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**Datasheet for the decision
of 13 January 2022**

Case Number: T 0201/19 - 3.3.06

Application Number: 09748116.2

Publication Number: 2496676

IPC: C11D3/22, C11D3/50

Language of the proceedings: EN

Title of invention:
LAUNDRY COMPOSITIONS

Patent Proprietor:
Unilever PLC
Unilever N.V.

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:
USE OF MICRO-FIBROUS CELLULOSE/UNILEVER

Relevant legal provisions:
EPC Art. 54, 56
RPBA 2020 Art. 13(1)

Keyword:

Amendment to appeal case - new experimental data unjustifiably
late filed - not admitted

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

T 0112/92, T 1539/14

Catchword:



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Case Number: T 0201/19 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 13 January 2022

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 November 2018 concerning maintenance of the
European Patent No. 2496676 in amended form.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: P. Ammendola
 C. Brandt

Summary of Facts and Submissions

I. This appeal is against the interlocutory decision of the opposition division to maintain European patent EP 2 496 676 in amended form based on auxiliary request 1 filed during the oral proceedings.

II. Claim 1 of this request (hereinafter **claim 1**), now also the **main request**, reads as follows:

"1. Use of micro-fibrous cellulose to increase the deposition of perfume particles on fabric."

The remaining claims 2 to 4 define preferred embodiments of claim 1.

Hereinafter the acronym **MFC** is used to indicate "*micro-fibrous cellulose*".

III. With its grounds of appeal, the opponent (hereinafter the appellant) submitted again **T2** (experimental report dated 26 July 2018) already considered in the decision under appeal, as well as an Annex (labelled **Annex 3** by the board) reporting statistical analysis of data from Table 1 of the patent in suit. The appellant submitted that claim 1 lacked novelty against **D2** (WO 2009/101545 A1) and that the increase of deposition of perfume particles on fabric would be an effect not occurring across the whole scope of the claim, therefore its subject-matter also lacked inventive step.

IV. The patent proprietors (hereinafter the **respondents**) replied submitting two sets of amended claims as **auxiliary requests 1 and 2**.

- V. With letter of 25 March 2020 the appellant submitted a further experimental report **T3** (titled "Data Report - EP 2496676").
- VI. In a communication dated 18 October 2021 the board expressed the preliminary opinion that, *inter alia*, the appellant's objections against claim 1 were unconvincing and that T3 had been filed unjustifiably late and thus was not to be admitted.
- VII. With letter of 13 December 2021 the appellant presented a line of argument of lack of inventive step based on document **D1** (WO 2009/126960 A2) already considered in the decision under appeal.
- VIII. At the oral proceedings - held in the announced absence of the respondents - the appellant maintained its request to admit T3 into the proceedings and its objections of lack of novelty and inventive step. It also referred to decisions **T 1539/14** and **T 112/92**.
- IX. The appellant requested that the decision under appeal be set aside but at the oral proceedings it submitted not to have objections against auxiliary request 2.

The respondents requested in writing that the appeal be dismissed (main request) - and thus that the patent be maintained in the amended form upheld by the opposition division found - or, alternatively, that the patent be maintained with the claims of anyone of auxiliary request 1 or 2 filed with the reply to the appeal.

Reasons for the Decision

1. Admissibility of Annex 3 and T3
 - 1.1 Annex 3, filed with the statement of grounds of appeal, provides statistical analysis of experimental data present in the patent in suit and aims at further supporting an argument (that these data are not conclusive) rebutted by the opposition division in the decision under appeal. Thus, the board sees no reason to disregard it under the provisions of Article 12(4) RPBA 2007 (see also Article 25 RPBA 2020).
 - 1.2 The appellant justified the filing of T3 with letter of 25 March 2020 as a reaction to the "allegation" of the respondents in the reply to the appeal (filed on 29 July 2019) that "the data provided in the patent shows a clear technical effect which can be ascribed to the distinguishing feature over the prior art, namely the presence of the microfibrinous cellulose".

In the board's view, such "allegation" appears to be nothing more than a repetition of the relevant reasoning given by the opposition division in the decision under appeal (last paragraph on page 8). Hence the board considers not plausible the justification provided by the appellant for the belated filing of T3 and that the unjustified filing of experimental data at such late stage of the proceedings is detrimental to procedural economy. Accordingly, the board exercising its discretion under Article 13(1) RPBA 2020 decided not to allow T3 into the proceedings.
2. Main request
 - 2.1 Construction of claim 1

The board preliminarily notes that the appellant explicitly acknowledged the purpose of claim 1 - namely that the MFC is used "*to increase the deposition of perfume particles on fabric*" (emphasis added by the board) - as a technical feature, and neither contested the possibility to attribute a clear meaning thereto nor provided any particular construction thereof.

In the board's view a skilled person reading claim 1 would construe it in the context of the whole patent disclosure and, in particular, would derive from the comparison between the wording of claim 1 and the patent examples, that the claimed subject-matter is essentially the use on fabric of a composition - which must comprise at least MFC and perfume particles - that deposits the perfume particles on the fabric to a level that is superior to that obtainable during a similar use of a similar composition in which MFC is absent. Hereinafter, this level of **perfume particle deposition on fabric** that the claimed use must achieve is also referred to in short as **the required PPDF**.

2.2 Novelty (Article 54 EPC)

The appellant disputed the finding of the opposition division that claim 1 is not anticipated in Example 7 of D2.

2.2.1 According to appellant's reasoning, the "Light Duty Liquid Detergent" composition of Example 7 of D2 was a laundry composition containing MFC and perfume micro-particles and, thus, aimed at providing perfume deposition on the fabric items cleaned therewith.

Hence, claim 1 would describe the use of a substance (microfibrous cellulose) already known as component of a prior art composition (the laundry detergent of Example 7 of D2), to provide the same perfume particle deposition for which the prior art composition was used.

2.2.2 The appellant further argued that, as also found in T 1539/14, the subject-matter of a claim directed to the use of a known component of a known composition to provide the same technical effect for which said composition had already been used, would simply provide a newly discovered explanation as to the origin of the known technical effect and thus the claimed use would not be new. Thus, the subject-matter of claim 1 was anticipated in D2.

2.3 In its preliminary opinion, the board expressed the following considerations:

(a) The appellant did not present any counter argument to the finding of the opposition division that D2 contains not even an indirect indication on what surface the composition of Example 7 will be used. Laundering, fabric or textile are indeed not mentioned in connection with this example and the cleaning of textile is one of many possible applications contemplated by D2 (see page 16, lines 10 to 15).

(b) Moreover, even in the hypothetical case that the "Light Duty Liquid Detergent" composition of Example 7 of D2 could be unambiguously recognised by the skilled reader as a laundry detergent for cleaning fabric, this would not necessarily imply that the perfume micro capsules present therein

would remain deposited on the (laundry) substrate cleaned with such detergent composition (because it is technically conceivable that perfume encapsulation might also be used to release the perfume in the wash liquor).

(c) Hence, the appellant did not render plausible that D2 disclosed in Example 7 a laundry detergent composition that provides perfume deposition on fabric.

2.3.1 As the appellant has not provided any further submission in these respects, the board sees no reason to depart from its preliminary opinion and finds the appellant's submissions insufficient at proving that the subject-matter of claim 1 is anticipated by Example 7 of D2.

Accordingly, the subject-matter of claim 1 (and by the same token that of claims 2 to 4 which define preferred embodiments of the use of claim 1) is found novel (Article 54 EPC).

2.4 Inventive step (Article 56 EPC)

2.4.1 In this respect, the appellant disputed the finding of the opposition division by submitting three alternative lines of argument, in which it started in each from the "entrapped fragrance composition" defined in claim 31 of D1, in which the fragrance composition of preceding claim 1 - which comprises a coated fragrance particulate that might also comprise a first "carrier agent" (see e.g. claim 2) - is entrapped within a "second carrier agent" which can, *inter alia*, be a "microcrystalline cellulose" (undisputedly a MFC).

As each of the appellant's lines of reasoning appears manifestly flawed for other reasons, in the following the board also assumes for the sake of an argument in favour of the appellant, that claim 31 of D1 represents the closest prior art to the claimed invention.

- 2.4.2 In the first line of reasoning the appellant referred to decision T 1539/14 - already cited in the novelty attack above - and argued that the subject-matter of claim 1 would just be an explanation of the required PPDF already necessarily achieved by the MFC-containing "entrapped fragrance composition" of claim 31 of D1. Thus, to arrive at the subject-matter of claim 1 starting from this prior art would not involve any inventive ingenuity.

The board notes however that the referred case law, beside relating to the issue of novelty, deals with a factual situation in which the relevant prior art disclosed a specific composition comprising the relevant substance (citric acid) accompanied by the explicit description that the use of such specific composition provides the relevant benefit (see T 1539/14, reasons 1 and 2.2).

- 2.4.3 In the present case instead, the relevant prior art is just a general definition of six alternative broad groups for the "entrapped fragrance composition" provided by claim 31 of D1, in which the fragrance composition (defined in claim 1 of D1) is entrapped in a "second carrier agent" and in which this latter can, *among others*, also be a MFC (see option "(6)" in claim 31 of D1).

Moreover there is no mention of fragrance deposition in this claim or in the corresponding passage in paragraph

[0081] of D1, let alone is there the mention of a particularly high level of deposition.

On the contrary, the teaching in paragraph [0027] of D1 relating to the achievement of "high deposition" of fragrances plausibly refers to the essential of the invention disclosed in D1: namely those recited in its claim 1 (and in which the "second carrier agent" is not even mentioned as an optional ingredient).

Hence, from the disclosure in D1 it is not apparent that the level of PPDF provided by the "entrapped fragrance composition" defined in its claim 31, or in particular by the group thereof containing MFC, might be superior to that already observable when using compositions with no "second carrier agent" at all (but still in accordance with claim 1 of D1).

- 2.4.4 It follows that the case law referred by the appellant is not relevant for the present case. Nor is the disclosure in D1 suggesting that a particularly high PPDF might be provided by compositions of claim 31 comprising MFC as second carrier agent.

Hence, the board finds unconvincing the appellant's reasoning that claim 1 could be equated to a newly discovered explanation of the required PPDF already necessarily achieved by the MFC-containing "entrapped fragrance compositions" of claim 31 of D1.

- 2.4.5 In a second line of reasoning the appellant argued that experimental data in the patent examples and/or those provided with T2 would prove that the effect to "*increase the deposition of perfume particles on fabric*" (i.e. the required PPDF) was not achieved "across the whole scope" of claim 1. In particular, it argued that one of the two examples, that the opposed

patent itself describes as in accordance with the invention, would demonstrate that the additional presence of MFC does not change significantly the level of PPDF. The same would be apparent from the experimental results in T2. Hence, the technical feature distinguishing the subject-matter of claim 1 from claim 31 of D1, namely the purpose of providing the required PPDF, would become irrelevant for the assessment of inventive step and so would render the subject-matter of claim 1 obvious in view of the closest prior art.

2.4.6 The board finds this line of reasoning difficult to understand because as indicated above, the use of claim 1 only occurs when a composition of matter - that must necessarily comprise at least MFC and perfume particles - is used on fabric and thereby produces the required PPDF. In other words, the purpose of the use limits the scope of such claim by implying the achievement of the required PPDF.

Hence, even assuming, for the sake of argument in favour of the appellant, that certain compositions comprising MFC and perfume particles would provide a level of PPDF comparable or inferior to that of similar examples not containing any MFC, this fact *per se* would only necessarily imply that the use of such MFC-containing compositions would not be an embodiment according to the use defined in claim 1.

Accordingly, even in this hypothetical case, there would be no reason for disregarding the purpose of the use of claim 1 in the assessment of inventive step.

Hence, if only for this reason the board finds unconvincing this line of reasoning either.

2.4.7 For sake of completeness the board considers it appropriate to indicate briefly also the reasons why the appellant's analysis of the patent examples and of the data in T2 has been found unconvincing.

- (a) The appellant's objection focused in particular on the comparison between the first and third rows in Table 1 of the patent in suit, respectively reporting for a comparative sample with no MFC a percentage of deposition of " 10.4 ± 1.7 " and for an invention example with 0.125 wt% of MFC a percentage of deposition of " 14.8 ± 3.0 ".

The appellant underlined that when these two values are compared taking into account their error margins, they overlap. Hence, the data reported in the patent would not scientifically prove that the invention example with MFC provides better PPDF than the comparative one without MFC.

The board is however of the opinion that also experimentally measured values that are affected by error margins too large to allow absolutely certain conclusions, may nevertheless show that one conclusion is more plausible than the opposite. In the present case, it remains that the average of measured % deposition values reported in the first and third rows of Table 1 are substantially different and that, also when considering the respective error margins, the overlap between the two corresponding ranges is very limited (the two ranges "from 8.7 to 12.1" and "from 11.8 to 17.8" only overlap in the common portion "from 11.8 to 12.1"). Hence, these data still render more plausible the conclusion that the percentage of

deposition of the example of the third row is higher than that of the first row than the opposite conclusion.

- (b) Also the statistical analysis of these data provided in Annex 3 (beside implying a number of alternative theoretical assumptions, some of which also disputed by the respondents) aims at demonstrating that the experimental values of % deposition in the first and third rows of Table 1 of the patent in suit do not allow absolutely certain conclusions as to whether the MFC-containing examples provide a higher percentage of deposition. Hence, also the analysis in Annex 3 is insufficient at depriving of any relevance the apparent difference between these data already discussed in point (a) above.
- (c) The data in T2 are instead manifestly irrelevant in view of the construction of claim 1 discussed above, because these data do not allow to compare examples only differing for the presence or absence of MFC. Hence, these data cannot possibly justify any conclusion as to whether the examples containing MFC used in T2, provide or not the level of PPDF required for the use of claim 1.

2.4.8 In the third line of reasoning, the appellant considered that the teaching in paragraph [0008] of D1 would remind to the reader that carriers for fragrance, such as the MFC present as "second carrier agent" in the compositions defined in claim 31 of D1, would be already known to increase the PPDF. This teaching would therefore render obvious the subject-matter of claim 1. In its reasoning, the appellant also referred to the

decision T 0112/92 on the obviousness of a new use of a known compound.

- 2.4.9 In the board's view the lack of plausibility of this line of reasoning is apparent if only for the fact that paragraph [0008] of D1 only vaguely refers to (not further identified) "[a]ttempts" that have been made in the prior art, in which "[o]ne approach" used "a carrier" to deposit the fragrance to the fabric, whereby "[t]he carrier is formulated to contain a fragrance".

In the conviction of the board, this wording would however be read by the skilled person as plausibly only referring to the term "carrier" in its normal meaning, namely as describing a substance that "carries" another substance and thus a substance also necessarily in direct contact with the substance that is "carried". Thus, also in paragraph [0008] of D1 the expression "carrier" would be understood by the skilled person as describing a substance that is in direct contact with the fragrance.

In D1 instead, in spite of the fact that the MFC are described as "second carrier agent", it is apparent that the latter expression is specifically used to describe substances that "entrap" the composition defined in claim 1 of D1, in which the fragrance particulate is already coated (and possibly even already contains a "carrier" in accordance with the normal meaning of such term, see claim 2 of D1).

Hence, it is apparent to the board that the expression "second carrier agent" in D1 refers to materials that necessarily are in particular not in direct contact with the fragrance and, thus, are plausibly not the

prior art "carrier" for the fragrance to which paragraph [0008] of D1 (vaguely) refers.

Thus, contrary to the appellant's submissions, paragraph [0008] of D1 does not teach to the skilled person that substances, such as the MFC present in the compositions defined in claim 31 of D1, would already be known to increase PPDF.

If only for this reason also the third line of reasoning of the appellant is found unconvincing.

In view of this finding, there is also no need for the board to consider further the possible relevance of the cited decision T 0112/92.

2.4.10 Hence the board concludes that none of the appellant's submissions is sufficient at rendering plausible that the opposition division erred in finding that the subject-matter of claim 1 involves an inventive step over the prior art.

Accordingly, the subject-matter of claim 1 (and by the same token that of claims 2 to 4 which define preferred embodiments of the use of claim 1) is found to comply with Article 56 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated