

**Internal distribution code:**

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

**Datasheet for the decision  
of 26 November 2024**

**Case Number:** T 0115/23 - 3.3.05

**Application Number:** 11817849.0

**Publication Number:** 2606009

**IPC:** C02F3/32, C02F3/00, A47L15/00

**Language of the proceedings:** EN

**Title of invention:**  
WASH WATER MAINTENANCE FOR SUSTAINABLE PRACTICES

**Patent Proprietor:**  
Ecolab USA Inc.

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

**Headword:**  
wash water maintenance/Ecolab

**Relevant legal provisions:**  
EPC Art. 100(c), 123(2)

**Keyword:**  
Grounds for opposition - extension of subject-matter (yes)

**Decisions cited:**

**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

**Case Number: T 0115/23 - 3.3.05**

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 26 November 2024**

**Appellant 1:** Ecolab USA Inc.  
(Patent Proprietor) 1 Ecolab Place  
St. Paul, MN 55102 (US)

**Representative:** Godemeyer Blum Lenze Patentanwälte  
Partnerschaft mbB - werkpatent  
An den Gärten 7  
51491 Overath (DE)

**Appellant 2:** Henkel AG & Co. KGaA  
(Opponent) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Henkel AG & Co. KGaA  
CLI Patente  
40191 Düsseldorf (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
22 November 2022 concerning maintenance of the  
European Patent No. 2606009 in amended form.**

**Composition of the Board:**

**Chairman** E. Bendl  
**Members:** S. Besselmann  
O. Loizou

## Summary of Facts and Submissions

- I. The appeals in this case, by the patent proprietor (appellant 1) and the opponent (appellant 2), are against the opposition division's interlocutory decision according to which European patent EP 2 606 009 B1 in amended form on the basis of the then auxiliary request 2 met the requirements of the EPC.
- II. The patent in suit concerns wash water maintenance for sustainable practices.
- III. Claim 1 of the patent as granted reads as follows:  
*"A method for cleaning a wash water source comprising:  
(a) generating an aqueous use solution by contacting an enzyme composition with water, wherein said aqueous use solution comprises between approximately 0.1 ppm and 20 ppm enzyme; and  
(b) cleaning a wash water source with said aqueous use solution, wherein the wash water source is a ware wash sump or a laundry sump."*
- IV. Claim 1 of auxiliary request 1 differs from claim 1 as granted in that the following wording has been added to the end of the claim: *"wherein said washing step further comprises washing a plurality of substrates contacted with said detergent composition and demonstrating enhanced detergency over cleaning applications without wash water sources cleaned with said aqueous use solution"*.

In claim 1 of auxiliary request 2, the following amendment has been made compared with claim 1 as granted (additions underlined by the board): *"A method*

*for cleaning a wash water source from starch or proteinaceous materials comprising: ...".*

Claim 1 of auxiliary request 3 differs from claim 1 as granted in that the following wording has been added to the end of claim 1: "*, wherein said washing step further comprises washing a plurality of substrates contacted with said detergent composition and demonstrating enhanced detergency over cleaning applications without wash water sources cleaned with said aqueous use solution and wherein said substrates are selected from the group consisting of textiles and ware".*

- V. The patent proprietor's arguments relevant to the present decision can be summarised as follows.

The opponent's statement of grounds of appeal contained remarks which, in substance, constituted a reply to the patent proprietor's appeal. These remarks should not be taken into account because they were filed prior to notification of the patent proprietor's appeal, and the opponent should not be allowed to reply twice.

The requirements of Article 123(2) EPC were met. The term "wash water source" in the application as originally filed covered not only liquids but also included parts of the laundry machine or dishwashing machine which are cleaned, namely sumps. This derived from page 1, lines 4-7 and page 7, lines 3-6, as well as from the examples.

Furthermore, defining the wash water source as being a ware wash sump or a laundry sump merely had the consequence that claim 1 related to a method for cleaning a ware wash sump or a laundry sump. Since the

application as originally filed disclosed cleaning a ware wash sump or a laundry sump, there was no infringement of the requirements of Article 123(2) EPC.

- VI. The opponent's arguments are reflected in the reasons for the decision.
  
- VII. Oral proceedings were held on 26 November 2024. The opponent was not represented during the oral proceedings and, with a letter of the same day, had requested shortly before the beginning of the oral proceedings that the latter be postponed due to sudden illness of their professional representative.
  
- VIII. The patent proprietor (appellant 1) requested that the decision under appeal be set aside and the opposition be rejected (main request), or, alternatively, that the patent be maintained in amended form on the basis of one of auxiliary requests 1-2 submitted with the statement of grounds of appeal, or that the opponent's appeal be dismissed (maintenance on the basis of the claims filed as auxiliary request 2 during oral proceedings before the opposition division, now auxiliary request 3).

The opponent (appellant 2) requested that the decision under appeal be set aside and the patent be revoked.

## **Reasons for the Decision**

- 1. Oral proceedings
  - 1.1 Given that the board's preliminary opinion had been favourable to the opponent, the board heard the patent

proprietor on substance before deciding whether it was necessary to adjourn the oral proceedings. The board did not deviate from its preliminary opinion, for the reasons outlined below. There was consequently no need to adjourn the oral proceedings to hear the opponent.

2. Consideration of the opponent's submission

2.1 The patent proprietor was of the view that those remarks in the opponent's statement of grounds of appeal which, in substance, constituted a reply to the patent proprietor's appeal should not be taken into account because they were filed prior to notification of the patent proprietor's appeal (point 2 of the patent proprietor's reply of 14 August 2023; point 12 of their submission of 20 November 2023). In the patent proprietor's view, the opponent should not be allowed to reply twice.

However, making such submissions at an earlier stage of the proceedings is in the interests of procedural economy and thus not objectionable. Moreover, the opponent clearly indicated in their statement of grounds of appeal that a full reply would be separately provided; there was thus no confusion in that regard. It is not apparent how this could be unfair to, or to the detriment of, the patent proprietor. It is noted that the context of a pleading is to be judged according to Articles 12 and 13 of the RPBA.

Under these circumstances, there is no reason to disregard those parts of the opponent's statement of grounds of appeal which constitute a reply to the patent proprietor's appeal.

3. Article 100(c) EPC

3.1 The international application as published is considered to represent the application as originally filed.

3.2 Compared with claim 1 as originally filed, claim 1 of the patent as granted has been amended, *inter alia*, to specify that "*the wash water source is a ware wash sump or a laundry sump*".

In this context, the term "sump" is to be understood as a structural part, for example of a dishwashing machine, in line with the opposition division's view that a sump was a container-type object (point 3.2 of the impugned decision).

The sump as a structural part has to be distinguished from water present in the sump. This distinction is important because the term "wash water source" can refer, alternatively, to an aqueous phase. For instance, the references to "*soil type to be cleaned with a wash water source*", "*decreasing the frequency at which wash water needs to be replaced with a clean wash water source*", "*wash water sources that are recirculated in a cleaning system*" and "*replacement of soiled wash water sources with clean wash water*" (page 3, lines 3-16 of the application as originally filed) can only be understood as using the term "wash water source" in the sense of an aqueous phase.

The patent proprietor did not contest that the application as originally filed disclosed embodiments according to which the wash water source was a liquid phase and not a structural part of a machine. They



were, however, of the view that the expression "the wash water source" covered not only liquids but also parts of the laundry or dishwashing machine which are cleaned, namely sumps (patent proprietor's submission of 20 November 2023, page 3, 5th and 7th paragraphs).

It thus needs to be assessed whether it can be directly and unambiguously derived from the application as originally filed that, alternatively, the "wash water source" can be a ware wash sump or a laundry sump as stipulated in claim 1 as granted.

- 3.3 According to the patent proprietor, the amendment specifying that *"the wash water source is a ware wash sump or a laundry sump"* was based on page 1, lines 4-7 and page 7, lines 3-6, as well as on the examples.
- 3.4 However, the relevant passage on page 1 reads *"[i]n particular, the invention relates to use of enzymes for effectively removing soils from wash water sources, such as the wash liquor or wash water solutions in a variety of cleaning applications, namely sumps"*. The wash water source is thus specified to be the wash liquor or wash water solution - in line with the general purpose of the invention, namely sustainable wash water treatment and maintenance (as stated in the preceding sentence). It is not entirely clear whether the indication "namely sumps" is to be understood - as argued by the opponent - as specifying the cleaning application, or whether it refers, for instance, to water in the sumps. In any case, said passage does not define the "wash water source" as being the sump in the sense of a structural part.

The other passage on which the patent proprietor relies does, in fact, exemplify sump cleaning as a cleaning

application. That passage reads: *"ware washing applications according to the invention may include ware wash sump cleaning, ware wash machine cleaning (automated and/or manual) and holding tank cleaning. Laundry applications according to the invention may include the cleaning of laundry sumps"* (page 7, lines 3-6). However, the term "wash water source" is not even directly mentioned. It may be indirectly present because the introductory sentence *"methods according to the invention..."* (page 7, lines 1-3) can be understood as referring to the methods specified in claim 1 as originally filed, and thus to *"method[s] for cleaning a wash water source"*. However, even on this basis, the indicated passage as a whole (page 7, lines 1-6) merely sets out that the methods for cleaning a wash water source can be used *for* [emphasis added] a variety of cleaning applications, which cleaning applications may include ware wash sump cleaning. This does not imply that a ware wash sump could be seen as an embodiment of the wash water source. Instead, the method can be understood to comprise cleaning wash water used for a cleaning application.

- 3.5 In fact, in so far as the application as originally filed mentions the cleaning of surfaces (of a washing machine), this is presented as a consequence of cleaning the wash water source, i.e. wash water. The application as originally filed explains that *"[i]n addition, the methods of using enzymes to clean a wash water source further promote cleaning of various surfaces, including ware, sump and the wash equipment surfaces itself, such as the interior of a washing machine by improving the detergency of the cleaning application"* (page 5, lines 14-16). This use is *in addition* [emphasis added] to effectively removing soils from wash water, having regard to the paragraph as a

whole (starting on page 5, line 8). Likewise, it is explicitly stated that "*methods of cleaning wash water sources further result in the prevention of and removal of soil buildup on the interior surfaces of cleaning equipment and treated surfaces contained therein*" (page 5, last sentence), and that "*the methods according to the invention provide further benefits of improving the efficacy of detergents in treating surfaces, such as ware and wash equipment, as a result of cleaning wash water sources*" [emphasis added] (page 1, lines 9-11).

Moreover, it is explained that adherent soils (on soiled surfaces) are "*removed by a detergent composition into a wash water source*", i.e. the removed solid ends up in the wash water source, and "*the enzyme compositions decrease and/or eliminate the soils in the wash water sources once the soils become readily dispersed into the wash water by a detergent or other cleaning agent*" (page 7, last two sentences). It is furthermore stated that, "*[a]ccording to an embodiment of the invention, enzymes are cleaning the wash water and not substrates within a cleaning application*" (page 12, lines 8-11).

- 3.6 The examples do not lead to any different conclusions. They relate to tests on reducing starch levels *in the wash water* of a commercial dishwashing machine sump (emphasis added; page 16, lines 11-13). Starch levels were tested in water samples taken from the dishwashing machine sump (page 17, lines 4-5). An initial increase in starch levels was hypothesised to result from enzymatic removal of starch build-up on the sump walls (page 18, lines 4-5). However, there is no disclosure that the examples involved examining the sump itself for soils deposited on its surfaces. In particular, it

cannot be derived from the examples that the wash water source was the sump.

- 3.7 For these reasons, it cannot be derived directly and unambiguously from the application as originally filed that the wash water source *is* a ware wash sump or a laundry sump.
- 3.8 According to another line of argument put forward by the patent proprietor, defining the ware wash sump or the laundry sump as being a wash water source merely had the consequence that claim 1 related to a method for cleaning a ware wash sump or a laundry sump. In the patent proprietor's view, the only relevant question was therefore whether the application as originally filed disclosed a method for cleaning a ware wash sump or a laundry sump. It was irrelevant whether the indicated definition as such was directly and unambiguously derivable from the application as originally filed.

The board does not share this view. While it may be impossible in practice to distinguish between an enzyme acting on soil in the aqueous phase and an enzyme acting on a surface where the enzyme is present in an aqueous phase in contact with a surface, the application as originally filed itself makes such a distinction. As outlined above (point 3.5), cleaning a wash water source which is an aqueous phase with an enzyme composition is distinguished from the cleaning of surfaces (for example of the sump) as a consequence. The disputed feature - even if seen as a mere definition - thus clearly conveys a technical meaning. Furthermore, said definition also affects the technical meaning of claim 8 as granted, which likewise mentions a wash water source. It is therefore not enough to show

that the application as originally filed discloses the cleaning of a ware wash sump or a laundry sump. For the amendment to be allowable, it would instead have to be directly and unambiguously derivable from the application as originally filed that the wash water source is a ware wash sump or a laundry sump, as stipulated in the claim. This is not the case, as concluded above (point 3.7).

- 3.9 In conclusion, the ground of opposition pursuant to Article 100(c) EPC prejudices the maintenance of the patent as granted.

#### **Auxiliary requests 1-3**

4. Notwithstanding the question of the admittance of auxiliary request 1, which was not admitted by the opposition division, claim 1 in all the auxiliary requests contains the same feature that "*the wash water source is a ware wash sump or a laundry sump*". Consequently, the same considerations as outlined in respect of the main request apply, and the requirements of Article 123(2) EPC are not met.
5. None of the auxiliary requests is 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:



C. Vodz

E. Bendl

Decision electronically authenticated