

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 27 April 2023**

**Case Number:** T 0064/21 - 3.3.06

**Application Number:** 11791621.3

**Publication Number:** 2640819

**IPC:** C11D3/39, C11D3/40, C11D17/00,  
C11D3/22

**Language of the proceedings:** EN

**Title of invention:**  
Dyed coated bleach material

**Patent Proprietor:**  
Reckitt Benckiser Finish B.V.

**Opponent:**  
Henkel AG & Co. KGaA

**Headword:**  
Dyed coated bleach / RECKITT BENCKISER

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

**Keyword:**

Inventive step (main request) - (no)  
Admissibility of auxiliary requests 1 and 2 - (no) - filed  
after summons to oral proceedings - no exceptional  
circumstances

**Decisions cited:**

T 0277/19

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0064/21 - 3.3.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.06**  
**of 27 April 2023**

**Appellant:** Henkel AG & Co. KGaA  
(Opponent) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Viering, Jentschura & Partner mbB  
Patent- und Rechtsanwälte  
Hamborner Straße 53  
40472 Düsseldorf (DE)

**Respondent:** Reckitt Benckiser Finish B.V.  
(Patent Proprietor) Siriusdreef 14  
2132 WT Hoofddorp (NL)

**Representative:** Cawdell, Karen Teresa  
Reckitt Benckiser  
Corporate Services Limited  
Legal Department - Patents Group  
Dansom Lane  
Hull HU8 7DS (GB)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 2 December 2020  
rejecting the opposition filed against European  
patent No. 2640819 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

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

## **Summary of Facts and Submissions**

- I. The opponent's appeal lies from the decision of the opposition division to reject the opposition against European patent no. 2 640 819.
- II. With its statement of grounds of appeal the appellant (opponent) argued *inter alia* that claim 1 as granted lacked an inventive step over D2 (WO 2006/000344 A1) in combination with document D1 (WO 97/14780 A1).
- III. In its reply to the opponent's appeal the respondent (patent proprietor) defended the patent in its granted form.
- IV. Following the board's communication under Article 15(1) RPBA dated 10 November 2022, the respondent informed with letter of 24 March 2023 that the proprietor would not attend the oral proceedings on 27 April 2023, filed two sets of claims as auxiliary requests 1 and 2 and adapted pages of the description, and put forward further arguments in defence of all requests.
- V. At the oral proceedings held on 27 April 2023 the respondent, as announced with letter dated 24 March 2023, did not attend the oral proceedings. According to Rule 115(2) EPC and Article 15(3) RPBA 2020 the proceedings were continued in its absence.
- VI. The final requests of the parties were the following:  
  
The appellant (opponent) requested that the decision under appeal be set aside and the patent be revoked in its entirety. Further it requested that auxiliary

requests 1 and 2 not be admitted into the appeal proceedings.

The respondent (patent proprietor) requested in writing that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained in amended form on the basis of auxiliary request 1 or auxiliary request 2, filed with letter dated 24 March 2023.

VII. Claim 1 as granted (main request) reads as follows:

*"1. A dyed particle comprising a bleach material and wherein the particle has a coating wherein the coating is a sugar compound or a mixture of sugar compounds."*

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that it contains the additional wording "**and wherein the dye is located in or on the coating.**"

Claim 1 of auxiliary request 2 reads as follows (amendment with respect to claim 1 as granted being put in evidence by the board):

*"1. A dyed particle comprising a bleach material and wherein the particle has a coating wherein the coating is **mannitol or a mixture of sugars comprising mannitol** ~~a sugar compound or a mixture of sugar compounds~~, **and wherein the dye is located in or on the coating.**"*

## **Reasons for the Decision**

Main request - patent as granted

1. *Inventive step (Articles 100(a) and 56 EPC) - Claim 1*

1.1 The patent in suit aims (paragraphs [0001] and [0012]-[0014]) at providing dyed bleach component particles which show more colour stability upon storage.

1.2 Both parties considered document D2, relating to the provision of a process for preparing particles of the bleach phthalimidoperoxycapronic acid (PAP) which are more stable upon storage (page 3, first full paragraph), to represent the most suitable starting point for evaluating inventive step.

The closest prior art appears thus to be represented by a coated PAP particle as prepared in the examples of D2, which particle differs from the subject-matter of claim 1 at issue in that it is not dyed and has a coating of the polyethylene glycol PEG 4000, which is not a sugar compound.

1.3 The examples of the patent in suit (paragraphs [0123]-[0131]), although not representing any direct comparison with the closest prior art, show that particles comprising PAP and provided with a coating of mannitol containing a dye have increased dye stability upon storage with respect to a **not coated** particle sprayed with the same dye.

However, claim 1 at issue does not specify as a feature the location of the dye within or on the claimed particle. Moreover, even though paragraph [0019] of the patent states that the bleach particle is coated with a coating and then treated with a dye or is coated with a coating already containing a dye like in the examples, these embodiments are only the subject-matter of dependent claims 8 or 10 as granted. Thus, claim 1 would not be read by the skilled person as being

limited to a bleach particle coated with a coating and then treated with a dye or coated with a coating already containing a dye, but to encompass also further embodiments wherein the dye is possibly not located in or on the coating.

- 1.3.1 Moreover, the term "*dyed particle*" of claim 1 at issue only necessarily implies that the colour provided by the dye must be visible, but it does not identify either the precise location of the dye within or on the particle. Hence, and since the claim does not describe or imply any specific optical characteristic of the coating, the skilled person would understand that claim 1 includes embodiments wherein the coating can be at least partially transparent and, thus, the dye can be contained below the coating and still be visible.

Therefore, claim 1 at issue encompasses particles wherein the dye is present in the core together with the bleach material. However, in such particles the dye would be necessarily in contact with the bleach component like in the control particles tested in the patent (paragraph [0128]) and would be similarly unstable (see paragraph [0131] of the patent).

- 1.3.2 Therefore, the technical advantage shown in the examples of the patent cannot be considered to have been credibly realized across the entire scope of claim 1 at issue.

Under these circumstances the objective technical problem successfully solved by means of the claimed dyed particle can only be formulated in less ambitious terms as the provision of a further dyed coated particle comprising a bleach material.

1.4 Document D2 discloses (page 5, last paragraph) that the coated bleach particles of that invention may contain dyes in its coating and in that it would be preferable in such a case to have a coating containing two layers and to locate the dye in the outer layer. Therefore, in the light of this explicit teaching, it would have been obvious for the skilled person to provide the coated PAP particles of the examples of D2 with two coating layers and to provide a dye in the outer layer.

Moreover, it would have also been obvious for the skilled person faced with the technical problem posed, to try instead of PEG 4000 also other organic polymers known from the prior art to be suitable coatings for preparing stable PAP bleach particles.

1.4.1 In this respect the skilled person would learn from document D1 (page 1, lines 6-8; page 7, line 2; claims 1 and 2) that stabilized bleach particles having a core of a peroxygen bleach material such as PAP can be provided with a coating of a gelled polymer material such as alginate, which is a polysaccharide sugar as required by claim 1 at issue.

In fact the wording "sugar compound" of claim 1 at issue would be understood by the skilled person as identifying a generic "carbohydrate" encompassing the class of compounds including all those identified in the description (paragraphs [0052] and [0054]), i.e. monosaccharides, disaccharides, polysaccharides as well as sugar polyols like mannitol (see also claim 2).

1.4.2 Therefore, it would have been obvious for the skilled person, faced with the above technical problem, to try an alginate instead of PEG 4000 as an alternative coating material for the PAP particles disclosed in D2,



which can also contain a dye in the coating as exposed above. It was thus obvious for the skilled person to provide a dyed bleach particle having all the features of claim 1 at issue.

1.5 The claimed subject-matter thus lacks an inventive step in the light of the combination of documents D2 and D1.

1.6 The main request is thus not allowable.

Auxiliary requests 1 and 2

2. Auxiliary requests 1 and 2 are new requests filed by the appellant on 24 March 2023, 5 months after the summons to oral proceedings and more than 4 months after having received the communication under Article 15(1) RPBA expressing the preliminary opinion of the board.

In particular, these requests incorporate into claim 1 the subject-matter of granted claim 10 or of granted claims 2 and 10, respectively. Therefore, they amount to an amendment of the party's case which shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the appellant (see Article 13(2) RPBA 2020).

2.1 The appellant has justified the filing of these two auxiliary requests in its letter of 24 March 2023 (points 6 and 7) as being a response to the board's communication of 10 November 2022 and having the intention of addressing the specific objections raised in the communication.

In particular (point 6.3 and 7.3 of the appellant's letter), the amendments to claim 1 according to these auxiliary requests intend to address the arguments exposed in paragraphs 5.3 and 5.2.1, respectively, of the board's communication, i.e. that

*"claim 1 appears to encompass particles with a transparent coating wherein the dye is present in the core together with the bleach material. In such a case the dye would thus necessarily be in contact with the bleach component as in the control particles tested in the patent (paragraph [0128]) and would not be stable"* and

*"the wording "sugar compound" does not define precisely the class of compounds covered by claim 1, which includes according to the description (paragraphs [0052] and [0054]) monosaccharides, disaccharides, polysaccharides as well as polyols as mannitol (see also claims 2 and 12). Under these circumstances it appears that the skilled person would understand the term "sugar compound" to identify a generic "carbohydrate" and thus a class of compounds including all those identified in the description."*

- 2.1.1 However, all these arguments were already put forward in the opponent's statement of the grounds of appeal (point 2.1, page 2, third and fourth full paragraphs and point 2.3, page 3, last full paragraph to page 5, fourth full paragraph) wherein the opponent maintained the same objections already put forward during opposition (see decision under appeal: paragraph 6.1.1).

Therefore, the board's communication of 10 November 2022, based on the arguments submitted by the appellant with its statement of grounds of appeal, has not

introduced new arguments or objections which could have been considered as representing exceptional circumstances justifying the amendment of the respondent's case.

It is in fact established case law (see Case Law of the Boards of Appeal, 10th edition, July 2022, Chapter V.A. 4.5.6c) and h) as well as T 0277/19: point 3.4 of the reasons) that filing claim requests in response to the board's preliminary opinion, which merely assesses objections raised from the very beginning of the appeal proceedings, does not qualify as exceptional circumstances and cannot justify these claim requests possibly being taken into account.

- 2.2 The board has thus decided in view of Article 13(2) RPBA 2020 not to admit auxiliary requests 1 and 2 into the appeal proceedings.
3. The board thus concludes that the respondent's only request in the proceedings is not allowable.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Pinna

P. Ammendola

Decision electronically authenticated