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**Datasheet for the decision
of 28 June 2023**

Case Number: T 0031/21 - 3.3.06

Application Number: 15153520.0

Publication Number: 3050948

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C11D3/39

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Title of invention:
New use of complexing agent

Patent Proprietor:
The Procter & Gamble Company

Opponent:
Henkel AG & Co. KGaA

Headword:
New use of complexing agent /The Procter & Gamble Company

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 0031/21 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 28 June 2023

Appellant: Henkel AG & Co. KGaA
(Opponent) Henkelstrasse 67
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Representative: Henkel AG & Co. KGaA
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Respondent: The Procter & Gamble Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 1 December 2020
rejecting the opposition filed against European
patent No. 3050948 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chair L. Li Voti
Members: P. Ammendola
R. Winkelhofer

Summary of Facts and Submissions

I. This appeal lies from the decision of the opposition division to reject the opposition filed against European patent No. 3 050 948, claim 1 thereof reading:

"1. Use of from 3 grams to 6 grams of the tri-sodium salt of methyl glycine diacetic acid in an enzymatic automatic dishwashing detergent composition comprising from 0.1 to 50 mg of active protease and bleach for the removal of baked-on burnt-on soils containing-proteins from dishware in automatic dishwashing."

Claims 2 to 11 of the opposed patent define preferred embodiments of the use of tri-sodium salt of methyl glycine diacetic acid (hereinafter **MGDA-3Na**) described in claim 1.

II. In its decision the opposition division found, *inter alia*, that the ground of opposition under Article 100(a) EPC in combination with Article 56 EPC (lack of inventive step) did not prejudice the maintenance of the patent as granted. In its reasoning on inventive step (reasons 4 of the decision under appeal) the opposition division considered the closest prior art to be that disclosed in **D6** (WO 2014/017564 A1) - whose content was established considering its English equivalent **D6b** (AU 2013293942 A1) - and also took into account, *inter alia*, **D3** (WO 2011/027170 A2) and **D7** (EP 2 166 092 A1). Document **D9** (experimental data available from 2 May 2013 in the online register of the proceedings as regards EP 2520641) that had been filed by the opponent as alternative for the closest prior art about two months before the oral proceedings, was

not admitted and not considered by the opposition division because it was held not to be *prima facie* relevant since it had, inter alia, a similar disclosure of the documents already cited with the notice of opposition (reasons 2 of the decision under appeal).

III. The opponent (hereinafter **appellant**) appealed the decision.

With the statement of grounds of appeal the appellant only submitted arguments relating to the ground of opposition of lack of inventive step (Article 100(a) EPC in combination with Article 56 EPC) in respect to claim 1 of the patent as granted (hereinafter **claim 1**). They requested the board to admit and consider D9 and presented an objection of lack of inventive starting from this prior art. They also presented a line of reasoning on inventive step starting from D6 based on the dimensions of the dishwashers allegedly used in D6, and filed **D10** (installation guide for dishwasher Panasonic NP-P45M2PS), **D11** (installation guide for dishwasher Panasonic NP-TR3) and **D12** (installation guide for dishwasher Maytag 24'') to support such line of reasoning.

IV. The patent proprietor (hereinafter **respondent**) replied to the appeal, disputing the admittance and consideration of document D9 and of the new line of reasoning based on the dimensions of the dishwashers described in D10 to D12.

V. In a communication pursuant to Article 15(1) RPBA, the board expressed its preliminary opinion that D9 to D12 as well as the appellant's new line of reasoning on inventive step based on the dimensions of the dishwashers in D6b were not to be admitted into the

appeal. As to the lack of inventive step objection the board wrote (see point 3 of the communication):

"Since the board is not minded to admit and consider documents D9 and D10 to D12 as well as the completely new line of reasoning based on the dishwashers' dimensions in D6b, the appellant's arguments as to inventive step based thereon cannot be dealt with. Apart from that, the statement of grounds of appeal only repeats their arguments as provided in first instance, which have already been answered correctly by the opposition division to which the board thus agrees (Article 15(8) RPBA 2020). The conclusion of the opposition division is thus also correct that the grounds of opposition under Article 100(a) EPC in combination with Article 56 EPC do not prejudice the maintenance of the patent as granted."

VI. Oral proceedings were held before the board on 28 June 2023.

VII. The parties' requests are as follows:

The appellant (opponent) requests that the decision under appeal be set aside and amended such that the patent be revoked.

The respondent (patent proprietor) requests that the appeal be dismissed.

Reasons for the Decision

Procedural issues

1. Non-admittance (non-consideration) of D9

- 1.1 According to Article 12(6) RPBA the board shall not admit facts, objections or evidence which were not admitted in the proceedings leading to the decision under appeal, unless the decision not to admit them suffered from an error in the use of discretion or unless the circumstances of the appeal case justify their admittance.
- 1.2 The appellant considered the opposition division's decision not to admit the late filed document D9 (in view of the not *prima facie* relevance of the latter, see reason 2 of the decision) to be erroneous, in essence because it would be in contradiction with the opposition division's acknowledgement (see reason 4.2) that the common weight of a unit dose of dishwashing composition would be 10 to 25 g.
- 1.3 Thus, the appellant neither disputes that the filing of D9 had occurred late, nor submits that the opposition division erred in the use of its discretion.
- 1.4 Further, reasons 2 of the decision refer to the existence of "several differences between D9 and claim 1" and conclude that the documents cited in the notice of opposition already provide a "similar disclosure".
 - 1.4.1 It cannot be derived from these reasons that the opposition division, while considering D9, disregarded the common general knowledge (allegedly) acknowledged in the first sentence in reasons 4.2 of the decision. In fact, the board notes that D9, which is an experimental report taken apparently from a different older case, does not disclose the amount of detergent used and such a common general knowledge cannot be

applied thereto without further explanations about the test background.

1.5 Hence, the board concludes that the contradiction in the decision under appeal alleged by the appellant, is neither apparent from the explicit content of reasons 2 and 4.2, nor necessarily implied therein.

1.6 Therefore, the opposition division's decision not to admit the late filed D9 was based on a valid criterion (of lack of *prima facie* relevance) and can thus not be challenged.

Further the factual and legal reasons are the same as those discussed during opposition so that there is no justification for the re-filing of the document not admitted into the opposition proceedings.

Accordingly, the appellant's request to admit D9 cannot be granted in view of Article 12(6) RPBA 2020.

2. Non-admittance (non-consideration) of D10 to D12

2.1 The documents D10 to D12 have been filed with the statement of grounds of appeal as evidence of the lower dimensions of the dishwashers for the Japanese market used in the examples of D6b, in comparison to those of an allegedly usual dishwasher for the European or US market.

2.2 It is undisputed that in no stage of the proceedings before the opposition division the appellant pointed to the possible relevance of the dimensions of the dishwasher used, and in particular of those used in D6b. Hence, also the decision under appeal does not address the relevance of dishwashers' dimensions.

2.3 Nevertheless, the appellant submitted that the filing of D10 to D12 addressed the consideration in the decision under appeal that the weight of the detergent composition unit dose taught in D6b is 3 g (see reasons 4.2 and 4.3 of the appealed decision).

2.3.1 The board notes, however, that the fact that the unit dose disclosed in D6b is 3 g was already pointed out in the written proceedings preceding the oral proceedings (held on 13 October 2020): see the submission of the respondent dated 13 August 2020, page 1.

2.3.2 Nor has the appellant at any stage of the opposition (e.g. even just during the final hearing) already pointed to the link possibly existing between the weight of unit dose disclosed in D6b and the dimensions of the dishwashers e.g. in Japan.

2.4 Thus, the filing of D10 to D12 with the statement of grounds of appeal appears neither a reaction to the reasoning in the decision under appeal nor an attempt to support arguments already presented in opposition. Moreover, these documents are cited for the first time at the appeal stage in combination with D6b to create a completely new line of reasoning for inventive step: i.e. a fresh case. This is not in accordance with the function of the appeal proceedings.

Hence, pursuant to Articles 12(4) and (6) RPBA 2020, D10 to D12 and the arguments based on these documents could not be considered in the appeal proceedings.

Patent as granted

3. Inventive step objection (Article 100(a) EPC in combination with Article 56 EPC): claim 1

3.1 The appellant did not dispute the findings of the opposition division that:

- the unit doses of 3 g of the dishwashing compositions exemplified in D6b [such as, for instance, that of composition 11 in Table 1-2 on page 40, wherein the MGDA-3Na content was 40 wt.%] could be considered the closest prior art (see reasons 4.1-4.3 of the decision under appeal),
- the subject-matter of claim 1 differed from this prior art in that the former required 3.0-6.0 g of MGDA-3Na and 0.1-50 mg of protease (see reason 4.5 of the decision under appeal), and
- the technical problem solved by the subject-matter of claim 1 vis-à-vis this prior art was "how to improve the use of MGDA-3Na and protease containing dishwashing composition for removal of baked-on, burnt-on egg and macaroni cheese" (see reasons 4.6 of the decision under appeal).

3.2 The appellant rather argued that the combination of D6b with either D3 or D7 would have rendered obvious for the skilled person to expect that larger amounts of the dishwashing compositions of D6b would also be apt at removing baked-on, burnt-on soils containing proteins from kitchenware. Hence, and since the skilled person was not only aware that the weight of common unit doses of dishwashing compositions ranged from 10 to 25 g, but would also expect that the use of larger amounts of dishwashing compositions would in general result in improved cleaning, no inventive step was required to scale-up the unit dose of 3 g of the prior art of departure so as to arrive at the claimed use.

3.3 It is undisputed that D3 is silent on the removal of baked-on, burnt-on soils.

In contrast thereto, the appellant's submission that the disclosure in D3 of the "IKW test method" (see D3, page 35, line 9 to 17) for ascertaining the cleaning performance of the dishwasher detergents of this prior art also implied the ability of the latter to remove baked-on, burnt-on soils, has been disputed by the respondent.

The respondent provided no supporting evidence for their allegation that this was not the case.

3.4 As to the disclosure in D7, the board concurs with the reasoning in 4.7.3 and 4.8 of the decision under appeal: even though D7 describes in Example 1 a unit dose of 17 g with a MGDA (but not specifically MGDA-3Na) amount as claimed in the patent in suit, as well as its use for dishwashing kitchenware with baked-on macaroni and cheese, still such example does not contain any protease, but rather an amylase. Moreover, neither this example nor the remainder of the disclosure in D7 acknowledge any effect of **MGDA-3Na** on the removal of baked-on burnt-on soils.

In particular, it is to be stressed that:

- in paragraph [0104] the composition of Example 1 in D7 is only described to provide the washed items with "excellent shine", possibly occurring cleaning effects not being analysed, and
- as apparent from paragraphs [0011] to [0017] therein, D7 focus rather on the use in dishwashing of a new amylase in combination with MGDA (or GLDA), optionally also in presence of protease.

Therefore, the disclosure in D7 does not suggest to the skilled person that it is the used amount of MGDA (in

particular possibly MGDA-3Na) that ensures removal of baked-on burnt-on soils and is fundamentally different from that of D6b, so that a combination of these two documents does not appear plausible. Moreover, even a hypothetical combination would not be possibly suggestive that a modification of the teaching of D6b with very different and larger unit doses of composition (not containing any amylase) would achieve improved removal of baked-on, burnt-on soils.

- 3.5 Finally, the skilled person's expectation referred to by appellant in their reasoning - namely that the use of larger amounts of detergent composition would in general result in improved cleaning - has been convincingly disputed by the respondent, by correctly referring to the well-known fact that larger amounts of dishwashing compositions may favour the formation of deposit onto the washed items and in fact might not be favourable for the removal of soils.
- 3.6 Therefore, the appellant could not show that the subject-matter of claim 1 did not involve an inventive step (Article 100(a) EPC in combination with Article 56 EPC).
4. Accordingly, the findings of the opposition division are correct that none of the invoked grounds of opposition prejudice the maintenance of the patent as granted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



A. Pinna

L. Li Voti

Decision electronically authenticated