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Aktenzeichen / Case Number / N^o du recours : T 122/87 - 3.3.2

Anmeldenummer / Filing No / N^o de la demande : 81 201 157.5

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 050 897

Bezeichnung der Erfindung: **Aluminosilicate-agglomerates and detergent**
Title of invention: **compositions containing them**
Titre de l'invention :

Klassifikation / Classification / Classement : C11D 3/08

ENTSCHEIDUNG / DECISION

vom / of / du 23 November 1989

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

The Procter & Gamble Company

Einsprechender / Opponent / Opposant :

01) Degussa AG, Frankfurt
02) Henkel Kommanditgesellschaft auf
Aktien

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Article 56

Schlagwort / Keyword / Mot clé :

"Inventive step - insufficient reply to
objections made in a communication by the Board
- objections not overcome"

Leitsatz / Headnote / Sommaire



Case Number : T 122/87 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 23 November 1989

Appellant : The Procter & Gamble Company
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Respondent : Henkel
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Representative :

Decision under appeal : Decision of the Opposition Division of the European
Patent Office dated 28 January 1987 revoking
European patent No. 0 050 897 pursuant to
Article 102(1) EPC

Composition of the Board :

Chairman : P. Lançon

Members : A. Nuss

E. Persson

Summary of Facts and Submissions

- I. European patent No. 0 050 897 was granted on 6 March 1985 on the basis of eight claims, pursuant to European patent application 81 201 157.5, filed on 20 October 1981.

Independent Claims 1 and 8 of the patent as granted read as follows:

1. A stable, rapidly-dispersible zeolite detergent builder agglomerate consisting essentially of an intimate mixture of:

(a) from 60% to 95% by weight of an aluminosilicate detergency builder, selected from the group consisting of:

(i) amorphous aluminosilicate;

(ii) a hydrated crystalline zeolite selected from the group consisting of zeolite A, X, P and mixtures thereof, containing at least 10% of water and having a particle size in the range from 0.1 to 25 micrometers; and

(iii) mixtures of the amorphous and the crystalline species;

said aluminosilicates having a calcium ion-exchange capacity of at least 200 mg CaCO₃/g; and a calcium ion-exchange rate of at least 0.034 g CaCO₃/l/min/g;

- (b) from 1% to 4% by weight of synthetic anionic detergent surfactant which is relatively hardness insensitive;
- (c) from 0.5% to 10% by weight of an inorganic salt and being essentially free of silicates; and
- (d) balance water.

8. A detergent composition comprising from 5% to 80% by weight of the agglomerate of Claim 1 and from 20% to 95% by weight of a spray-dried granule containing a surfactant.

II. Notices of opposition were filed by Respondents (Opponent OI and OII) on 18 September 1985 and 5 December 1985 respectively, both requesting revocation of the patent on the basis of Article 100(a) EPC. The oppositions were supported by altogether five documents of which the following two were considered to be relevant:

- (4) DE-A-2 615 698
- (5) DE-A-2 525 778.

III. In a decision dated 28 January 1987, the Opposition Division revoked the patent.

According to the Opposition Division, the claimed compositions were entirely within the range of products produced by drying the suspensions according to Claim 1 of document (4). Although aluminosilicates as defined in Claim 1 of the patent in suit were not specifically disclosed in document (4), i.e. the closest state of the art, they were within the general formula given in Claim 1 of that prior art document. Furthermore, they were well known products as acknowledged in the proprietor's letter of

4 August 1986 and in the patent in suit. The use of such aluminosilicates would thus have been obvious to a skilled person.

Both the claimed and the known compositions were described as free-flowing and dust-free when produced by spray-drying. Although in document (4) the main aim is to produce stable pumpable suspensions, it is clearly stated therein that the spray-dried products have said properties. In these circumstances, an inventive step could only have been acknowledged if a selection made on the basis of the matter disclosed in document (4) had resulted in an unexpected advantage over the spray-dried prior art products.

As to the absence of silicates stipulated in Claim 1 of the patent in suit, the known interaction between silicate and aluminosilicate would have discouraged a skilled person from adding silicates if spray-drying was contemplated. Silicates were mentioned in document (4) merely as a possibility without being actually necessary.

Finally, although anionic surfactants were not preferred in document (4), they were named there as a possibility.

- IV. The Appellant (Proprietor of the Patent) filed a notice of appeal against this decision on 24 March 1987. The appeal fee was paid in due time. A Statement of Grounds of Appeal was filed on 3 June 1987.

In this Statement, the Appellant not only agreed that document (4) constituted closest art, but also that the components (a) to (c) of the claimed composition, as well as their levels, could theoretically be chosen from the group of compounds and ranges broadly disclosed in Claim 1

of the prior art document. He insisted^{on} that the claimed invention was a qualitative and quantitative inventive selection.

However, he considered that no additional comparative evidence was to be needed for demonstrating an inventive step vis-à-vis document (4).

- V. Both Respondents disagreed that the claimed invention involved an inventive step and one stressed in particular that it appeared from document (4) that the known suspensions were not necessarily spray-dried together with other detergent compounds, but could be transformed by such treatment into free-flowing and dust-free products such as powders for water softening.
- VI. In a communication to the parties dated 6 June 1989, the Board set out the major reasons speaking against a reversal of the decision of the first instance in the following terms.
1. In order to be patentable, it is not sufficient for the claimed compositions to merely restrict the choice of components to combinations not specifically disclosed in the closest prior art document, i.e. document DE-A-2 615 698 (4). Although this may impart novelty to the independent Claims 1 and 8 in the present case, it cannot, however, lead to a patentable (selection) invention in the absence of testable and significant improvements which are neither expected nor necessarily obtained in the routine development of such products, as follows from the jurisprudence of the Boards of Appeal such as illustrated by decision T 192/82 (see OJ 9/1984, page 415 ff., in particular point 19 of the Reasons).

2. In document (4), silicates are only mentioned as a further possibility among others (see page 25(26), lines 6 to 9) and their absence in the claimed compositions cannot, therefore, be taken into account when determining the problem. Furthermore, in view of the interaction between silicate and aluminosilicate the man skilled in the art knew that this was likely to adversely affect the capacity and rate of hardness depletion of the ion exchange material in laundry liquor (cf. document DE-A-2 525 778 (5), page 25(32), in particular lines 9 to 19).

In addition, it is not relevant that in document (4) sulfonated surfactants are positioned as non-preferred (see Appellant's letter dated 27 May 1987, point 6, first paragraph) since all the previously published embodiments must be taken into consideration when assessing inventive step, irrespective of whether they are particularly emphasised in the citation (cf. decision T 24/81, OJ 4/1983, page 133 ff., in particular point 14 of the Reasons).

3. Under the circumstances, it does not seem likely that the decision of the first instance will be reversed.

- VII. (i) In answer thereto, the Appellant only referred globally to his initial position that the claimed subject-matter represented a patentable selection invention over document (4) and further stated that no additional evidence was needed to support such a selection invention.
- (ii) From the two Respondents, one reacted on the Board's communication, which was considered to reflect his own opinion.

VIII. The Appellant requests that the decision under appeal be set aside and the patent be maintained.

The Respondents requests that the appeal be dismissed.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
2. The Appellant has failed to take position on the specific points raised by the Board in its communication, although the provisional conclusion of the Board at that stage was that a reversal of the decision of the first instance seemed to be unlikely. Instead, the Appellant only in very general terms referred to his initial submissions and for the rest merely stated that no additional evidence was needed to support that the claimed subject-matter represented a patentable selection invention over document (4) (see paragraph VI and VII(i) above).

The reasons indicated in said communication not being rebutted, the Board maintains them entirely, with the inevitable consequence that the prerequisites for a patentable selection invention, mentioned in that communication, are neither met by Claim 1 nor by Claim 8. The requirements of Article 56 EPC are therefore not met (see decision T 39/84 of 8 December 1986 (not published in the O.J. EPO), in particular point 5 of the Reasons).

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Beer

P. Lançon