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D E C I S I O N
of 11 November 1996

Case Number: T 0594/93 - 3.2.5

Application Number: 87305072.8

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IPC: D06F 39/02

Language of the proceedings:EN

Title of invention:

Sachet product

Patentee:

UNILEVER PLC, et al

Opponent:

Procter & Gamble E.T.C.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56

Keyword:

"Novelty and inventive step (yes) - after further amendment"

Decisions cited:

-

Catchword:

-

Case Number: T 0594/93 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 11 November 1996

Appellant: PROCTER & GAMBLE E.T.C.
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Decision under appeal: Interlocutory decision of the Opposition Division of the European Patent Office posted 05 May 1993 concerning maintenance of European patent No. 0 249 439 in amended form.

Composition of the Board:

Chairman: G. Gall
Members: W. D. Weiß
A. Burkhard

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the interlocutory decision of the Opposition Division on the amended form in which the European patent No. 0 249 439 can be maintained.

One opposition was filed against the patent as a whole and based on Article 100(a) EPC (lack of novelty and inventive step) and on Article 100(b) EPC (not sufficient disclosure for the embodiment according to Claim 4 as granted to be carried out).

The Opposition Division held that the grounds for opposition mentioned in Article 100(a) and (b) EPC did not prejudice the maintenance of the patent as amended, having regard to the following documents:

- (D1) US-A-4 259 373,
- (D2) EP-A-0 099 197,
- (D3) US-A-2 083 193,
- (D4) GB-A-0 395 211, and
- (D5) US-A-4 156 592.

II. The appellant (opponent) appealed against this decision maintaining his view that the subject-matter of Claim 1 as maintained by the Opposition Division was not novel having regard to either of the documents D3 or D4 and failed to involve an inventive step with respect to document D2.

III. In a communication issued together with the summons for oral proceedings, the Board expressed its

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intention to discuss the amendments applied to the claims also in the light of the provisions of Article 123(2) EPC.

Moreover, the Board pointed to that, starting from the closest prior art mentioned in the description of the patent in suit (EP-B-0 011 500 or EP-A-0 163 417), the basic problem of the patent in suit appeared to arise from an obvious drawback and that it appeared to be the obvious action of common sense to prevent a sachet from slipping through an opening or crevice by making it bulkier by filling something into or attach something to it.

IV. At the end of the oral proceedings held on 11 November 1996, the following was requested:

The appellant requested that the decision under appeal be set aside and that the European patent No. 0 249 439 be revoked.

The respondent requested that the appeal be dismissed (main request) or that the patent be maintained on the basis of Claims 1 to 8 of the second auxiliary request filed with letter of 14 March 1994 or be maintained on the basis of the documents (Claims 1 to 3 and 6 pages of an amended description) filed as a "Fifth Auxiliary Request" at the oral proceedings of 11 November 1996.

V. Claim 1 according to the main request reads as follows:

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"1. A sachet of flexible sheet material for a treatment composition characterised in that the sachet is so shaped and dimensioned that when immersed in water in the absence of the treatment composition the thickness of the sachet at least at one point exceeds the thickness of the sachet walls themselves and is at least 1 cm, whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced."

The set of claims filed as "Second Auxiliary Request" with letter of 14 March 1994 contains the four independent Claims 1, 3, 4, and 6. Claims 1 and 3 in this version read as follows:

"1. A sachet of flexible sheet material for a treatment composition, which sachet is a non-opening sachet consisting at least partially of water-permeable material characterised in that the sachet contains water-insoluble material whereby the sachet is so shaped and dimensioned that when immersed in water in the absence of the treatment composition the thickness of the sachet at at least one point is at least 1 cm, whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced.

3. A sachet of flexible sheet material for a treatment composition characterised in that the sachet has attached thereto a relatively rigid stud having at least one dimension of 1 cm or more whereby

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the sachet is so shaped and dimensioned that when immersed in water in the absence of the treatment composition the thickness of the sachet at least one point is at least 1 cm, whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced."

The independent Claims 1 and 2 filed as "Fifth Auxiliary Request" at the oral proceedings on 11 November 1996 read as follows:

"1. A sachet of flexible sheet material for a treatment composition, which sachet is a non-opening sachet consisting at least partially of water-permeable material characterised in that the sachet contains a water-insoluble ball so dimensioned that when the sachet is immersed in water in the absence of the treatment composition, the sachet has a thickness at at least one point which is at least 1 cm, whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced.

2. A sachet of flexible sheet material for a treatment composition, which sachet is a non-opening sachet which in the dry state has a thickness smaller than 1 cm consisting at least partially of water-permeable material characterised in that the sachet contains water-insoluble, water-swellaible material which on immersion in water increases in bulk whereby the sachet is so shaped and dimensioned that when immersed in water in the absence of the

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treatment composition the thickness of the sachet at at least one point is at least 1 cm, whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced."

VI. The appellant argued as follows:

Claim 1 of the "Second Auxiliary Request" offended against the provisions of Article 123(2) EPC, because "water insoluble material" was originally only disclosed as being "granular".

Since it was not clearly defined which dimension had to be considered as the "thickness" of a sachet, the subject-matter of claim 1 according to the main request was anticipated by the products disclosed in either of the documents D3 or D4 and, therefore, lacked the prerequisite of novelty.

Having regard to the requirement of inventive step, the comments of the Board expressed in its communication were fully endorsed. Consequently, the subject-matter of independent Claim 1 of the main request did not involve an inventive step. Taking into further consideration that problem of posting was known from document D2, Claims 1 and 3 of the "Second Auxiliary Request" and Claims 1 and 2 of the "fifth auxiliary request" lacked an inventive step.

VII. The respondent argued as follows:

It was clear from the Comparative Example A

(EP-B-0 249 439, page 4, lines 50 to 54) when opposed to the examples reflecting embodiments of the invention that the essence of the invention was to create the final thickness by adding the thickness of an insert or an external protrusion to the thickness of the sachet walls.

Claim 1 of the "second auxiliary request" was intended to originate as an admissible generalisation of the original Claims 2, 5 and 7 all of which referred to different kinds of water-insoluble materials only one of which was of granular consistency.

Documents D3 and D4 concerned reusable bags the intended use of which was completely different from the sachets of the invention which were flat after having exhausted their contents. Since these known bags were fixedly suspended and not floating freely in the laundry during use the problem of posting could not arise. Consequently, these documents could put into question neither the novelty nor the inventive step of the subject-matter of the main and the auxiliary requests.

This was even more valid for the claims of the "Fifth Auxiliary Request" because the sachets claimed there coped with the additional requirement of reduced storage space.

Reasons for the Decision

1. *Original Disclosure*

- 1.1 Claim 1 according to the main request differs from its predecessor as granted by the additional feature that the sachet at least one point exceeds the thickness of the sachet walls themselves.

Sachets according to the Examples 1 to 8 which refer to embodiments of the invention differ from the sachet according to the Comparative Example A obviously representing the state of the art acknowledged in the introductory part of the description in that they contain an additional insert or external protrusion but leave the basic construction, in particular the thickness of the sachet walls, unchanged. The sachet of Example 9 representing an embodiment according to Claim 4 as granted differs from the known sachet by a different design but is made from the same non-woven fabric used to make the prior art Comparative Example A.

Consequently also in this embodiment, increased thickness of the sachet is created by a measure other than increasing the thickness of the walls themselves.

Therefore by the additional feature, which by its nature reduces the scope of protection originally conferred by the version as granted, Claim 1 according to the main request does not contain subject-matter which extends beyond the content of the application as filed.

- 1.2 Claim 1 according to the "Second Auxiliary Request" has been objected with respect to the feature of "a water-insoluble material" which was rated as an inadmissible generalisation of the particularly disclosed embodiments of a "water-insoluble granular material", a "water-insoluble ball", and a "water-swellable material".

This rating, however, neglects the fact that the patent itself generalises the above mentioned embodiments as belonging to a group which solves the basic problem of the invention by a sachet which contains an insert (cf. EP-B-0 249 439, page 4, lines 52 and 53, and EP-A-0 249 439, page 4, lines 51 and 52). This expression is technically the same as the objected expression mentioned above.

Consequently, this objection on the ground of Article 123 EPC against Claim 1 of the "Second Auxiliary Request" is not pertinent.

2. *Novelty*

- 2.1 The sachets according to the patent in suit are of the type which may be used in an automatic, in particular front-loading, washing machine, where they, turning together with the laundry, exhaust their complete content of active ingredient during one wash cycle. After having delivered their active ingredient, they tend to be very thin and give rise to the problem of posting. The fact that the sachets according to the patent in suit must be adapted for this particular use is unambiguously reflected by the

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functional feature "whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced", which feature is contained in all the independent claims at issue.

The bags disclosed in documents D3 and D4 are intended to be filled with dyestuff, in particular with bluing, and are adapted to be temporarily introduced by hand into the rinsing water and to be moved therein in order to release a part of its content. Thereafter the bag is removed and adequately stored for the next use. In order to enable this kind of use, these known bags comprise a handle at which they are held when being moved through the water and are suspended for drying between the uses.

These known bags are not constructed and intended to be used in drum-type automatic washing machines which do not permit access to the laundry when being active. Even when misused in such a machine, the rather low thickness of these known handles would bring about the risk that the handle slipped into the gap between the drums and blocked their motion.

Consequently, the bags disclosed in documents D3 and D4 are alien to the sachets with which the patent in suit is concerned. Therefore, these documents are not apt to challenge any of the claims on the ground of novelty.

3. *Inventive Step*

3.1 The document D3 and D4 having proven to be alien to the subject-matter of the patent in suit, the documents EP-B-11 500 or EP-A-163 417 from which the patent in suit starts in its description are still the closest prior art.

These known sachets suffer from the drawback that, when used in a drum-type washing machine, they tend to pass between the inner, rotating drum and the outer, stationary drum (cf. EP-B-0 249 439, page 2, lines 13 to 18). The main problem on which the patent in suit is based consists in avoiding this disadvantageous effect which is called "posting".

Even if, as the appellant asserts, posting occurred in a relatively small percentage of cases, it must have caused breakdowns of the washing machines, since otherwise it would not have caused a problem. This problem which originates from an obvious drawback of the prior sachets can, therefore, not contribute to the presence of an inventive step.

3.2 According to the patent as granted (page 2, lines 29 to 31), the principle of the solution to this problem consists in that posting is eliminated or at least substantially reduced by making sure that, throughout the entire wash cycle, at least part of the sachet is sufficiently large that it cannot pass through the gap between the drums or, in the more sophisticated words of Claim 1 according to the main request that "the sachet is so shaped and dimensioned that when immersed in water in the absence of the treatment composition the thickness of the sachet at at least

one point is at least 1 cm, whereby passage of the sachet between inner and outer drums of a drum-type automatic washing machine is prevented, or substantially reduced".

The measure to prevent an article from slipping through an opening or crevice which it should not pass by adapting its shape and dimensions in a manner that it fits no longer through the opening or crevice, or, in simpler words, by making it bulkier, can only be rated as an action of common sense.

The other imaginable option of reducing the width of the gap between the drums has to be excluded in practice because this tolerance is dictated by the economy of machine production and the unbalanced motion of the rotating drum.

There cannot be any inventive merit in the idea to fill something into or attach something to a sachet to increase its bulk.

Consequently, the subject-matter of Claim 1 according to the main request and Claims 1 and 2 according to the "Second Auxiliary Request" fails to involve an inventive step.

The main request and the "Second Auxiliary Request" are, therefore not allowable,

- 3.3 The requirement of increased thickness is dictated by the washing function of the sachet, however, in conflict with the requirement of reduced storage

space and low packaging cost which is dictated by business management calculations (see EP-B-0 249 439, the paragraph bridging pages 2 and 3).

The combination of features of the independent Claims 1 and 2 according the "Fifth Auxiliary Request" present two different solutions which are compromises reconciling the these contradictory requirements.

The principle of the first solution consists in that the ball while increasing the bulk of the sachet is freely movable in its interior allowing for a side-by-side arrangement of the balls in a stack of sachets of one packaging unit.

The principle of the second solution consists in that the swellable material assumes its final volume only when it is in use.

- 3.4 None of the cited documents provides any hint for a person skilled in the art which would lead to the "ball"-solution of the above described dilemma.

The subject-matter of Claim 1 or the "Fifth Auxiliary Request", therefore, involves an inventive step.

- 3.5 Document D5 discloses a fabric softener-containing article consisting of a body of an open-celled reticulated urethane foam which is impregnated with the fabric softener. The softener also acts as a solid binder which maintains the foam body in a compressed form when it is out of contact with water. Document D5 also states (see column 3, lines 5 to 35) that this known article combines two advantages: It

has a thin sheet-like configuration when packaged and exhibits a slow gradual release of the softener when popping open in water. These two desirable functions are two not separable aspects of the same article.

Therefore, a person skilled in the art looking for a remedy for a solution of the problem of popping inherent in the conventional sachets would be guided to do away with the whole sachet and replace it by an article disclosed in D5.

Therefore, document D5 does not guide to the subject-matter of Claim 2 according to the "Fifth Auxiliary Request". The other cited documents are even farther away.

Consequently, the subject-matter of Claim 2 according to the "Fifth Auxiliary Request" involves an inventive step.

4. Since the dependent Claim 3 and the adapted description are not subject to any objection either, the Board is of the opinion that, taking into consideration the amendments made by the proprietor of the patent according to his "Fifth Auxiliary Request", the patent and the invention to which it relates meet the requirements of the EPC.

Order

For these reasons it is decided that:

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1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent in amended form in the following version:

Claims 1 to 3 according to the "Fifth Auxiliary Request" presented during the oral proceedings of 11 November 1996;

description as presented during the oral proceeding of 11 November 1996.

The Registrar:

The Chairman:

A. Townend

G. Gall