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**Datasheet for the decision
of 8 January 2020**

Case Number: T 0146/17 - 3.3.06

Application Number: 05028022.1

Publication Number: 1672058

IPC: C11D17/04, C11D17/00, C11D3/43

Language of the proceedings: EN

Title of invention:
Dishwashing method

Patent Proprietor:
The Procter & Gamble Company

Opponents:
Henkel AG & Co. KGaA
Reckitt Benckiser (Brands) Limited

Headword:
Procter&Gamble/Pouches

Relevant legal provisions:
EPC Art. 54, 56, 84, 123(2), 111(1)
RPBA Art. 13
RPBA 2020 Art. 11

Keyword:

Inventive step - (yes)

Amendments - allowable (yes)

Late-filed request - justification for late filing (yes)

Claims - clarity (yes)

Decisions cited:

G 0004/92, T 0945/11

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0146/17 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 8 January 2020

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
30 November 2016 maintaining European Patent
No. 1672058 in amended form.

Composition of the Board:

Chairman J.-M. Schwaller
Members: S. Arrojo
 R. Cramer

Summary of Facts and Submissions

I. In its grounds of appeal the patentee (from now on "appellant 1") requested to set aside the decision of the opposition division - to maintain European patent No. 1 672 058 in amended form - and to maintain the patent as granted (main request), claim 1 of which reads:

"1. A method of washing dishware/tableware in an automatic dishwashing machine, the method comprising simultaneously or sequentially delivering quantities of a particulate or densified particulate automatic dishwashing product and of an anhydrous liquid, gel or paste form dishwashing detergent auxiliary contained in separate compartments of a water-soluble multi-compartment pouch into the same or different cycles of the dishwashing machine, wherein the particulate dishwashing product is in the form of a tablet."

or, auxiliarily, on the basis of one of auxiliary requests 1-12 filed with the grounds of appeal.

II. Opponents 1 and 2 (from now on respectively "appellant 2" and "appellant 3") also appealed the above decision and requested to revoke the patent in its entirety.

III. The board issued a communication to inform the parties of its preliminary opinion that the claims as granted and the claims according to auxiliary request 1-12 did not appear to comply with the requirements of Article 123(2) EPC.

IV. With letter dated 2 September 2019 and in response to the preliminary opinion of the board, appellant 1

submitted new auxiliary requests 1-8 to substitute auxiliary requests 1-12 on file.

V. Claim 1 of **auxiliary request 1** reads as follows:

"1. A method of washing dishware/tableware in an automatic dishwashing machine, the method comprising simultaneously or sequentially delivering quantities of a particulate ~~or densified particulate~~ automatic dishwashing product and of an anhydrous liquid, gel or paste form dishwashing detergent auxiliary contained in separate compartments of a water-soluble multi-compartment pouch into the same or different cycles of the dishwashing machine, wherein the particulate dishwashing product is in the form of a tablet, wherein the particulate automatic dishwashing product and the anhydrous liquid, gel or paste form dishwashing detergent auxiliary are contained in an internal volume space of the pouch and are separated from the outside environment by a barrier of water-soluble material."

Claim 1 of **auxiliary request 2** is further characterised by the additional features "*and wherein the dishwashing product comprises one or more moisture-sensitive detergent actives and wherein the detergent auxiliary comprises a humectant in levels sufficient to act as a moisture sink for stabilising the moisture-sensitive detergent active.*"

Claim 1 of **auxiliary request 3** corresponds to that of auxiliary request 2 with the additional features "*and wherein the compartment comprising the detergent auxiliary is placed above or adjacent the compartment comprising the moisture-sensitive detergent active in order to help protect the moisture-sensitive detergent*

active and to reduce the surface area of the pouch containing compartment which is exposed to moisture."

Claim 1 of **auxiliary request 4** corresponds to that of auxiliary request 3 with the additional requirement that *"the humectant is selected from non-aqueous hydrophilic organic solvent inclusive of glycols and polyhydric alcohols"*.

- VI. Appellants 2 and 3 replied and objected to the new auxiliary requests in particular under Articles 84 and 123(2) EPC. Further they requested not to admit the newly filed auxiliary requests into the proceedings.
- VII. With letter dated 6 January 2020, appellant 1 informed the board that it would not be attending the oral proceedings.
- VIII. At the oral proceedings, the board informed appellants 2 and 3 of its preliminary opinion that claim 1 of the main, first and second auxiliary requests did not meet the requirements of patentability of the EPC, in particular in the light of document D2 (**WO 01/36290 A1**). Claim 1 of auxiliary requests 3 and 4 were then discussed under Articles 123(2), 84 and 56 EPC, the latter starting from either of documents D2 or D5 (**CA 2313506**) as closest prior art. Appellant 3 also raised a novelty objection in the light of document D5.
- IX. After closure of the debate, the opponents maintained their request for revocation of the patent, in particular also because the patentee had not filed an adapted description for any of the auxiliary requests on file.

Reasons for the Decision

1. Request for revocation for missing adapted description
 - 1.1 Appellant 3 argued that the absence of an adapted description for any of the auxiliary requests on file implied that none of these requests complied with the requirements of Article 84 EPC. Since the patentee had deliberately decided not to attend the oral proceedings and had provided no justification therefor, the board should revoke the patent on this basis, in particular in view of the fact that Article 11 of the new rules of procedure of the Boards of Appeal in force from 1 January 2020 instructed not to remit cases unless special reasons applied.
 - 1.2 The board disagrees with this argumentation because, as indicated in the explanatory notes of the new RPBA, Article 11 RPBA "*does not apply to cases that are remitted with an order by the Board to ... maintain a patent in amended form, with or without the description to be adapted*".
 - 1.3 Since it is customary to remit cases to the first instance with the instruction to maintain the patent with the description to be adapted, the board finds no reason to deviate from this standard course of action simply because the patentee has not attended the oral proceedings.
 - 1.4 The board has thus decided to exercise its discretion under Article 111(1) EPC to remit the case to the first instance with the instruction to maintain the patent with the description to be adapted.

2. Main request - Novelty

2.1 The board has concluded that the opposition ground under Article 100(a) EPC in relation to Article 54 EPC prejudices the maintenance of the patent as granted.

2.2 Appellant 2 raised a lack of novelty objection in view of document D2 in its letter of 10 August 2017 (see pages 3 and 4).

2.3 Document D2 discloses a method of washing dishware (page 9, lines 1-10) using a multiple compartment washing capsule or pouch with a main receptacle (the first compartment) and a depression formed at its bottom (the second compartment), wherein in a particular embodiment (page 64, line 28 - page 65, line 6; figures 6 and 7) a detergent composition in the form of a tablet is press-fitted into the depression and subsequently covered by two or more gels added to the main receptacle. As also indicated in the contested decision, the term "anhydrous" is relative and can therefore not be used to clearly establish a distinction with respect to the gels of D2.

2.4 The opposition division however concluded that the above-mentioned embodiment of D2 did not anticipate the subject-matter of claim 1 because it did not clearly and unambiguously disclose a combination of an anhydrous gel and a tablet made from particulate material. In particular, according to D2 (page 20, lines 21-22) the tablets (such as that used in the relevant embodiment) could also be gelled, implying that it was not necessarily formed from particulate material as required by claim 1. In its letter dated 2 January 2018, appellant 1 further argued that in

order to arrive at the subject-matter of claim 1, different parts of document D2 had to be combined.

2.5 The board disagrees with this argumentation because D2 explicitly indicates (page 20, lines 19-24) that the tablets of the invention can be "compressed or gelled". The feature "compressed tablet" is considered to be (at least within the technical context of detergents) a specific sub-group of densified particulates. While it is true that in order to arrive at the subject-matter of claim 1 the skilled person would need to select the alternative "compressed tablet" from a list (i.e. compressed or gelled), it is established case law that a subject-matter based on a selection from a single list (particularly a very short one) constitutes a clear and unambiguous disclosure. There is furthermore no need to combine independent portions of the disclosure of D2, as appellant 1 argued, because the paragraph in page 20 is simply relied upon to interpret the term "tablet" in the novelty destroying embodiment of pages 64-65 of D2.

2.6 The board therefore concludes that the above-mentioned embodiment of D2 discloses all the features of claim 1, rendering it not novel.

3. Auxiliary requests - Admittance

3.1 Appellants 2 and 3 argued that the auxiliary requests should not be admitted into the proceedings because they were late filed and divergent.

3.2 The board nonetheless observes that:

- the new auxiliary requests are clearly intended to overcome the objections under Article 123(2) EPC

raised for the first time in the appeal proceedings by the board in its preliminary opinion;

- while it could be argued that the subject-matter of auxiliary requests 5-8 diverges with respect to that of auxiliary requests 1-4, the latter requests are based on a convergent restriction of the subject-matter of the main request and can therefore not be considered to be divergent.

3.3 The board has therefore decided to exercise its discretion under Article 13 RPBA to admit at least auxiliary requests 1-4 into the proceedings.

4. Auxiliary request 1 - Inventive step

4.1 The board has concluded that auxiliary request 1 is not allowable under Article 56 EPC.

4.2 Closest prior art

The board agrees with appellant 2 in that the embodiment disclosed in page 64, line 28 - page 65, line 6 and figures 6-7 of document D2 can be regarded as the closest prior art.

Claim 1 differs therefrom in that the components of the pouch are *"separated from the outside environment by a barrier of water-soluble material"*.

4.3 Problem solved

As indicated in paragraph [0012] of the patent in suit, the pouches of the invention provide an "efficient packing" and ensure that the "user does not touch or

come into direct contact" with the detergent composition.

The problem solved might therefore be regarded as that of proposing a method of cleaning dishware/tableware with pouches which provide an efficient and safe packing of the detergent composition.

4.4 Obviousness

Sealing detergent pouches with water-soluble detergent barriers to provide an efficient packing and prevent contact with the detergent composition is not only well-known in the underlying technical field but also disclosed in document D2 as a preferred embodiment (see for example claim 8 and figure 5).

It would therefore be obvious for the skilled person (both in view of common general knowledge and of the contents of D2) to consider this solution for the particular embodiment disclosed in page 64, line 28 - page 65, line 6 and figures 6-7 of document D2.

4.5 The subject-matter of claim 1 of this request is therefore considered to be obvious in view of D2 alone or combined with common general knowledge.

5. Auxiliary request 2 - Inventive step

5.1 The board has concluded that auxiliary request 2 is not allowable under Article 56 EPC.

5.2 Closest prior art

The embodiment disclosed in page 64, line 28 - page 65, line 6 and figures 6-7 of document D2 is still considered to be the closest prior art.

5.3 Problem solved according to the patent

According to the patent in suit (par. [0008]) the problem solved by the underlying invention is that of "delivering improved cleaning performance and product stability".

5.4 Solution

5.4.1 The embodiment in pages 64-65 and figures 6-7 of document D2 does not specify the components of the tablet and the gels, nor does it explicitly disclose that the tablet contains a moisture-sensitive detergent active or that the gels contain a humectant.

5.4.2 Nonetheless, since claim 1 does not define how the feature *"moisture-sensitive detergent actives"* should be interpreted and in the absence of a generally accepted meaning for this concept, the board considers that virtually any substance forming the tablet in D2 could be regarded as falling within the scope of this feature. In particular, since the components of dishwashing compositions are conceived to dissolve or to be incorporated into the washing water, the contact with excessive moisture prior to the washing process might potentially lead to undesired losses of substances which, in the absence of a more restricted definition, qualifies as *"moisture-sensitive"* in the sense of claim 1. The board is thus of the opinion that the tablet in the above mentioned embodiment of document D2 implicitly anticipates the presence of a *"moisture-sensitive detergent active"*.

5.4.3 A humectant, on the other hand, implies that the substance must have a certain capacity to retain humidity, which at the very least would exclude hydrophobic substances. There is therefore no clear and unambiguous disclosure of a humectant in the relevant embodiment of D2.

5.4.4 Thus, the subject-matter of claim 1 of this request differs from D2 in that "*the detergent auxiliary comprises a humectant in levels sufficient to act as a moisture sink for stabilising the moisture-sensitive detergent active*".

5.5 Reformulation of the problem

5.5.1 The patent in suit indicates (par. [0003]-[0004]) that peroxide bleaches, which are often used to improve cleaning performance, are liable to decompose in the presence of moisture, and that such moisture can permeate through the walls of detergent pouches thereby decreasing the amount of bleach available for the dishwashing process. To solve this problem the patent proposes to include a humectant acting as a moisture sink in the detergent auxiliary.

5.5.2 It is first noted that since claim 1 does not specify the content of the detergent active and, in particular, omits the presence of a bleach, it is not plausible that the invention successfully solves the problem of improving the cleaning performance in particular over the known prior art.

5.5.3 Appellants 2 and 3 argued that it was also not plausible that the presence of a humectant would provide the alleged effect of improving the stability of the detergent active, in particular in view of the

fact that the humectant was not arranged in the same compartment as the moisture-sensitive substance, and that humectants were intended to increase moisture and not to reduce it.

5.5.4 The board is not convinced by this argumentation because while humectants might indeed be configured to retain humidity rather than to remove it, it is precisely the separate arrangement of the humectant and the moisture-sensitive detergent active (i.e. in different compartments) which arguably keeps humidity away from the moisture-sensitive substance. It is thus apparent that the humectant as defined in claim 1 plausibly provides the effect of improving the stability against moisture.

5.5.5 The board therefore concludes that the problem solved by the invention should be restricted/reformulated to that of proposing a method of cleaning dishware/tableware with pouches having an improved stability against moisture.

5.6 Obviousness

According to par. [0018] of the patent in suit, a humectant is, in its broadest sense, a substance capable of picking up and retaining humidity. Thus, in the absence of a more restricted definition, any substance showing affinity for water (i.e. hydrophilic) could be considered to fall within the broad scope of the term "humectant".

Gels in dishwashing compositions are generally arranged to quickly dissolve in the washing water. This also appears to be the case in the gels of the closest prior art, because their arrangement on top of the pouch

(covering the tablet) clearly intends to ensure their quick release into the washing water. Thus, the board considers that when reproducing the embodiment cited as closest prior art, the skilled person would inevitably (i.e. in a one-way street situation) consider working with hydrophilic gels which, as indicated above, would fall within the broad scope of the term "humectant".

It is also noted that since claim 1 does not provide any hint as to what would be considered as a sufficient level of the humectant to *"act as a moisture sink for stabilising the moisture-sensitive detergent active"*, it should be assumed that any amount of a humectant would satisfy this condition.

The board therefore concludes that the subject-matter of claim 1 is rendered obvious by document D2 alone or combined with common general knowledge.

6. Auxiliary request 3 - Inventive step

6.1 The board has concluded that auxiliary request 3 is not allowable under Article 56 EPC. In view of this conclusion, there is no need to address the question of admittance of the late filed novelty objection against claim 1 of this request in the light of D5 (raised by appellant 3 at the oral proceedings).

6.2 In the embodiment of page 64, line 28 - page 65, line 6 and figures 6 and 7 of D2, the main compartment with the gels is arranged above the depression containing the tablet, thereby covering it and reducing the surface area of the tablet in contact with the environment. The features differentiating claim 1 of this request from document D2 are therefore the same as those of claim 1 of auxiliary request 2.

6.3 It follows that the same arguments and conclusions presented for auxiliary request 2 apply also to auxiliary request 3, which is therefore not considered to be inventive in view of D2 alone or combined with common general knowledge.

7. Auxiliary request 4 - Clarity

7.1 The board has concluded that auxiliary request 4 is allowable under Article 84 EPC.

7.2 Appellant 2 argued that the feature *"the compartment comprising the detergent auxiliary is placed above or adjacent the compartment comprising the moisture-sensitive detergent active in order to help protect the moisture-sensitive detergent active and to reduce the surface area of the pouch containing compartment which is exposed to moisture"* was unclear because it left many options open, in particular encompassing embodiments having adjacent compartments which did not reduce the surface area exposed to moisture (see images 1-3 in pages 5-6 of the letter of appellant 2 dated 13 November 2019).

7.3 The board disagrees with this argumentation, because it is precisely the functional indication in claim 1 that the arrangement of the compartment should reduce the surface area exposed to moisture which clarifies that the compartment comprising the detergent auxiliary should cover at least part of the surface of the compartment containing the detergent active (which would otherwise be exposed to environmental moisture). The subject-matter of claim 1 therefore clearly excludes the embodiments in the images cited and filed by appellant 2.

- 7.4 Appellants 2 and 3 also argued that the reference to "an internal volume space of the pouch" was unclear, in particular in view of paragraph [0027] of the patent in suit, which referred to "the internal volume space of the pouch" and indicated that the different compartments were separated from one another and from the environment by water-soluble barriers. In particular, it would not be evident whether the defined internal volume was indeed the internal volume of the pouch (which would not add any new information) or a different volume (which would lead to clarity issues).
- 7.5 The board disagrees with these arguments, because it is apparent that the contested feature merely intends to indicate that the different components are contained within the volume of the pouch. There is no ambiguity with respect to the use of "*the*" or "*an*", because it is clear that in either case the feature can only refer to the space defined by the outer walls of the pouch. Furthermore, the feature is considered to limit the scope of protection because it clarifies that the dishwashing product and the detergent auxiliary are contained within the water-soluble barriers of the pouch, which would exclude, for example, pouches in which the compositions were arranged outside the water-soluble barriers.
- 7.6 Appellants 2 and 3 finally argued that it was unclear whether the expression "*inclusive of*" was to be interpreted as "*comprising*" or as "*for example*".
- 7.7 In this respect, the board notes that the contested feature corresponds to the subject-matter of dependent claim 3 as granted. Since the incorporation of this subject-matter into claim 1 does *per se* not give rise to additional clarity issues, it follows that the

feature should not be examined under Article 84 EPC (see conclusions of G 3/14). However, for the sake of completeness and to provide a basis for the discussion on patentability, the feature "inclusive of" will be considered to be equivalent to "comprising".

8. Auxiliary request 4 - Article 123(2) EPC
- 8.1 The board has concluded that auxiliary request 4 complies with the requirements of Article 123(2) EPC.
- 8.2 Appellants 2 and 3 argued that the arrangement of the compartments *"above or adjacent"* one another could not be based on page 8, first paragraph of the original description, because this paragraph referred to *"a powder composition"* and not to *"a particulate automatic dishwashing product"* as defined in claim 1. Since the term *"powder"* was broader than the claimed *"particulate"*, the subject-matter of claim 1 extended beyond the content of the application as filed.
- 8.3 The board cannot follow this argumentation because the arrangement of the compartments as defined in claim 1 finds explicit support in the subject-matter of claim 1 as filed, which also refers to a *"particulate or densified particulate automatic dishwashing product"* and not to a *"powder"*.
- 8.4 Appellants 2 and 3 also argued that the claim was based on multiple arbitrary selections such as the selection of particulate (rather than densified particulate or powder), of all the compartments being separated from the environment (rather than only some) and of glycols and polyhydric alcohols as humectants.
- 8.5 The board disagrees with this argumentation, because:

- the claim defines a particulate in the form of a tablet, which falls within the scope of *"densified particulate"* and is, in any case, a preferred embodiment defined in claim 3 as originally filed. Thus, there is no reason to conclude that the term *"particulate"* is based on an arbitrary selection;

- the separation of the components (i.e. all the components) of the pouch from the outside environment and of the different compartments by a barrier of water-soluble material is supported by the last paragraph of page 8 as originally filed, so it is not apparent how this can represent an arbitrary selection;

- the definition of humectants comprising glycols or polyhydric alcohols finds support in claim 5 as originally filed, so no selection has been performed.

8.6 Finally, appellants 2 and 3 also argued that the definition of *"an internal volume space of the pouch"* in claim 1 extended beyond the original reference to *"the internal volume space of the pouch"* in page 8, last paragraph of the description because the term *"an"* encompassed portions of the pouch which were not necessarily equivalent to the volume enclosed by the external walls of the pouch.

8.7 The board does not follow this argumentation because, as indicated in point 7.5 above, it is apparent that the feature *"internal volume space of the pouch"* can only refer to the volume enclosed by the outer walls of the pouch, irrespective of whether this feature is preceded by *"the"* or by *"an"*.

8.8 The board therefore considers that the subject-matter of claim 1 does not extend beyond the content of the application as filed.

9. Auxiliary request 4 - Novelty and inventive step

9.1 The board has concluded that auxiliary request 4 meets the requirements of Articles 54 and 56 EPC.

9.2 Closest prior art

9.2.1 The board considers the embodiment disclosed in page 64, line 28 to page 65, line 6 and figures 6-7 of document D2 to represent the closest prior art.

9.2.2 The subject-matter of claim 1 differs from this embodiment in document D2 in that:

- *"the detergent auxiliary comprises a humectant in levels sufficient to act as a moisture sink for stabilising the moisture-sensitive detergent active",* and in that

- *"the humectant is selected from non-aqueous hydrophilic organic solvent inclusive of glycols and polyhydric alcohols".*

9.3 Problem solved

Since the invention defined in claim 1 is essentially based on further specifying the nature of the humectant (i.e. claim 1 of auxiliary requests 2 and 3 defined a "humectant" in general) and this substance is used to improve the stability against moisture, the discussion and conclusions brought forward for auxiliary request 2 also apply in the present case.

The board thus concludes that the problem solved by the invention is that of proposing a method of cleaning dishware/tableware with pouches having an improved stability against moisture.

9.4 Obviousness

9.4.1 Neither document D2, nor D3 (US 4 115 292) or D5, discloses the use of glycols or polyhydric alcohols as humectants to improve the stability of the pouches against moisture.

9.4.2 Appellants 2 and 3 argued that document D2 (page 55, lines 18-21) explicitly disclosed the use of propylene glycol and polyols as stabiliser, and that it would thus be obvious to consider these components for the pouches of the embodiment of pages 64-65 and figures 6-7 of D2.

9.4.3 The board cannot follow this argumentation because the use of polyols and glycols in D2 is explicitly disclosed as a means for stabilising the enzymes in the same compartment rather than as a humectant to protect substances from moisture in an adjacent compartment. There is thus no information in D2 which could (let alone would) lead the skilled person to incorporate these substances into the pouches of pages 64-65 in order to improve the stability of a moisture-sensitive substance arranged in an adjacent compartment.

None of the other cited documents (i.e. D3 or D5) provides any information or hint which would lead the skilled person towards the solution proposed in D1.

9.4.4 It follows that the subject-matter of claim 1, and by the same token that of its sole dependent claim 2,

which includes all the features of claim 1, is novel and inventive in view of the cited prior art, and therefore also meets the requirements of Articles 54 and 56 EPC.

10. Since auxiliary request 4 meets the requirement of the EPC, there is no need to further discuss the objections to the admittance and the allowance of auxiliary requests 5-8.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in amended form on the basis of the claims of the fourth auxiliary request filed with the letter dated 2 September 2019, and a description to be adapted where appropriate.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated