of the oral proceedings before the opposition division.

In conclusion, the board does not consider it justified to overrule the finding of the opposition division and exercised its discretion under Article 12(4) RPBA 2007, Article 25(2) RPBA not to admit auxiliary requests 2 to 4 into the appeal proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated