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**Datasheet for the decision
of 29 September 2021**

Case Number: T 0170/18 - 3.3.06

Application Number: 09178726.7

Publication Number: 2333042

IPC: C11D1/66, C11D1/825, C11D1/72,
C11D3/39, C11D3/37, C11D11/00,
C11D1/722

Language of the proceedings: EN

Title of invention:
Automatic dishwashing product and use thereof

Patent Proprietor:
The Procter & Gamble Company

Opponents:
Reckitt Benckiser Finish B.V.
Henkel AG & Co. KGaA

Headword:
Automatic dishwashing product and use thereof / The Procter &
Gamble Company

Relevant legal provisions:
RPBA Art. 12(4)
RPBA 2020 Art. 13(2)
EPC Art. 56

Keyword:

Late-filed evidence - submitted with the statement of grounds
of appeal - disregarded
Amendment after summons - exceptional circumstances (no)
Inventive step - non-obvious solution

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 0170/18 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 29 September 2021

Appellant:
(Opponent 2)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 22 November
2017 rejecting the opposition filed against
European patent No. 2333042 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman L. Li Voti
Members: P. Ammendola
 O. Loizou

Summary of Facts and Submissions

I. The appeal of opponent 2 (hereinafter "appellant") is against the decision of the opposition division to reject the oppositions filed by both opponents 1 and 2 against European patent no. 2 333 042.

II. Claim 1 of the patent as granted reads:

"1. Use of from 300 to 700 ppm of a nonionic surfactant to prevent deposition of soils on dishwasher parts, including internal parts, during an automatic dishwashing operation in the presence of a dishwashing load."

The remaining granted claims define preferred embodiments of the use of claim 1.

III. With the statement of grounds of appeal the appellant filed:

- **D16** (patent proprietor's experimental report filed on 3 August 2012 during examination proceedings with the title "Summary of the Dishwasher Soil removal Performance of Product A vs Product B");
- **D17** (appellant's experimental report of 27 March 2018 with the title "Entfernung von Verschmutzungen in der Geschirrspülmaschine, Vergleich der Ergebnisse bei Verwendung von Produkt D oder E"),
- **D18** (appellant's experimental report of 28 March 2018 with the title "Versuch der Bestimmung von Grenzflächenspannungszerfallskonstante und Gleichgewichtsgrenzflächenspannung"),
- **D19** (Data Sheet of "BIO-SOFT[®] N1 Series", Stepan, February/October 2017) and

- **D20** (Data Sheet of "NEODOL Ethoxylates Typical Properties, N91 and N1 Series", Shell, June 2006).

The appellant's only objections raised were insufficient disclosure (Article 100(b) EPC) of the subject-matter of granted claims 2 and 4, and lack of inventive step (Article 100(a) EPC in combination with Articles 52(1) and 56 EPC) of all the granted claims. In particular, the appellant disputed the finding of the opposition division that the subject-matter of claim 1 was not obvious in view of the prior art disclosed in **D7** (WO 2008/035071 A1) in combination with the common general knowledge apparent from **D15** (T.F.Tadros, "*Applied Surfactants - Principles and Applications*", 2005, WILEY-VCH Verlag, page 395, section 11.17.3). It also referred to, *inter alia*, documents **D1** (US 2006/0199754 A1) and **D12** (US 4,105,573).

IV. The board summoned the parties to oral proceedings and issued a communication pursuant to Article 15(1) RPBA 2020 dated 6 March 2020, expressing the board's preliminary assessment of the case in preparation to the hearing. The board indicated therein, *inter alia*, to be minded not to disregard D16 under the provisions of Article 12(4) RPBA 2007.

V. The following letters were received by the board thereafter:

- appellant's letter of 17 April 2020 enclosing **D21** (EP 0 682 105 A2);
- appellant's letter of 11 May 2021 enclosing **D11** (EP 1 061 123 A1) and mentioning an objection of lack

inventive step based on the combination of D7 with D11;

- letter of 25 August 2021 of the patent proprietor (hereinafter "respondent") requesting the board not to admit:
 - (i) the new objections of lack of sufficient disclosure of granted claims 2 and 4 and the related documents D18 to D20,
 - (ii) the late filed documents D17 and D21 and arguments based thereupon and
 - (iii) the late filed new objection of lack of inventive step based on the combination of D7 with D11;

- appellant's letter of 27 August 2021 enclosing **D22** (Statement of Professor (emeritus) Rainer Stamminger (Rheinische Friedrich-Wilhelms-Universität Bonn) on the water consumption of automatic dishwashers in the years up to 2009, dated 27 August 2021), **D22a** (Test Report of Stiftung Warentest on automatic dishwashers of 4/2008, cited in D22), **D22b** (Test Report of Stiftung Warentest on automatic dishwashers of 4/2010, cited in D22) and **D23** (*Mintel Database* excerpt on packaged consumer products (dishwashing tablets Dreft and Fairy Platinum) as being marketed by Respondent in the Netherlands, Belgium, the UK or Portugal in March, May, July and November 2009); and

- respondent's letter of 27 September 2021 enclosing a set of amended claims labelled as auxiliary request and requesting the board not to admit the late filed documents D22 to D23 and arguments based thereupon.

- VI. Opponent 1, party as of right in these appeal proceedings, did not file any written submission as to the substance of the case.
- VII. At the oral proceedings held before the board in the announced absence of opponent 1 the parties' final requests were as follows:

The appellant (opponent 2) requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, as an auxiliary measure, that the patent be maintained on the basis of the auxiliary request filed with letter of 27 September 2021. It also requested that documents D17 to D23 and the objections based thereon be not admitted into the appeal proceedings.

Reasons for the Decision

1. Procedural issues
- 1.1 The objections of insufficient disclosure and the documents D18 to D20 related thereto.

The appellant raised in pages 10 to 15 of the statement of grounds of appeal new objections of insufficient disclosure (Article 100(b)/83 EPC) directed against the subject-matter of granted claims 2 and 4.

As already indicated by the board in point 4.3.1 of its communication pursuant to Article 15(1) RPBA of 6 March 2020, and undisputed by the appellant, no similar objections of insufficient disclosure directed specifically against the granted claims 2 and 4 had been substantiated neither in writing nor orally by any of the opponents during the opposition proceedings. Hence, these objections of insufficient disclosure amount to a belated fresh ground.

The board further notes that the appellant failed to indicate any reasons possibly justificative of the lateness of these objections. Accordingly, the board, exercising its discretion under Article 12(4) RPBA 2007, decided not to consider the belated appellant's objections of insufficient disclosure against granted claims 2 and 4.

Since documents D18 to D20 (also filed with the statement of grounds of appeal) had only been filed to substantiate these new objections of insufficient disclosure, the board, exercising its discretion under Article 12(4) RPBA 2007, decided to disregard documents D18 to D20 for the same reasons as above as well.

1.2 D17

This document contains appellant's new experimental data and was filed with the statement of grounds of appeal without providing any reason explicitly indicating why it had not already been filed before the opposition division. As already indicated by the board in point 4.2.1 of the communication of 6 March 2020, and undisputed by the appellant, the filing of D17 only aimed at demonstrating that the claimed upper limit of "700 ppm" of nonionic surfactant had been chosen

arbitrarily (see the paragraph bridging pages 7 and 8 of the grounds of appeal). The board notes however that the inventive step's reasoning in the decision under appeal does not imply that the upper limit of 700 ppm is critical in view of some technical advantage. In fact, the objective technical problem was seen only as the provision of an alternative way for cleaning internal parts of a dishwasher in the presence of a dishwashing load (page 8, second paragraph, of the decision under appeal). In other words, no aspect of the decision under appeal implies that the upper limit of 700 ppm is not arbitrary. Hence, the filing of D17 only with the statement of grounds of appeal, is neither occasioned by the reasoning in the decision under appeal nor relevant.

Accordingly, the board, exercising its the discretion under Article 12(4) RPBA 2007, decided to disregard D17 and the arguments based thereupon.

1.3 D21

D21 was filed by the appellant with letter of 17 April 2020 allegedly in response to the board's "different opinion" in the board's communication of 6 March 2020 (see from the middle of page 4 onwards in the appellant's letter) in order to further support the common general knowledge relating to the amount of wash liquor during automatic dishwashing.

As required by Article 13(2) RPBA 2020 any amendment to a party's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

As underlined in writing and argued orally by the respondent, the board's communication of 6 March 2020 contains no "new" line of reasoning in respect of the arguments already considered in the decision under appeal. This was finally undisputed by the appellant. Moreover the appellant had already filed with its grounds of appeal D16 and D17 in support of its arguments relating to common general knowledge.

Hence, the preliminarily negative opinion of the board does not represent any exceptional circumstance that could justify, as a reaction thereto, the filing of D21 after having filed already D16 and 17 with its grounds of appeal and oral proceedings had already been summoned. Hence, the board, decided not to admit into the appeal proceedings D21 and the arguments based thereupon (Article 13(2) RPBA 2020).

1.4 The new objection of lack of inventive step based on D11

The appellant submitted with letter of 11 May 2021 a new objection of lack of inventive step based on the combination of D7 with D11, an objection which had not been raised as such during opposition and was not part of the decision under appeal. D11, though being on file before the opposition division, had not been previously mentioned in these appeal proceedings.

The appellant argued that the late filing of this new objection was in reaction to the board's preliminary opinion expressed in the communication of 6 March 2021. Moreover, the respondent could not be surprised by this objection since D11 had already been cited during opposition.

The board notes firstly that the letter of 11 May 2021 was filed more than a year after the appellant's first reaction with the letter of 17 April 2020 to the board's preliminary opinion. Moreover, as already discussed above in 1.3 the preliminary opinion of the board undisputedly substantially corresponds to the findings of the opposition division except for the additional (negative) finding as to the appellant's additional arguments in the grounds of appeal based on D16. Hence, the board's preliminary opinion does not represent any exceptional circumstance that could justify the filing of a new additional and different attack of lack of inventive step after that oral proceedings had already been summoned and more than a year after that the appellant had already replied to the board's communication.

Hence, the board, considering Article 13(2) RPBA 2020, decided not to admit into the appeal proceedings the new attack of inventive step based on the combination of D7 with D11 and to not take into account this latter document.

1.5 D22, D22A, D22B, D23 and the arguments based thereupon.

Each of these documents has been filed with letter of 27 August 2021, i.e. after that the parties had already been summoned to oral proceedings and only about one month before the date of the hearing. The appellant argued that these documents were very relevant to the discussion of common general knowledge and that the late filing of the independent expert opinion D22 and related documents was due to the disruptive effects of the pandemic on the preparation of the work on which D22 is based. Therefore these documents should be admitted in view of their relevance and of the fact

that the information contained in D22A, D22B and D23 should have been already known to the respondent.

The board notes that prior to the letter of 27 August 2021 the appellant had not announced an intention to submit an independent expert opinion or further documents. In any case, neither the (alleged) relevance of D22 to D23 nor the (alleged) fact that the information contained in D22A, D22B and D23 had to be already known to the respondent represent an exceptional circumstance, that could justify the filing of D22 to D23 after having filed other documents for similar reasons already with the grounds of appeal and in the appellant's previous letters in response to the board's preliminary opinion and after oral proceedings had already been summoned and only about one month before the hearing.

Hence, the board, considering Article 13(2) RPBA 2020, decided not to admit into the appeal proceedings the documents D22, D22A, D22B and D23 and the arguments based thereupon.

Respondent's main request (patent as granted)

2. Alleged lack of inventive step of the subject-matter of claim 1 (Article 100(a) EPC in combination with Articles 52(1) and 56 EPC)
 - 2.1 Closest prior art and technical problem solved
 - 2.1.1 It is undisputed that D7 discloses the closest prior art. As this document has the same aim as the patent in suit (i.e. to achieve simultaneous cleaning of dishware/tableware/cookware and of the body and internal parts of the automatic dishwasher; compare

paragraph [0005] of the patent in suit with page 3, lines 5-9; page 4, lines 4-20; and claims 13 and 14 of D7), the board sees no reason to take a different stance.

- 2.1.2 The appellant identified the closest prior art in the disclosure in D7 - allegedly provided by the combination of claims 1, 11, 13 and 14 with page 14, lines 8 to 10 and 23 to 24, of the description - of a method for treating the interior of a loaded automatic dishwasher during the wash cycle, by using an automatic dishwashing machine cleaning composition which comprises up to 10 wt% of nonionic surfactants.

The respondent argued instead that the teaching in the cited passages in page 14 of D7 does not necessarily imply that the surfactants that can constitute "up to 10 wt%" of the composition are (all) nonionic since any type of surfactant can be present (page 14, lines 17-18). Moreover (page 14, lines 13-14) the preferred amount of surfactant is much lower (0.1 to 4%) and the only example of D7 (page 30) contains at most 1% of nonionic surfactant. Furthermore the claims do not specify any preference for a type of surfactant.

However, since D7 indicates nonionic surfactants as being the most preferred (page 14, lines 23-24) and the only surfactant of the example of D7 is nonionic, the closest prior art should be seen in the board's view as a method for treating the interior of a loaded automatic dishwasher during the wash cycle, by using an automatic dishwashing machine cleaning composition as disclosed in D7 that comprises nonionic surfactants (without a specified concentration).

2.1.3 It is undisputed among the parties that the use of the non-starch carbohydrase enzymes described in claim 1 of D7 (as ingredient of the dishwashing machine cleaning composition according to this prior art) allows to clean the body and internal parts of the automatic dishwasher during the automatic dishwashing process. Therefore, the technical problem addressed in the patent in suit is undisputedly already solved in D7.

2.1.4 Accordingly, the technical problem solved by the subject-matter of claim 1 vis-à-vis the prior art of departure needs to be reformulated as the provision of a further use for providing simultaneous cleaning of dishware/tableware/cookware and of the body and internal parts of an automatic dishwasher (see also the second paragraph on page 8 of the decision under appeal).

2.2 The solution and its alleged obviousness

2.2.1 The solution to the posed technical problem offered by claim 1 under consideration is the use during automatic dishwashing operations "*from 300 to 700 ppm of a nonionic surfactant*".

2.2.2 The board notes that it is undisputed among the parties that the teaching in D15, which explicitly identifies nonionic surfactants of the poly(ethylene oxide) type as the detergents "most effective" in preventing the dirt particles to redeposit, is part of the common general knowledge of the skilled person. Accordingly, the skilled person would expect that nonionic surfactants contribute to the cleaning also of internal parts of an automatic dishwasher.

- 2.2.3 However, it is not in dispute that the skilled person, starting from D7 has to choose appropriate amounts of nonionic surfactant and wash conditions in order to arrive at the claimed level of nonionic surfactant in the wash liquor.
- 2.2.4 The appellant argued in essence that a skilled person would have obviously used greater amounts of nonionic surfactants up to 10% because of the teaching of D7 and of their known anti-redeposition effect (see D15) and would have used conventional automatic dishwashing machines as available at about the filing date of D7 in 2007.

In order to demonstrate the functioning conditions of these dishwashers, the appellant referred to the examples in the patent in suit (whose filing date was just about two years after that of D7) as well as D16, both using a portioned composition of about 20 g. The appellant derived therefrom that the concentration of nonionic surfactant required in claim 1 under consideration would be attained by using automatic dishwashers designed to function with about 20 g of composition added to about 5 L water. Finally, the appellant also mentioned the amounts of 20 and 24 g detergent composition used respectively in D1 (see paragraph [0064]) and in D12 (see col. 4, line 63). The appellant derived therefrom that it was conventional for the skilled person carrying out the cleaning methods described in D7 in 2007 to use dishwashers designed to function by delivering about 20 g of cleaning composition in about 5 L of water.

The appellant concluded that when using such a conventional dishwasher with a composition of D7 that comprised e.g. about 10 wt% of an ethoxylated nonionic

surfactant (as used in D16, product A), the resulting washing liquor would comprise an amount of such surfactant of about 400 ppm. Thus, the skilled person starting from D7 only needed to make an arbitrary choice among the obvious solutions to the posed problem in order to arrive at the subject-matter of claim 1 under consideration.

- 2.2.5 The board finds however the appellant's line of reasoning manifestly unconvincing if only for the following reason: even assuming, for the sake of argument, in favour of the appellant, that even though the patent itself and D16 cannot represent common general knowledge, at around the filing date of D7 it would have been conventional to perform dishwashing in machines designed to function by delivering amounts of cleaning composition of about 20 g in about 5 L of water, still the skilled person would have to select an amount of nonionic surfactant in the used composition sufficiently high in order to arrive at an amount in the wash liquor as required by claim 1 at issue. Therefore even if she could have chosen to use a nonionic surfactant as being preferred in D7 she would still have to select non-preferred and not disclosed concentrations thereof, the preferred concentrations for the nonionic surfactant disclosed in D7 being of 0.1 to 4% as convincingly submitted by the respondent (see in 2.1.2 above). Such lower concentrations would result manifestly in an amount of nonionic surfactant in the wash liquor of less than the half of that shown in D16 or in the examples of the patent, i.e. in amounts below the lower limit of 300 ppm.

Hence, in order to arrive at the subject-matter of claim 1 the appellant's reasoning implies to select

from the broader teaching of D7 a not preferred composition containing about 10 wt% of ethoxylated nonionic surfactant even though the same effect is already attained in D7 by using a specific enzyme and this document does not require any specific amount of such surfactants in the wash and contains a pointer only to the use of much lower amounts of such surfactants.

Furthermore also D15 does not suggest to use greater amounts of nonionic surfactants.

- 2.2.6 The board finds therefore that, even under the assumption in favour of the appellant described above, the subject-matter of claim 1 does not result from an arbitrary choice among obvious alternative solutions to the posed technical problem equally suggested to the skilled reader of D7, being aware of the common general knowledge apparent from D15, but from a choice of a solution which is neither disclosed nor suggested in D7.
- 2.2.7 The board concludes therefore that the subject-matter of claim 1 involves an inventive step.
3. As the other granted claims define preferred embodiments of the use of claim 1 they are also found not obvious in view of the prior art for the same reason given above for claim 1.
4. The board concludes that the opponent's appeal cannot succeed.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



A. Pinna

L. Li Voti

Decision electronically authenticated