Date	October 8, 2015	Court	Intellectual Property High Court Fourth Division
Case number	2015 (Ne) 10059		
– A case in which the court found that "a person who infringes or is likely to infringe the patent right or exclusive license" as referred to in Article 100, paragraph (1) of the Patent Act means a person who has carried out an act of direct infringement or indirect infringement of a patent right by himself/herself but not a person who has solicited or aided, as an accessory, infringement of a patent right.			

Reference: Article 100, paragraph (1) and Article 101 of the Patent Act
Number of related rights, etc.: Patent No. 4366672

Summary of the Judgment

1. In this case, the appellant who holds the patent right in question (the "Patent Right") for an invention titled "detergent" (the "Invention") alleged against the appellees that the appellees' act of manufacturing, selling and exporting the appellees' products constitutes infringement of the Patent Right and thereby sought an injunction against the manufacture, sale and export mentioned above.

In the judgment in prior instance, the court dismissed all of the appellant's claims and the appellant, who was dissatisfied with this, filed an appeal.

2. In this judgment, the court mainly held as follows and dismissed the appeal in question.

(1) Appellee P is engaged in the manufacture and sale of Appellees' Product 1 but Appellees' Product 1 is not recognized as containing calcium oxide powder, which is one of the constituent features of the Invention, and thus, cannot be recognized as falling within the technical scope of the Invention.

(2) There is no sufficient evidence to recognize that Appellee Q has been manufacturing, selling, and exporting Appellees' Product 2. In addition, there is no sufficient evidence to recognize that Appellees' Product 2 contains both calcium carbonate powder and calcium oxide powder, which are part of the constituent features of the Invention, and thus, cannot be recognized as falling within the technical scope of the Invention.

(3) With respect to Appellee R's act of manufacturing, selling and exporting Appellees' Product 3, the appellant only proved that Appellees' Product 3 is introduced on a webpage in the "R! Shopping" website as a mail-order product. This fact cannot serve as a basis to find that Appellee R itself is engaged in the sale of such product. Article 100, paragraph (1) of the Patent Act provides that it is possible to demand that a person who infringes or is likely to infringe a patent right (a "person who infringes a patent

right, etc.") stop or prevent such infringement. A person who infringes a patent right, etc. means a person who has worked a patented invention by himself/herself (Article 2, paragraph (3) of said Act) or has committed any of the acts prescribed in Article 101 of said Act or is likely to do so, and a person who has solicited or aided, as an accessory, infringement of a patent right is not included in such person. Appellee R is neither recognized as having worked the Invention, nor is recognized as having committed nor is likely to commit any of the acts prescribed in Article 101 of the Patent Act. Therefore, there is no room to uphold the appellant's claim for an injunction against Appellee R's manufacturing, sale, and export.

Judgment rendered on October 8, 2015, the original of the judgment received by the court clerk on the same day

2015 (Ne) 10059 Appeal Case of Seeking Injunction

(Court of prior instance: Tokyo District Court; 2014 (Wa) 23512)

Date of conclusion of oral argument: September 1, 2015

Judgment

Appellant: Chafflose Corporation Co., Ltd.

Appellee: Kabushiki Kaisha Kohkin Kenkyusho

Appellee: Ryoko Chemical Co., Ltd.

Appellee: Yahoo Japan Corporation

Main text

1. All the appeals shall be dismissed.

2. The appellant shall bear the costs of the appeals.

Facts and reasons

No. 1 Objects of the appeals

1. The judgment in prior instance shall be revoked.

2. Appellee Kabushiki Kaisha Kohkin Kenkyusho (hereinafter referred to as "Appellee Kohkin") shall not manufacture, sell, or export the products described in List of Products Subject to Injunction 1 attached to the judgment in prior instance (hereinafter referred to as "Injunction List 1").

3. Appellee Ryoko Chemical Co., Ltd. (hereinafter referred to as "Appellee Ryoko") shall not manufacture, sell, or export the products described in List of Products Subject to Injunction 2 attached to the judgment in prior instance.

4. Appellee Yahoo Japan Corporation (hereinafter referred to as "Appellee Yahoo") shall not manufacture, sell, or export the products described in List of Products Subject to Injunction 3 attached to the judgment in prior instance (hereinafter referred to as "Injunction List 3").

5. The appellees shall bear the court costs for both the first and second instances.

6. This judgment may be provisionally executed.

No. 2 Outline of the case

1. Outline of the action

(Abbreviations are as in the judgment in prior instance unless otherwise noted.)

(1) The appellant alleged that the appellees infringe the appellant's patent right (the "Patent Right") by manufacturing, selling, and exporting the products described in Injunction Lists 1 to 3 (the "Defendants' Products"). Based on this allegation, the appellant filed this action against the

appellees to seek an injunction against the aforementioned manufacturing, sale, and export under Article 100, paragraph (1) of the Patent Act.
(2) The court of prior instance ruled that the Defendants' Products cannot be recognized as falling within the technical scope of the invention claimed in Claim 1 (the "Invention") pertaining to the Patent Right, and dismissed all of the appellant's claims.

The appellant filed the appeals against the judgment in prior instance.

(omitted)

3. Issues
(1) Regarding Appellee Kohkin (Defendant's Products 1)
A. Whether there is the fact that Appellee Kohkin has manufactured, sold, and exported Defendant's Products 1
B. Whether Defendant's Products 1 fall within the technical scope of the Invention
(2) Regarding Appellee Ryoko (Defendant's Product 2)
A. Whether there is the fact that Appellee Ryoko has manufactured, sold, and exported Defendant's Product 2
B. Whether Defendant's Product 2 falls within the technical scope of the Invention
(3) Regarding Appellee Yahoo (Defendant's Products 3)
A. Whether there is the fact that Appellee Yahoo has manufactured, sold, and exported Defendant's Products 3
B. Whether Defendant's Products 3 fall within the technical scope of the Invention

(omitted)

No. 4 Court decision
1. Regarding the Invention
(1) The technical scope of a patented invention shall be determined based upon the statements in the scope of claims attached to the application (Article 70, paragraph (1) of the Patent Act), and in that case, the meaning of each term used in the scope of claims shall be interpreted in consideration of the statements in the description and drawings attached to the application (paragraph (2) of said Article).

Therefore, the technical scope of the Invention must also be determined based upon the statements in Claim 1 in the scope of claims attached to the application for the Invention. In doing so, it is necessary to interpret the meaning of each term in consideration of the statements in the description in question (the "Description").

(2) Statements in the scope of claims of the patent in question ("Patent")

The Invention is stated as follows in Claim 1 in the scope of claims of the Patent: "A detergent which is characterized by the mixing of calcium carbonate powder, which is made of powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure, and calcium oxide powder, which is obtained by calcining said calcium carbonate powder."

(3) Statements in the Description (Exhibit Ko 1)

A. There is the following statement in the "Problem to be solved of the invention" section: "This inventor grinded scallop shells, which had been disposed of as waste, and focused attention on the point that scallop shell powder has an extremely higher effect of absorbing chemical substances and effect of inhibiting the reproduction of bacteria than powder made from the shells of other shellfishes. In consideration of the aforementioned circumstances, the problem to be solved of this invention is to obtain a detergent that can remove pesticides and other chemical substances and has a sterilizing effect from scallop shells, and the purpose thereof is to make effective use of waste." ([0003])

B. There are the following statements in the "Embodiment" section: "In obtaining the detergent, it is first necessary to use shells having a crystal structure of calcium carbonate with a calcite structure at least in their major part. Scallop shells satisfy this requirement and differ from the shells of other shellfishes in that the large portion thereof has such crystal structure." ([0005]); "As mentioned above, scallop shells are used as raw materials in obtaining the detergent, … gathered shells are dried by sun drying and are thereby hardened. Next, shells hardened by sun drying are grinded into particles whose size is about 200 μm. The grinding method itself is not particularly limited, and it is only necessary to use existing grinding equipment. Calcium carbonate powder is obtained in this manner, and the grains thereof are porous. Then, part of calcium carbonate powder consisting of the aforementioned porous grains is used. It is put in a ceramic pot and heated at the temperature of about 1,000°C for a period of several tens of minutes to a few hours to obtain calcium oxide powder. The detergent is obtained by mixing calcium oxide powder obtained in this manner and the aforementioned calcium carbonate powder. ([0007]); "In the aforementioned detergent, the calcium carbonate powder portion consists of the unique porous grains of scallop shell powder as mentioned above, and it has a profound absorption effect. In addition, the calcium oxide powder portion is alkaline and shows bactericidal property. Therefore, this detergent has the effect of absorbing pesticides and other chemical substances. It is possible to remove pesticides and other chemical substances attached to food materials by soaking food materials in washing solution consisting of the mixture of this detergent and water or by washing food materials while keeping the washing solution running over food materials. Alkaline acts to annihilate bacteria and fungi, etc. Not only in washing food materials but also in washing hands and dirty goods, the porous grains absorb chemical substances and fine pollution substances

attached to the surface of hands and the aforementioned goods, and alkaline acts to annihilate bacteria, etc." ([0008])

C. There is the following statement in the "Effect of the invention" section: "Owing to this invention explained above, if this detergent is used for washing vegetables and other food materials and dirty goods in general, it removes chemical substances and fine pollution substances attached to the surface thereof and can also sterilize those washed." ([0009])

2. Regarding Issue (1) (in relation to Appellee Kohkin (Defendant's Products 1))

(1) Regarding whether there is the fact that Appellee Kohkin has manufactured, sold, and exported Defendant's Products 1

According to evidence (Exhibit Otsu A-2) and the entire import of the oral argument, Defendant's Products 1 described in Injunction List 1 are presumptively recognized as being identical with Kohkin Kenkyusho's products, and Appellee Kohkin is recognized as having been manufacturing and selling them.

(2) Regarding whether Defendant's Products 1 fall within the technical scope of the Invention

A. According to the evidence mentioned later, the following facts are recognized.

(A) "Water and calcium obtained by calcining shells (calcium hydroxide)" are described as the "major components" on the package of "Sukarō Shōshū Supurē (Scallow odor eliminating spray)" (which is equivalent to a Kohkin Kenkyusho's product "Sukarō uosshā (Scallow washer)") described in 1. in Injunction List 1 (Exhibit Otsu A-2).

(B) "Olive oil, purified water, sodium hydroxide, and calcium hydroxide" are described as the "major components" on the package of "Purēn (plain)" (which is equivalent to Kohkin Kenkyusho's product "Tezukuri Sekken Purēn (plain handmade soap)" described in 2. in Injunction List 1 (Exhibit Otsu A-2).

(C) "Soap base material, water, and calcium hydroxide" are described as the "major components" on the package of "Za Oyakata: Nyūmon (the master: introductory))" (which is equivalent to a Kohkin Kenkyusho's product "Sukarō Sōpu: Za Oyakata (Scallow soap: the master)") described in 3. in Injunction List 1 (Exhibit Otsu A-2).

(D) "Starch and calcium obtained by calcining scallop shells (Scallow)" are described as the "components" on the package of "Furi Furi Shūzu Paudā (dusting shoes powder)" (which is equivalent to a Kohkin Kenkyusho's product "Sukarō Furi Furi Shūzu Paudā (Scallow dusting shoes powder") described in 4. in Injunction List 1 (Exhibit Otsu A-2). In addition, there is the same statement on the Internet site that introduces said product (Exhibit Ko 29). There are the following statements in the brochure of said product (Exhibit Otsu A-3): "'Scallow' is a food additive. We obtained a food additive manufacturing license for calcium obtained by calcining shells (calcium hydroxide) which is made of natural scallop shells."; "Scallow (calcium obtained by calcining scallop shells)[*1] *1: Shells of scallops produced in Mutsu Bay, Aomori are rebirthed

into calcium hydroxide that is safe, environment friendly, and excellent in antimicrobial and odor eliminating effects by calcining them through special high-temperature calcination and adding water thereto."; "Scallow = calcium hydroxide ($Ca(OH)^2$)."

B. According to 1. above, the detergent pertaining to the Invention is a mixture of calcium carbonate powder and calcium oxide powder. For all of Defendant's Products 1, there is no statement that indicates the inclusion of calcium carbonate powder or calcium oxide powder on their packages or in their brochures.

C. According to evidence (Exhibit Otsu A-5) and the entire import of the oral argument, the following facts are recognized: [i] All of Defendant's Products 1 are obtained by having other substances added, mixed and kneaded, or contained in "Sukarō S (Scallow S)"; [ii] "Sukarō S (Scallow S)" is obtained by calcining scallop shells at the temperature of 1,000°C in an electric furnace, and then adding water thereto, and grinding it into fine powder; [iii] The analysis report (Exhibit Otsu A-5) prepared by Kureha Special Laboratory Co., Ltd. describes the result of calcium thermogravimetric analysis of "Sukarō S (Scallow S)," and according to this, Sukarō S (Scallow S) contained 95.7% of calcium hydroxide and 1.6% of calcium carbonate.

Therefore, "Sukarō S (Scallow S)" is not recognized as containing calcium oxide powder, which is one of the constituent features of the detergent pertaining to the Invention.

D. On these bases, none of Defendant's Products 1 can be recognized as containing either "calcium carbonate powder, which is powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure," or "calcium oxide powder, which is obtained by calcining part of calcium carbonate powder," both of which constitute the Invention. Consequently, Defendant's Products 1 cannot be recognized as falling within the technical scope of the Invention.

(3) Summary

Therefore, there is no reason for the appellant's claims against Appellee Kohkin.

3. Regarding Issue (2) (in relation to Appellee Ryoko (Defendant's Product 2))

(1) Regarding whether there is the fact that Appellee Ryoko has manufactured, sold, and exported Defendant's Product 2

There is no sufficient evidence to recognize that Appellee Ryoko has been manufacturing, selling, and exporting or is likely to manufacture, sell, and export Defendant's Product 2.

(2) Regarding whether Defendant's Product 2 falls within the technical scope of the Invention

There is no sufficient evidence to recognize that Defendant's Product 2 falls within the technical scope of the Invention.

In this regard, even if "Antibacterial Agent Produced by Calcining Scallop Shells: Scallow" (Exhibit Ko 57), which is introduced as one of the "lines of business" on the website of Appellee Ryoko, falls under Defendant's Product 2, it is described as follows on the aforementioned website: "Scallow is a powder antibacterial agent made of 100% scallop shells. Strongly-alkaline

(pH 12.8 to 13.2) and antibacterial calcium (calcium hydroxide), that is, Scallow, is produced by calcining scallop shells in a special high-temperature calcination cracking furnace and adding water in the calcination process." The website refers neither to calcium carbonate powder nor to calcium oxide powder.

(3) Summary

Therefore, there is no reason for the appellant's claims against Appellee Ryoko.

4. Regarding Issue (3) (in relation to Appellee Yahoo (Defendant's Products 3))

(1) Regarding whether there is the fact that Appellee Yahoo has manufactured, sold, and exported Defendant's Products 3

A. The appellant only proved that "Sukarō Furi Furi Shūzu Paudā 80g (Scallow dusting shoes powder 80g)," which is described in 53. in Injunction List 3, is introduced on a webpage in the "Yahoo! Shopping" website as a mail-order product (Exhibits Ko 29 and 63), and did not prove anything about the relevance between other Defendant's Products 3 and Appellee Yahoo.

According to evidence (Exhibits Otsu B-1 to B-5), the following facts are recognized: [i] "Yahoo! Shopping" refers to services which are provided by Appellee Yahoo under its service mark to enable store owners to sell or purchase goods or provide services at a price they set, and webpages in the "Yahoo! Shopping" website are those whereby store owners can post information about their own goods or services by using said services; [ii] Sales contracts for the aforementioned goods or contracts for provision of the aforementioned services are concluded between store owners and persons who view the aforementioned webpages. According to these facts, as mentioned above, even if "Sukarō Furi Furi Shūzu Paudā 80g (Scallow dusting shoes powder 80g)," which is described in 53. in Injunction List 3, is introduced on a webpage in the "Yahoo! Shopping" website as a mail-order product, it cannot be immediately said that Appellee Yahoo itself is selling it.

B. In this regard, the appellant alleges that Appellee Yahoo assumes the liability of joint tortfeasors. Even if this allegation means that Appellee Yahoo's website solicits or aids, as an accessory, a store owner's act of sale, the appellant cannot demand that Appellee Yahoo suspends the sale under Article 100, paragraph (1) of the Patent Act, as mentioned below.

(A) That is, Article 100, paragraph (1) of the Patent Act provides that it is possible to demand that a person who infringes or is likely to infringe a patent right (hereinafter referred to as a "person who infringes a patent right, etc.") stop or prevent such infringement. A person who infringes a patent right, etc. means a person who has worked a patented invention per se (Article 2, paragraph (3) of said Act) or has committed any of the acts prescribed in Article 101 of said Act or is likely to do so, and it is reasonable to understand that a person who has solicited or aided, as an accessory, infringement of a patent right is not included in such person.

The reasons for this understanding are as follows. That is, [i] under the Civil Code, an

injunction based on a tort is not permitted, and an injunction intended to "stop or prevent such infringement" prescribed in Article 100, paragraph (1) of the Patent Act is specially set by the Patent Act based on the exclusive effect of patent right. [ii] On the other hand, Article 719, paragraph (2) of the Civil Code provides that a person who has solicited or aided, as an accessory, an infringement should be liable to compensate damages, deeming solicitation and aid as an accessory as a joint tort from the perspective of protecting victims, despite the fact that the person per se is not a person who infringes another person's right. Therefore, the objective and purpose of the system under that paragraph differs from those of the right to seek an injunction prescribed in Article 100, paragraph (1) of the Patent Act, which is based on the exclusive effect of patent right as mentioned in [i] above. [iii] There are various forms of the acts of solicitation or aid as an accessory, and if an injunction is granted against the acts of solicitation or aid as an accessory for infringement of a patent right without any restriction, those against which an injunction can be sought become infinitely widespread, which is likely to cause adverse effects, such as an excessively broad scope of injunction. The provisions on indirect infringement prescribed in Article 101 of the Patent Act are considered as deeming only some types of acts of aid as an accessory for infringement of a patent right to constitute an infringement and making them be subject to an injunction, in consideration of the aforementioned adverse effects. Therefore, granting an injunction against the acts of aid as an accessory in general and the act of solicitation beyond said scope can be considered as going against the purpose of said Article.

(B) According to A. above, Appellee Yahoo is neither recognized as having worked the Invention, nor is recognized as having committed nor is likely to commit any of the acts prescribed in Article 101 of the Patent Act. Therefore, there is no room to uphold the appellant's claim for an injunction against Appellee Yahoo's manufacturing, sale, and export.

(2) Regarding whether Appellee's Products 3 fall within the technical scope of the Invention

Out of Defendant's Products 3, "Sukarō Furi Furi Shūzu Paudā 80g (Scallow dusting shoes powder 80g)," which is described in 53. in Injunction List 3, is recognized as being identical with "Furi Furi Shūzu Paudā (dusting shoes powder)," which is described in 4. in Injunction List 1, that is, a Kohkin Kenkyusho's product "Sukarō Furi Furi Shūzu Paudā (Scallow dusting shoes powder)." However, as mentioned in 2. above, there is no sufficient evidence to recognize it as falling within the technical scope of the Invention.

Regarding other Defendant's Products 3, the appellant has not proven anything about the point that those products fall within the technical scope of the Invention.

On these bases, there is no sufficient evidence to recognize that Defendant's Products 3 fall within the technical scope of the Invention.

(3) Summary

Therefore, there is no reason for the appellant's claims against Appellee Yahoo.

5. Regarding the appellant's allegations

(1) Regarding the technical scope of the Invention, the appellant alleges as follows: [i] All the detergents that are made from clam shells having a crystal structure with a calcite structure fall within the technical scope of the Invention; [ii] "Calcium carbonate powder" as stated in the scope of claims of the Patent is only required to be made from scallop shells and is not required to have a crystal structure with a calcite structure; [iii] The aforementioned "calcium carbonate powder" includes not only original powder made by grinding scallop shells but also such powder that has gone through chemical reactions, such as calcination and addition of water.

A. However, regarding the point mentioned in [i] above, the scope of claims of the Invention is clearly stated as a "detergent which is characterized by the mixing of calcium carbonate powder and calcium oxide powder" as mentioned in 1.(2) above. Therefore, it is obvious that even a detergent made from clam shells having a crystal structure with a calcite structure does not fall within the technical scope of the Invention unless it contains both calcium carbonate powder and calcium oxide powder.

Regarding the point mentioned in [ii] above, it is clearly stated in the scope of claims as "calcium carbonate powder, which is made of powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure," as mentioned in 1.(2) above. Therefore, it is obvious that calcium carbonate powder, which is not made of powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure, does not fulfill this requirement.

On these bases, the points mentioned in [i] and [ii] above should be considered as allegations that are not based upon the statements in the scope of claims.

B. Regarding the point mentioned in [iii] above, the meaning of "calcium carbonate powder, which is made of powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure," which constitutes the Invention, is considered.

(A) As mentioned in 1.(3) above, there is a phrase "grinded scallop shells" ([0003]) in the "Problem to be solved of the invention" section in the Description. In addition, it is stated in the "Embodiment" section that calcium carbonate powder is obtained by grinding scallop shells after hardening them by sun drying ([0007]). On the other hand, it is neither stated nor suggested that calcium carbonate powder is obtained by a method other than grinding. Regarding the method of obtaining calcium oxide powder, a method wherein calcium oxide powder is obtained by heating part of calcium carbonate powder obtained by grinding scallop shells at the temperature of about 1,000°C for a period of several tens of minutes to a few hours" is stated in the "Embodiment" section, and any other methods are neither stated nor suggested.

Regarding calcium carbonate powder obtained by grinding scallop shells, there are the following statements in the Description: "the grains thereof are porous" ([0007]); The calcium

carbonate powder portion "consists of the unique porous grains of scallop shell powder … and it has a profound absorption effect"; "this detergent has the effect of absorbing pesticides and other chemical substances"; "but also in washing hands and dirty goods, the porous grains absorb chemical substances and fine pollution substances attached to the surface of hands and the aforementioned goods" ([0008]). Regarding the aforementioned calcium oxide powder, there are the following statements: "the calcium oxide powder portion is alkaline and shows bactericidal property"; "Alkaline acts to annihilate bacteria and fungi, etc. (in food materials)"; "(but also in washing hands and dirty goods,) alkaline acts to annihilate bacteria, etc." ([0008]).

On these bases, the Invention can be considered as one that solves the problem of obtaining a "detergent that can remove pesticides and other chemical substances and has a sterilizing effect" ([0003]) by making a detergent that "removes chemical substances and fine pollution substances attached to the surface" of the subject of washing "and can also sterilize those washed" ([0009]) by removing chemical substances, etc. attached to the subject of washing, such as food materials, by absorbing them with calcium carbonate powder through mixing of the calcium carbonate powder and calcium oxide powder and by annihilating bacteria and fungi on the subject of washing with calcium oxide powder, with the use of the following characteristics: [i] The "grains" of calcium carbonate powder obtained by grinding the shells of scallops, etc. having a crystal structure of calcium carbonate with a calcite structure "are porous," and "porous grains" have a profound absorption effect; and [ii] calcium oxide powder obtained by calcining part of the aforementioned calcium carbonate powder at the temperature of about 1,000°C is alkaline and has bactericidal property.

(B) On these bases, "powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure," which constitutes the Invention, refers to powder obtained merely by grinding such shells itself, and is not considered as including such powder after going through chemical reactions, such as calcination and addition of water.

Therefore, the appellant's allegation mentioned in [iii] above is also unacceptable.

C. Regarding evidence submitted by the appellant

(A) Regarding Exhibit Ko 30

According to Exhibit Ko 30 submitted by the appellant, as a result of X-ray analysis of "Furi Furi Shūzu Paudā (dusting shoes powder)" described in 4. in Injunction List 1, it is recognized as containing $Ca(OH)_2$ (calcium hydroxide), $CaCO_3$ (calcium carbonate), and Ca (calcium), but is not recognized as containing calcium oxide powder, which is one of the constituent features of the detergent pertaining to the Invention.

(B) Regarding "Sukarō HK (Scallow HK)"

The appellant submitted the results of X-ray analysis, etc. of the inclusions, etc. of "Sukarō HK (Scallow HK)" that is manufactured and sold by Appellee Kohkin (Exhibits Ko 32, 34, 39,

and 65). According to them, "Sukarō HK (Scallow HK)" is recognized as containing $CaCO_3$ (calcium carbonate) and CaO (calcium).

However, originally, the relevance between "Sukarō HK (Scallow HK)" and Defendant's Products 1 is unclear. In addition, "scallop shell calcium powder (calcium hydroxide)" is stated as the "component" on the package (Exhibit Ko 38) of "Sukarō HK (Scallow HK)," and neither calcium carbonate powder nor calcium oxide powder is stated thereon. In that case, there is no sufficient evidence to recognize that the aforementioned $CaCO_3$ is powder obtained merely by grinding shells having a crystal structure of calcium carbonate with a calcite structure, as mentioned in B.(B) above, itself.

(C) Regarding the sample measurement result report (Exhibit Ko 52)

Moreover, the appellant submitted the "sample measurement result report" (Exhibit Ko 52). In the report, the following is stated as the "result of sample measurement": "If components expected to be contained are only calcium oxide, calcium carbonate, and calcium hydroxide, their content rates can be analyzed by the following method."

However, the subject of measurement itself is unclear, and there is no sufficient evidence to recognize that "calcium carbonate powder obtained by grinding shells having a crystal structure of calcium carbonate with a calcite structure" or "calcium oxide powder obtained by calcining" said "calcium carbonate powder," both of which constitute the detergent pertaining to the Invention as mentioned in B.(B) above, are contained.

(2) The appellant alleges as follows: All of the Defendant's Products are those obtained by making calcium oxide by calcining clam shells having a crystal structure with a calcite structure and adding water thereto to change it into calcium hydroxide; the detergent pertaining to the Invention is also made into calcium hydroxide by mixing calcium oxide with water at the time of use; therefore, the Defendant's Products and the detergent pertaining to the Invention are also identical with each other in terms of the form of use. The appellant is recognized as alleging this point as one of the grounds for which the Defendant's Products fall within the technical scope of the Invention. However, whether a subject product falls within the technical scope of a patented invention is determined by comparing the technical scope that is determined based upon the scope of claims of said patented invention with the structure of the subject product itself. Therefore, the aforementioned appellant's allegation regarding identity in the form of use as a ground for the fulfillment of the constituent features is unacceptable.

(3) Furthermore, the appellant alleges as follows: Even if the Defendant's Products do not literally fulfill the constituent features of the Invention, it is easy to conceive of replacement and the part pertaining to the difference is not essential; therefore, the Defendant's Products are within the scope of equivalents of the Invention.

In alleging infringement under the doctrine of equivalents, the patentee is required to allege

and prove the fulfillment of the following requirements out of the requirements shown in the judgment of the Third Petty Bench of the Supreme Court, 1994 (O) 1083, February 24, 1998, Minshu, Vol. 52, No. 1, at 113: Even if, within the structure stated in the scope of claims, there is a part which is different from the product, etc., [i] this part is not the essential part of the patented invention, [ii] the purpose of the patented invention can be achieved and an identical function and effect can be obtained even by replacing this part with the relevant part in the product, etc., and [iii] a person ordinarily skilled in the art could have easily conceived of the idea of such replacement at the time of the manufacturing, etc. of the product, etc.

Although the appellant's allegation cannot be necessarily considered as clear in some points, it obviously lacks the allegation of the fulfillment of requirement [ii] above. Therefore, the allegation itself is unreasonable, and it also lacks the proof of the fulfillment of requirements [ii] and [iii] above.

6. Conclusion

On these bases, there is no reason for all of the appellant's claims. Consequently, the judgment in prior instance that dismissed these claims is reasonable.

Therefore, all the appeals shall be dismissed, and the judgment shall be rendered in the form of the main text.

Intellectual Property High Court, Fourth Division

Presiding judge: TAKABE Makiko

Judge: TANAKA Yoshiki

Judge: SUZUKI Wakana