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**Datasheet for the decision
of 1 April 2022**

Case Number: T 1380/18 - 3.2.06

Application Number: 06773606.6

Publication Number: 1924731

IPC: D06F43/00, D06F43/08, D06L1/02

Language of the proceedings: EN

Title of invention:
SYSTEM AND METHOD FOR DRY CLEANING ARTICLES

Patent Proprietor:
Greenearth Cleaning, LLC

Opponent:
Multitex Maschinenbau GmbH

Headword:

Relevant legal provisions:
EPC Art. 54, 111(1)

Keyword:
Novelty - (yes)

Decisions cited:

Catchword:



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Case Number: T 1380/18 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 1 April 2022

Appellant: Greenearth Cleaning, LLC
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 29 March 2018
revoking European patent No. 1924731 pursuant to
Article 101(3) (b) EPC.

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
J. Hoppe
P. Cipriano
C. Almberg

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 1 924 731. The appellant requested that the decision under appeal be set aside and the patent be maintained based on the claims according to its main request filed with the grounds of appeal dated 2 August 2018 or, in the alternative, that the patent be maintained according to one of auxiliary requests 1 to 14 also filed therewith.
- II. With letter of 27 August 2018 the respondent (opponent) withdrew its opposition with the consequence that it was no longer a party to the appeal proceedings.
- III. The following documents, referred to by the appellant, are relevant to the present decision:
- D1c Sales invoice for modification of Multitex MT160 machine to a silicone solvent, February 2003
- D1d Sales invoice for Multitex MT160, November 2003
- D5 Affidavit of Mr Manfred Rohde;
- D5a Sales invoice of 22 February 2002;
- D5b Delivery note of 27 February 2002;
- D5c Datasheet for Decamethylcyclopentasiloxan of 11 November 2002;
- D6 Datasheet for Adsorbon of 17 April 2015;
- D6a Datasheet for Adsorbon of 2003;
- D6b Email from the company Kreussler;
- D6c Further email thread between Multitex and Kreussler;
- D7 Webpage www.bentonit.de/bentonit/arten-von-bentonit/ , 'Types of Bentonite'.

IV. Claim 1 of the main request reads as follows:

"A system (10) for dry cleaning articles, the system comprising:

a first receptacle (12) adapted to contain one or more articles; and

at least one second receptacle (14) adapted to contain a volume of siloxane solvent, the system characterized by:

at least one regenerative filter (20) capable of being regenerated, said regenerative filter being coated with a filtering medium for filtering the siloxane solvent, said filtering medium comprising an activated clay; and a pump (16) coupled to the first receptacle (12), at least one second receptacle (14) and the at least one filter (20), the pump (16) being adapted to pump the volume of siloxane solvent from the at least one second receptacle (14) to the first receptacle (12) and from the first receptacle (12) to the at least one second receptacle (14);

wherein the pump (16) is also adapted to pump the volume of siloxane solvent from the first receptacle (12) to the at least one filter (20)."

Claim 4 of the main request reads as follows:

"A method of dry cleaning articles in a system according to any of the preceding claims comprising the following steps:

- inserting articles to be cleaned into the first receptacle (12);
- immersing the articles to be cleaned in a cleaning fluid comprising a siloxane solvent composition;
- agitating the articles in the siloxane solvent composition,
- filtering the siloxane solvent composition through at

least one regenerative filter (20), said regenerative filter (20) having being coated with a filtering medium comprising an activated clay,

- removing the siloxane composition from the articles;
- drying said articles, and
- regenerating said filter at a periodic time basis by removing said first coating and coating said regenerative filter with a second coating for preventing oligomerization of at least one of said first coating activated clay and said solvent."

V. The appellant's arguments relevant to the present decision may be summarised as follows:

The prior use machine Multitex MT160 delivered in February 2002 did not deprive the subject-matter of claims 1 and 4 of novelty. The filtering medium Adsorbon was not an activated clay in 2002. This was clear from the Safety Data Sheets D6 and D6a which, despite both relating to a product named 'Adsorbon', indicated different physical properties of the product. D6 related to an acid-bleached bentonite suited to filtering cyclosiloxane solvents. Conversely, D6a related to calcium bentonite with a pH of 6 to 8, i.e. of essentially neutral pH.

D7 offered some insight into activated bentonites. Acid activation was of particular relevance with regard to D6 and D6a. The Adsorbon of D6a was thus not an acid activated bentonite and could therefore not be considered an activated clay.

As regards the email correspondence D6c, despite the question being directly asked, no answer was given as to whether or not Adsorbon was acid-bleached in 2002. The possibility of the chemical composition of Adsorbon

having changed at some time in 2003 was also not excluded by the replies of Mr Schmidt from Kreussler. It thus followed that the Adsorbon available in 2002 was not an activated clay and the subject-matter of claims 1 and 4 was novel over the prior use.

Lacking any objections on file under Article 56 EPC, the subject-matter of claims 1 and 4 also involved an inventive step.

Reasons for the Decision

1. *Summary of the opposition division's decision*

1.1 In point 4.2 of its decision, the opposition division found that the following belonged to the state of the art according to Article 54(2) EPC:

"A dry cleaning machine Multitex MT160 having a cleaning basket, a tank for silicone solvent, a regenerative spin disk filter and a pump for pumping the solvent into the cleaning basket and to the filter and the tank. Adsorbon is used as filtering medium. Adsorbon is an activated clay."

1.2 There are three separate prior use instances which the opposition division identified in its decision:

(a) The sale of a Multitex MT160 machine in February 2002 to Kleenothek Franchise Vertriebs GmbH evidenced by D5 and D5a - D5c;

(b) The sale of a Multitex MT160 machine in November 2003 to Kleenothek-Kolender-Franchise-Verwaltungsgesellschaft mbH, evidenced by D1d; and

(c) The modification of a Multitex MT160 machine in February 2003, in use at Kleenothek-Markkleeburg, to use Siloxane (silicone) evidenced by D1c.

The opposition division however failed to specifically indicate which one of these instances of prior use belonged to the state of the art. Nevertheless, the division saw the relevant date of disclosure of 'the prior use' to be 2002 (see particularly the first paragraph on page 9 of its decision), such that it can be inferred that it was only prior use (a) above which it considered to belong to the state of the art.

1.3 As regards the claimed 'filtering medium comprising an activated clay', the opposition division found it to be insufficiently proven that a bag of 'Tonsil' was delivered with each of the three prior used machines (a), (b) and (c). It however saw the filtering medium comprising an activated clay to be anticipated by 'Adsorbon', a filtering medium supplied by Chemische Fabrik Kreussler & Co. GmbH and used in each of the instances of prior use.

1.4 In point 5.2 of its decision, the opposition division thus concluded that the subject-matter of claim 1 'lacks novelty over the prior use' (see paragraph 1.2 above).

2. *Prior use*

2.1 *Burden and standard of proof*

A party to proceedings normally bears the burden of proof for the facts it alleges. The opponent of the present patent (until it withdrew its opposition (see point II. above) was Multitex Maschinenbau GmbH which

supplied the machine it alleges to be a prior use. Since the evidence for the prior use thus lies fully within the opponent's sphere of influence, it is up to the opponent to prove the alleged prior use 'beyond reasonable doubt' (see Case Law of the Boards of Appeal, 9th ed., 2019, I.C.3.5).

2.2 *Adsorbon as the filtering medium*

2.2.1 The appellant argues, contrary to the finding of the opposition division, that:

- i) Adsorbon sold in 2002 was not an activated clay;
- ii) Adsorbon sold in 2002 was chemically different to that sold in 2015; and
- iii) D6b and D6c fail to confirm that Adsorbon of 2002 was identical to that in 2015,

and that, consequently, the alleged prior use does not deprive the subject-matter of claim 1 of novelty.

2.2.2 In its decision, the opposition division found that the Adsorbon used in the Multitex MT160 machine of the prior use, purchased in February 2002, was an activated clay. This conclusion was based on D6, dated 2015, which was a Safety Data Sheet providing a description of Adsorbon as an acid-bleached bentonite (an activated clay). This data in D6 was used to interpret the content of D6a, a Safety Data Sheet for Adsorbon dated from 2003, which simply described it as calcium bentonite (a clay, but not activated). Email correspondence from the supplier of Adsorbon was then considered, resulting in the opposition division's conclusion that Adsorbon supplied in 2002 would be identical to that of the Safety Data Sheet D6a.

- 2.2.3 The Board concurs with the opposition division regarding that which D6a discloses. It is a Safety Data Sheet for Adsorbon dated 2003 and details a selection of chemical characteristics of Adsorbon, including that it is calcium bentonite. However, it notably fails to identify calcium bentonite (a clay) as being an activated clay.
- 2.2.4 D6 was also correctly interpreted by the opposition division as being a Safety Data Sheet for Adsorbon dated 2015. It identifies Adsorbon to be an acid-bleached bentonite used *inter alia* in the regeneration of siloxane solvent (see D6, page 1/6, Paragraphs 1.2 and 3.1). As such it is an activated clay, which is also accepted by the appellant (see section 4 of its grounds of appeal).
- 2.2.5 The Board however does not concur with the opposition division's conclusion that the Adsorbon of D6a must be an activated clay based on the knowledge that the clay of D6 was. This conclusion cannot be drawn unambiguously. The reasons for this are given below.
- 2.2.6 D7 describes acid-activated Bentonite as a Bentonite treated with an acid which can then be used for cleaning of oils, resins and sugar syrup; such acid treated bentonite is also the material of D6, the acid treatment being described in D6 as acid-bleaching (see page 1/6, Paragraph 3.1). Such an acid-bleached bentonite is an activated clay as indicated above.
- 2.2.7 As regards D6a, this indicates the pH value of the Adsorbon to be 6 to 8 i.e. not acidic. With D7 having identified acid treatment of bentonite as activating it, a Bentonite of neutral pH (as also argued by the appellant) is not unambiguously an activated bentonite

i.e. there is credible doubt that it is not an activated clay as claimed. No arguments countering this view were filed in the appeal proceedings.

2.2.8 As regards point iii) in paragraph 2.2.1 above, and contrary to the opposition division's finding in the first paragraph on page 9 of its decision, the Board does not find it unambiguous from the email correspondence in D6b and D6c that the composition of Adsorbon was unchanged from 2002 to 2015. D6c is most illuminating in this regard since it includes the full thread of emails between Multitex (the opponent) and Kreussler (the supplier of Adsorbon) from September 2017 until November 2017 relating to Adsorbon and its composition from 2002 until 2015. Of note in this regard is the email from Mr Schmidt of Kreussler dated 27 September 2017, in which reference is made to the Adsorbon Safety Data Sheet of 2003 (D6a) and the comment that the composition of Adsorbon in 2002 and 2003 was identical. With this information Mr Biesinger of Multitex asked whether the Bentonite in Adsorbon in 2002 was acid bleached and whether Adsorbon was the same chemical substance in 2003 and 2015. Mr Schmidt replied with email of 10 November 2017 that the substance had not changed since 2003.

With respect to the questions asked, the replies of Mr Schmidt are somewhat ambiguous, as the appellant also indicates under points 6 and 7 of its grounds of appeal.

Firstly, no response at all was given to the question as to whether the Adsorbon in 2002 was acid bleached. Consequently it is not possible to conclude that the Adsorbon used to coat the filtering medium in 2002

comprised activated clay (see also point 2.2.7 above).

Secondly, Mr Schmidt confirmed that Adsorbon had the same composition in 2002 and 2003 and separately confirmed that the substance had not changed since 2003 (until 2015, the date of D6). This leaves doubt as to whether the composition was indeed unchanged for the entirety of the period from 2002 until 2015, since Mr Schmidt's answers leave open the possibility of the composition having changed at sometime in 2003.

Thus, D6b and D6c also fail to prove beyond reasonable doubt that the Adsorbon used as a filtering medium in 2002 comprised an activated clay.

2.2.9 In summary, in view of the required standard of proof for the prior use being 'beyond reasonable doubt', the Board finds it not to be unambiguous that the prior use machine utilised a filtering medium comprising an activated clay. It may also be noted that the appellant had offered a technical expert to explain why differences would exist between the Adsorbon of the data sheet from 2003 and that from 2015, but since the Board already considered that sufficient doubt existed based on the written submissions alone, this further verification was not required.

3. *Novelty*

3.1 The sole novelty objections raised before the opposition division were based on the instances of prior use (a), (b) and (c), as identified in point 1.2 above.

3.2 Even if all instances of prior use are considered, each of these was substantiated with Adsorbon as the claimed

filtering medium (see point 1.3 above). The novelty objections against both claims 1 and 4 based on the instances of prior use thus, as explained above, fail to unambiguously disclose the filtering medium comprising an activated clay. In other words, the opponent has failed to fulfil its burden of proof.

3.3 Since both claims 1 and 4 have activated clay as one of their features, the subject-matter of claims 1 and 4 is therefore novel (Article 54 EPC).

4. *Inventive step*

4.1 In the entirety of the opponent's notice of opposition, no specific argument attacking inventive step of the subject-matter of independent claims 1 or 4 has been presented. Similarly, in the entirety of its further letters during the opposition procedure, dated 20 May 2016 and 29 September 2017, no substantiated inventive step objection was made. The opposition division was also not required to consider inventive step as it found the novelty objections to be prejudicial to the allowability of any of the requests before it. With the opponent now also having withdrawn its opposition, this lack of substantiated inventive step objections cannot be remedied. There are thus no substantiated arguments on file attacking the presence of an inventive step in the subject-matter of claim 1 or 4 of the present request and consequently no reason for the Board to conclude that inventive step of the subject-matter of the claims is for any reason *prima facie* in doubt.

4.2 Absent any objections which would give rise to doubt, at least *prima facie*, that the claims according to the main request would not be allowable, the Board finds

that the claims of the main request meet the requirements of the EPC.

5. Remittal

5.1 According to Article 111(1) EPC 1973, when deciding on an appeal, the Board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

5.2 With its grounds of appeal, the appellant requested that the patent be maintained "on the basis of the claims according to the enclosed main request". With no adapted description pages having been filed with the claims of the main request, the Board remits the case to the opposition division for adaptation of the description.

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 as amended on the basis of claims 1 to 17 of the main request received with letter of 2 August 2018 and a description to be adapted thereto.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated