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D E C I S I O N
of 6 October 2004

Case Number: T 0943/99 - 3.3.6

Application Number: 92306336.6

Publication Number: 0523922

IPC: C11D 1/835

Language of the proceedings: EN

Title of invention:
Fabric softening composition

Patentee:
UNILEVER PLC, et al

Opponent:
PROCTER & GAMBLE Europe B.V.B.A.

Headword:
Fabric softening composition/UNILEVER

Relevant legal provisions:
EPC Art. 54(3)

Keyword:
"Novelty (no): all features disclosed in combination - physical characteristics of different batches of product commercialised under a specific trade name and according to given specifications cannot diverge to a great extent (point 1.2.3 of the Reasons for the Decision)"

Decisions cited:
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Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0943/99 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 6 October 2004

Appellant: (Opponent)
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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 23 August 1999 concerning maintenance of European patent No. 0523922 in amended form.

Composition of the Board:

Chairman: P. Krasa
Members: L. Li Voti
A. Pignatelli

Summary of Facts and Submissions

I. The present appeal is from the decision of the Opposition Division relating to the maintenance in amended form of the European patent No. 0 523 922, concerning a fabric softening composition, on the basis of the first auxiliary request.

II. In its notice of opposition the Opponent sought revocation of the patent *inter alia* on the grounds of Article 100(a) EPC, in particular for lack of novelty of the claimed subject-matter.

Inter alia the following documents were cited during the opposition proceedings:

(1): EP-A-0507478;

(7): Hoechst AG, Raw materials, March 1991, regarding ®Genapol, pages 40 to 51 and 69 to 75.

III. In regard to the set of amended claims according to the first auxiliary request, filed by the Patent Proprietor under cover of a letter dated 26 May 1999, the Opposition Division found in its decision *inter alia* that

– the Krafft point of the nonionic stabilising agent was already a feature of the granted claims, unrelated to the disclaimer introduced during the opposition proceedings; the clarity of this feature was thus not open to discussion during opposition;

– the limitation of the upper limit of the range of Krafft points in claim 1 to a temperature lower than that indicated in the respective granted claim did not contravene the requirements of Article 123(3) EPC;

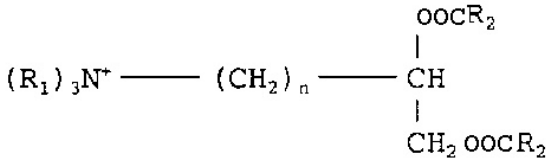
– document (1) disclosed compositions comprising the same softening agents used in the patent in suit and the same class of nonionic stabilising agents, the most preferred commercial compounds from this class being also mentioned in the patent in suit as suitable agents;

– document (7) showed that the nonionic agents listed in document (1) had necessarily a Krafft point below 20°C; however, there was no evidence that the commercial nonionic compounds listed in document (1) had necessarily a Krafft point below 10°C as claimed;

– the claimed subject-matter was thus novel over document (1) as well as over the other cited prior art documents.

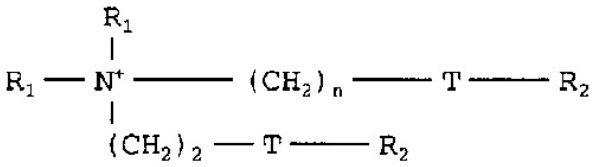
The independent claim 1 according to the first auxiliary request reads as follows:

"1. A fabric softening composition comprising at least 1% by weight of a water insoluble cationic fabric softening agent and a nonionic stabilising agent wherein the water insoluble cationic fabric softening agent is a quaternary ammonium material represented by the formula:

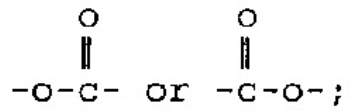


wherein each R_1 is independently selected from C_{1-4} alkyl, alkenyl or hydroxyalkyl groups; each R_2 group is independently selected from C_{8-28} alkyl or alkenyl groups; and n is an integer from 0-5;

or by the formula:



wherein R_1, n and R_2 are as defined above, and T is



characterised in that the nonionic stabilising agent is selected from predominantly linear C_8 to C_{22} alcohols alkoxylated with 10 or more moles of alkylene oxide and in that the nonionic stabilising agent has a clear phase at a 1% concentration in water somewhere in the range of 0°C to 45°C and a Krafft point of less than 10°C, provided that when the fabric softening agent is 1,2 dihardened tallowyloxy-3-trimethyl-ammonio propane chloride, the nonionic stabilising agent is not tallow

alcohol ethoxylated with 15 or 20 moles of ethylene oxide."

This request contains also dependent claims 2 to 6 relating to particular embodiments of the product of claim 1, claim 7 relating to a process for its preparation and claims 8 to 11 relating to the use of the nonionic stabilising agent in a fabric softening composition according to claim 1.

IV. An appeal was filed against this decision by the Opponent (Appellant).

The Appellant submitted in the statement of the grounds of appeal inter alia that

- the clarity of the claims was to be discussed since the claims had been amended during opposition;

- the limitation of the upper limit of the Krafft point extended the scope of claim 1 beyond that of the respective granted claim;

- the test report I, filed with the statement of the grounds of appeal, showed that some of the commercial products disclosed in document (1) had the Krafft point required by the claims;

- moreover, commercial products sold under a particular trade name were standardized as to their physical properties; therefore, the physical properties of such products were expected not to differ substantially from one batch to the other;

– the claimed subject-matter thus lacked novelty in the light of document (1).

V. The Respondents (Patent Proprietors) submitted *inter alia* that

– the clarity of the claims was not open to discussion in opposition proceedings;

– the selected Krafft point range was narrower than that claimed in the granted claim 1; the claims thus complied with the requirements of Article 123(3) EPC;

– different batches of the same commercial product could have substantially different Krafft points; therefore the commercial nonionics disclosed in document (1) had not necessarily a Krafft point as required in claim 1 of the patent in suit;

– the claimed subject-matter was thus novel over document (1).

VI. The Appellant requests that the appealed decision be set aside and that the patent be revoked.

The Respondents request that the appeal be dismissed.

VII. At the end of the oral proceedings at which the duly summoned Respondents were not represented, the chairman announced the decision of the Board.

Reasons for the Decision

1. *Claims considered by the first instance to comply with the requirements of the EPC*

1.1 Articles 84 and 123(3) EPC.

The Board is satisfied that these claims comply with the requirements of Articles 84 and 123(3) EPC as found by the first instance (see point III above).

Since claim 1 fails on other grounds there is no need to give further details.

1.2 Novelty

1.2.1 The subject-matter of claim 1 relates to a fabric softening composition comprising at least 1% by weight of specific water insoluble quaternary ammonium fabric softening agents containing a carboxyl group and a nonionic stabilising agent represented by predominantly linear C_8 to C_{22} alcohols alkoxylated with 10 or more moles of alkylene oxide, wherein the nonionic stabilising agent has a clear phase at a 1% concentration in water somewhere in the range of 0°C to 45°C and a Krafft point of less than 10°C, the Krafft point being defined in the description as the temperature within the range of 0°C to 45°C at which a cloudy 1% aqueous solution of the nonionic material becomes clear, such a solution being cloudy below this temperature and clear above it (page 2, lines 43 to 44 and page 4, lines 4 to 6). Claim 1 contains also the additional proviso that when the fabric softening agent is a 1,2 dihardened tallowyloxy-3-trimethyl-ammonio

propane chloride (HT TMAPC), the nonionic stabilising agent is not tallow alcohol (a mainly C_{16-18} alcohol) ethoxylated with 15 or 20 moles of ethylene oxide.

1.2.2 Document (1), which is a state of the art under Article 54(3) EPC, discloses a fabric softening composition comprising, preferably, at least 1% by weight of the specific water insoluble quaternary ammonium fabric softening agents of the patent in suit and a nonionic stabilising agent selected from the class of linear C_8 to C_{22} alcohol alkoxylated with 10 to 20 moles of alkylene oxide (see page 2, lines 47 to 48 and page 2, line 52 to page 3, line 47); the commercial nonionics listed on page 4, lines 4 to 6, of document (1) are especially preferred.

The Board finds therefore that document (1) discloses a combination of the same softening agents of claim 1 with **any** of these commercial nonionics, e.g. also with Genapol C-200 which, as explained on page 43 of document (7), is a C_{10-18}, mainly C_{12-14}, alcohol alkoxylated with 20 moles of ethylene oxide.
The proviso contained in claim 1, excluding the two particular compositions of the examples 1D and 3C of document (1) containing an ethoxylated derivative of tallow alcohol, i.e. a mainly C_{16-18} alcohol, is thus not sufficient for delimiting the claimed subject-matter in respect to the whole teaching of that document and does not exclude a composition comprising Genapol C-200.

As explained in document (7), a 1% aqueous solution of Genapol C-200 is clear at 20°C (see page 43). Therefore a 1% aqueous solution of this commercial product has a

clear phase between 0 and 40°C as required in the patent in suit.

As regards the novelty of the claimed subject-matter in the light of the teaching of document (1) it remains thus only to assess if the above mentioned commercial compound Genapol C-200 also possess a Krafft point below 10°C.

1.2.3 The Appellant filed a test report I with the statement of the grounds of appeal showing that Genapol C-200 has a Krafft point below 5°C.

The Board notes also that Genapol C-200 is cited on page 3, line 24, of the patent in suit as being one of the preferred nonionic stabilising agents.

The Respondents argued that the physical properties of commercial products such as Genapol C-200 were affected from the chain length distribution of the specific product batch, since their chain length distribution depended from the composition of the natural feedstock used as starting product for their preparation. Such physical properties could thus vary from batch to batch. For example, it was shown in the patent in suit that the tallow alcohol with 11 moles of ethylene oxide of example B had a Krafft point of 45°C whilst another one, a commercial product named Genapol T-110(NR), had a Krafft point below 5°C (see the patent in suit, page 5, lines 44 to 45).

The Appellant's experiments thus showed in the Respondents' view only that the particular tested sample of Genapol C-200 had a Krafft point below 5°C

but could not be considered as evidence that any commercial product sold under that name would have necessarily a Krafft point as required in claim 1.

The Appellant submitted that a commercial product sold in great quantity such as Genapol C-200 was subjected to quality controls in order to guarantee so much as possible characteristics upon which the customers could rely. Therefore, it had to show necessarily very little variation in its physical parameters. For example, document (7) showed that the viscosity, drop point and cloud point of the product Genapol C-200 could vary only within a restricted range (page 43); products not complying with these requirements would thus have to be discarded and not commercialised under that name.

In the Board's judgement it cannot be disputed that a commercial product has to show as much as possible reliable physical characteristics. Therefore, even accepting that the composition of commercial products manufactured from natural sources may present some variation from batch to batch, the physical characteristics of different batches of the same commercial product cannot diverge to a great extent.

Since the experimental test submitted by the Appellant, the results of which have not been disputed by the Respondents, shows a Krafft point below 5°C for a sample of Genapol C-200 and no evidence was submitted to the Board that different samples of the same product would show (contrary to what would be expected) relevant deviations from this value of Krafft point up to a temperature above 10°C, the Board concludes under these circumstances that other samples of Genapol C-200

could only show values of Krafft point not diverging to a great extent from that found according to the Appellant's test and that such values have to lie necessarily below 10°C.

Therefore, the Board concludes that document (1) discloses all the features of the subject-matter of claim 1 in combination.

1.3 Since claim 1 lacks thus novelty already on these grounds there is no need to discuss the other claims or the other objections put forward by the Appellant.

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:

G. Rauh P. Krasa