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D E C I S I O N
of 18 February 1999

Case Number: T 0339/95 - 3.3.1

Application Number: 88202253.6

Publication Number: 0313146

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Language of the proceedings: EN

Title of invention:
Detergent compositions

Patentee:
THE PROCTER & GAMBLE COMPANY

Opponent:
UNILEVER PLC / UNILEVER NV

Headword:
Softening agent/PROCTER & GAMBLE

Relevant legal provisions:
EPC Art. 123(3)

Keyword:
"Extension of the scope of protection (no) - proper interpretation of a granted claim in the light of the description"

Decisions cited:

-

Headnote/Catchword:



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Boards of Appeal

Chambres de recours

Case Number: T 0339/95 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 18 February 1999

Appellant: THE PROCTER & GAMBLE COMPANY
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Decision under appeal: Decision of the Opposition Division of the European
Patent Office posted 10 March 1995 revoking
European patent No. 0 313 146 pursuant to
Article 102(1) EPC.

Composition of the Board:

Chairman: J. M. Jonk
Members: R. Freimuth
W. Moser

Summary of Facts and Submissions

- I. The Appellant (Patentee) lodged an appeal against the decision of the Opposition Division by which European patent No. 0 313 146 was revoked in response to an opposition, based on Article 100(a), (b) and (c) EPC, which had been filed against the patent as a whole. Claim 1 of the patent in suit as granted read as follows:

"A granular detergent composition comprising

(a) conventional detergent ingredients; and

(b) clay agglomerates comprising from 60% to 99.5% by weight of smectite-type clay and

characterised in that **it** further comprises from 30% to 0.5% by weight of an organic humectant selected from: glycerol, ethylene glycol, propylene glycol, dimers and trimers of glycerol, and mixtures thereof." (emphasis added)

- II. The decision was based on three sets of claims according to the main, first auxiliary and second auxiliary request as submitted on 14 February 1995.

Claim 1 of the main request corresponded to Claim 1 as granted, except that the term "**it**" was replaced by "**said agglomerate**".

The main claims of the two auxiliary requests substantially contained the same amendment.

- III. The Opposition Division held that due to this amendment the scope of protection conferred by the patent in suit as granted was extended and that, consequently, the claimed subject-matter did not meet the requirements of Article 123(3) EPC.
- IV. Oral proceedings before the Board were held on 18 February 1999.
- V. The Appellant defended the formal allowability of the claimed subject-matter on the basis of sets of claims according to the main, first auxiliary and second auxiliary request submitted on 20 January 1999.

Claim 1 of this new main request corresponded to Claim 1 of the patent in suit as granted, except that the expression "**in that it further comprises**" was replaced by "**in that said clay agglomerates further comprise**". This amendment corresponded therefore essentially to the one considered by the Opposition Division.

The Appellant argued that the claims of the new main request satisfied Article 123 EPC. In this context, he argued in particular that in accordance with Article 69 EPC and the Protocol on the Interpretation of this article, adopted at the Munich Diplomatic Conference on 5 October 1973, the scope of protection conferred by a European patent should be determined by the terms of the claims, whereby the description should be used to interpret the claims. Therefore, having regard to the description and Claims 2 and 12 of the patent in suit as granted indicating that according to the invention the softening clay was present in the form of agglomerates comprising from 0.5% to 30%, preferably from 2% to 15%,

of the humectant, a proper interpretation of the subject-matter of Claim 1 as granted would give rise to a scope of protection not differing from that of Claim 1 of the present main request.

VI. The Respondents (Opponents) argued that Claim 1 of the present main request extended the scope of protection of the patent in suit as granted and therefore did not meet the requirements of Article 123(3) EPC. They argued in particular that the subject-matter of said Claim 1 was clear as it stands and that it was not inconsistent with the totality of the disclosure of the patent. Moreover, they emphasised that an interpretation of the wording of Claim 1 as granted in the sense of Claim 1 of the present main request would contravene the Protocol on the Interpretation of Article 69 EPC, since such an interpretation would degrade the meaning of the wording used in Claim 1 as granted to an unallowable extreme low level and would clearly be against the interests of third parties who might find themselves within the scope of the amended claim while outside the scope of Claim 1 as granted.

VII. The Appellant requested that the decision under appeal be set aside and a decision by the Board concerning the formal allowability of the claims of the main, the first auxiliary or the second auxiliary request as filed on 20 January 1999 under Article 123 EPC or Rule 88 EPC. Furthermore, the Appellant requested the remittal of the case to the Opposition Division, if the Board came to the conclusion to set aside the decision of the first instance.

The Respondents requested that the appeal be dismissed.

They also requested the remittal of the case to the Opposition Division, if the Board came to the conclusion to set aside the decision of the first instance.

VIII. At the conclusion of the oral proceedings the Board's decision was pronounced.

Reasons for the decision

1. The appeal is admissible.

2. *Main request*

2.1 Claim 1 is supported by Claims 1 and 4 as originally filed.

Claim 2 is based on the originally filed Claim 3.

Claims 3 to 11 and 13 to 16 correspond to the originally filed Claims 5 to 13 and 15 to 18, respectively.

Claim 12 is supported by the originally filed Claim 14, but is restricted to organic humectants as defined in present Claim 1.

Therefore, the subject-matter as defined in the present claims of the patent in suit complies with the requirements of Article 123(2) EPC. The Respondents did not raise objections in this respect.

2.2 The issue to be dealt with by the Board is whether the claims of the patent in suit in accordance with the present main request meet the requirements of

Article 123(3) EPC.

2.2.1 Article 123(3) EPC stipulates that the claims of a European patent "may not be amended during opposition proceedings in such a way as to extend the protection conferred".

2.2.2 Furthermore, Article 69(1) EPC specifies that the extent of protection conferred by a European patent shall be determined by the terms of the claims, and that, **nevertheless, the description and drawings shall be used to interpret the claims.**

In this context, the Protocol on the Interpretation of Article 69 EPC, adopted at the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents on 5 October 1973, which forms an integral part of the Convention pursuant to Article 164(1) EPC, stipulates that:

"Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the **strict, literal meaning** of the wording used in the claims, the description and drawings being employed only **for the purpose of resolving an ambiguity found in the claims.** Neither should it be interpreted in the sense that the claims **serve only as a guideline** and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining **a position between these extremes which combines a fair protection**

for the patentee with a reasonable degree of certainty for third parties." (emphasis added)

Thus, in each case, the question to be answered is whether, on a fair interpretation of the claims as granted in the light of the disclosure of the patent as a whole, the protection conferred by them has or has not in fact been extended.

2.2.3 In the present case, it is true that the skilled person would not on a reading of Claim 1 as granted on its own have reason to doubt that the indicated amount of one of the specified organic humectants relating to the granular detergent composition was a technically feasible feature, although he would perhaps ask himself what the function of that feature might be, in particular in the light of Claims 2, 12 and 13 indicating that the humectant forms part of the clay agglomerates.

2.2.4 In view of this fact, the Respondents argued that Claim 1 as granted was clear on its own, so that the skilled person had no reason to suppose that it was not what the Appellant intended to claim. In this context, he also submitted that, in view of the Examples II to V of the patent in suit, Claim 1 as granted was not evidently inconsistent with the teaching of the patent in suit as a whole.

However, in the Board's judgment, it clearly follows from Article 69(1) EPC and the Protocol on its interpretation, which - as indicated above - set out the way in which the extent of protection conferred by a patent is to be determined, that the description of the patent must be used to interpret the claims, irrespective of the

question whether the latter contain any ambiguity.

Moreover, it is clear from the patent in suit as a whole that the invention relates to detergent compositions comprising clay agglomerates as softening agents, whereby said agglomerates comprise 60% to 99,5% by weight of a smectite-type clay and, in addition, 30% to 0.5% by weight of one or more of the specified organic humectants (see page 2, lines 3 to 5 and 36 to 39; page 5, lines 3 to 5; the examples, which all describe the preparation of clay agglomerates; and Claims 2, 12 and 13 as granted).

Therefore, in the Board's judgment, it was not intended in the patent in suit to claim patent protection for a detergent composition comprising clay agglomerates which did not contain the indicated amount of the specified organic humectants.

Thus, in these circumstances, the Board concludes that the present amendment of Claim 1 as granted does not broaden its scope of protection because, on a proper interpretation of granted Claim 1 in the light of the disclosure of the patent in suit, its scope is actually as set out in the amended version, i.e. in the version of present Claim 1.

- 2.2.5 In this context, the Respondents argued that such an interpretation of the granted Claim 1, essentially relying on what the skilled person would derive from the description, while disregarding the specific wording of the claim, would not be in conformity with the Protocol on the Interpretation of Article 69(1) EPC.

However, having regard to the facts of the present case,

namely, that - as indicated above - the skilled reader of the patent in suit would have **immediately** understood that what is defined in the granted Claim 1 could only be that for which protection is sought in present Claim 1, it is the Board's position that the interpretation of the granted claim as indicated above under point 2.2.4 is clearly in line with the Protocol, since it combines a fair protection for the Appellant with a reasonable degree of certainty for third parties.

2.2.6 Thus, in view of the above considerations, the Board concludes that all the claims of this request comply with Article 123(3) EPC.

3. Since the Board considers the amended Claim 1 as allowable under Article 123 EPC, there is no need to consider its allowability under Rule 88 EPC.

Auxiliary requests

4. In the light of the above findings, it is of course not necessary to consider the Appellant's auxiliary requests.

Remittal

5. Since the Opposition Division did not examine the substantive allowability of the claims of the present main request, the Board makes use of its competence under Article 111(1) EPC and remits the case to the first instance for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution on the basis of Claims 1 to 16 filed on 20 January 1999 as main request.

The Registrar:

The Chairman:

E. Görgmaier

J. Jonk