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D E C I S I O N
of 8 March 2005

Case Number: T 0416/01 - 3.3.2

Application Number: 90250319.2

Publication Number: 0436257

IPC: A01N 65/00

Language of the proceedings: EN

Title of invention:

Method for controlling fungi on plants by the aid of a hydrophobic extracted neem oil

Patentee:

Thermo Trilogy Corporation, et al

Opponents:

Aelvoet, Magda. MEP, The Green Group in the European Parliament, et al.

Headword:

Method for controlling fungi on plants/THERMO TRILOGY CORPORATION

Relevant legal provisions:

EPC Art. 99, 83, 56, 123(2)
EPC R. 1, 5
Rules relating to Fees Art. 8(1)(a)

Keyword:

"The opposition is admissible"

"Main request - inventive step (no) - it was obvious to try in the light of the closest prior art taken account on the general knowledge in the field to use formulations containing a hydrophobic extracted neem oil in a method of controlling fungi on plants"

"Auxiliary request - allowable amendments (no) - they relate to unallowable generalisations"

Decisions cited:

T 0305/87, G 0003/99, G 0004/92, T 0214/83

Catchword:

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Case Number: T 0416/01 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 8 March 2005

Appellant: Thermo Trilogy Corporation, et al.
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Representative: UEXKÜLL & STOLBERG
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Respondents: Aelvoet, Magda, MEP, The Green Group in the
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B-1047 Brussels (BE)

Representative: Prof. Dr, iur. F. Dolder
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CH-8304 Wallisellen-Zürich (CH)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 13 February 2001
revoking European patent No. 0436257 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: U. Oswald
Members: M. C. Ortega Plaza
P. Mühlens
J. Riolo
J. P. B. Seitz

Summary of Facts and Submissions

- I. European patent No. 0 436 257 based on application No. 90 250 319.2 was granted on the basis of ten claims.

Independent claim 1 as granted reads as follows:

"1. A method of controlling fungi on plants comprising contacting the fungi with a neem oil formulation containing 0.1 to 10% of a hydrophobic extracted neem oil which is substantially free of azadirachtin, 0.005 to 5.0% of emulsifying surfactant and 0 to 99% water."

- II. The following documents and pieces of evidence *inter alia* were cited in the proceedings:

(8) H. B. Singh and U. P. Singh, Australian Plant Pathology, pages 66 to 67, 1981

A2 Affidavit of Mr A. D. Phadke of 27 August 1996

A7 Affidavit of Mr A. D. Phadke of 14 May 1998

A10 Affidavit of Prof. U. P. Singh of 8 January 1998

A13 Affidavit of Mr A. D. Phadke of 19 November 2003

Testimony of Mr A. D. Phadke before the opposition division (minutes of the taking of evidence by hearing the witness Mr A. D. Phadke recorded in the oral proceedings before the opposition division on 9 May 2000, closed on 10 May 2000).

- III. Opposition was filed and revocation of the patent in its entirety was requested pursuant to Article 100(a) EPC on the grounds of lack of novelty (Article 54(1) and (2) EPC, lack of inventive step (Article 56 EPC)

and because the invention would be contrary to morality (Article 53(a) EPC) and pursuant to Article 100(b) EPC on the grounds of insufficiency of disclosure. The ground concerning Article 53(b) EPC was introduced later on during the opposition proceedings.

IV. The appeal lies from a decision of the opposition division revoking the patent under Article 102(1) EPC.

The opposition division considered the opposition to be admissible.

The opposition division considered the requirements of sufficiency of disclosure (Article 83 EPC) to be met since the description contained enough information to perform the invention by choosing one hydrophobic solvent among the list of possible solvents and the result of the extraction was a product substantially azadirachtin-free.

With respect to Article 53(a) and (b) EPC, the opposition division stated that in the present case *inter alia* the question raised in respect of the traditional knowledge was a question of state of the art for assessment of novelty since the patent did not give its proprietor any right to prohibit acts in India. Moreover, no plant variety was claimed but a method of controlling fungi by a hydrophobic extract of the oil from seeds of a generically defined tree. Additionally, the opposition division further stated that the extract used in the claimed method was obtainable from seeds of *Azadirachta indica* (neem tree), but this was a plant species, i.e. a higher taxonomic unit than a plant variety.

The opposition division considered the public prior use to be proven on the basis of affidavit A7 by Mr A.D. Phadke together with his testimony during the oral proceedings before the opposition division.

In particular, the opposition division considered that the "when" and "where" of the alleged prior use were clearly established as summer 1985 and 1986 in the Pune and Sangli districts of Maharashtra, Western India. The fungicidal effect was observed in the months of November and December. In particular, Mr Phadke himself had carried out some of the tests with two farmers.

The opposition division also considered that the testimony established the following: that hydrophobic extract (with a non-polar hydrophobic solvent such as hexane) from neem seeds was diluted with an emulsifying surfactant (either synthetic such as Tween^R or natural such as Acida Consica); that the products used were compositions containing less than 1% hexane, 90% neem oil and 10% emulsifier (synthetic) or 85% neem oil and 15% emulsifier (natural) and that for pest control 4-8 ml of the above product were diluted in 1l water resulting in a final concentration of about 0.4-0.8% neem oil (0.36-0.72%) and about 0.04-0.08% emulsifier.

In the opposition division's view the witness made clear that the broader values mentioned in affidavit A7, namely 0.5-5% of neem oil, concerned the whole period, whereas the specific concentration 0.4-0.8% was applied in the first year.

The opposition division was of the opinion that both the testimony and affidavit A7 confirmed the treatment of agricultural crops such as rice, lentils or sunflowers and of fruits and vegetables such as grapes, tomatoes, strawberries, mangoes and pomegranates and beans. The target were insects and diseases caused by fungi such as powdery mildew, rust, brown patches, black spots and botrytis. An unlimited number of local farmers could take note of said treatment.

Additionally, since the extraction with hexane was also made in example 1 of the patent in suit, the opposition division considered that the hexane extracts were substantially free of azadirachtin as a consequence of the choice of the solvent used for the extraction.

According to the opposition division's findings the main request (claims as granted) lacked novelty and the auxiliary request (filed during the oral proceedings before the opposition division) lacked an inventive step.

With respect to inventive step, the opposition division considered that the prior use represented the closest prior art. It defined the problem to be solved as finding alternative methods for controlling fungi or protecting plants.

In the opposition division's view the skilled person would have used formulations comprising a lower concentration of the neem oil extract as obvious lower cost alternatives of the known formulations.

- V. The appellant (patentee) lodged an appeal against the decision.
- VI. The respondents (opponents) filed counterarguments.
- VII. The board sent a communication on 6 June 2003 expressing rapporteur's preliminary comments in respect of the admissibility of the opposition, as well as some objections within the meaning of Article 123(2) EPC concerning the auxiliary request.
- VIII. The respondents filed further arguments and *inter alia* a further affidavit A13 by Mr A.D. Phadke.
- IX. The appellant filed an amended set of claims with its letter of 16 February 2004.

Claim 1 of the auxiliary request read as follows:

"1. A method of controlling fungi on plants comprising contacting the fungi by way of foliar application with a neem oil formulation containing 0.25% of a neem oil obtainable by extraction of neem seeds with a non-polar hydrophobic solvent by way of adding dried and ground neem seeds to the solvent and agitating same, which neem oil is substantially free of azadirachtin and salannin, 0.005 to 5.0% of emulsifying surfactant and up to 99% water."

- X. In a communication sent on 17 August 2004 as an annex to the invitation to oral proceedings, the board mentioned document (8) as relevant for the assessment of inventive step.

- XI. The respondents filed more arguments dealing with several aspects of the case. In particular they objected to claim 1 of the auxiliary request under Article 123(2) EPC.
- XII. In a letter of 24 November 2004 the appellant announced that it would not be attending the oral proceedings and that it withdrew its request for oral proceedings.
- XIII. The board sent a communication on 9 December 2004 expressing the preliminary opinion that claims 1 and 5 of the auxiliary request did not meet the requirements of Article 123(2) EPC.
- XIV. Oral proceedings were held before the board on 8 March 2005.
- XV. The appellant's arguments were filed in writing with the grounds of appeal. They may be summarised as follows:

The opposition was not admissible since three opponents paid one opposition fee and filed and signed one opposition letter without being represented by a professional European representative.

It was questionable whether the one opposition fee paid was indeed paid in time since a bank account sheet in the official file bore the date of the last day of the opposition period and stated "Receipt of payment to another account". If the opposition fee was paid on the last possible day by transfer order from one account to another, it was very unlikely that it reached the receiving account on the very same day.

The opponents needed a representative for the opposition to be deemed filed, and this applied at least to the non-European opponent. The representative was appointed later, i.e. after the opposition time limit had expired.

The opposition as originally filed was insufficiently supported by facts and arguments with respect to the several grounds for opposition cited therein. Additionally, it was immediately clear from the beginning that the objection raised in the original opposition letter with respect to morality did not apply to the claimed subject-matter.

The prior use was not sufficiently proven. In particular, the appellant considered that Mr Phadke relied on documentation (such as laboratory books), in order to refresh his knowledge when giving his affidavits and testimony, which was not introduced into the proceedings. Therefore, the appellant could not verify the contents of these documents. Furthermore, Mr Phadke did not identify in the opposition proceedings before the first instance one individual local farmer. Since about 10 to 14 years had passed since the alleged action, it had to be taken into account that for most people the recollection of dates and numerals was not reliable and hence supporting documents were needed.

It was furthermore unproven whether the alleged tests had actually been carried out and in particular what specifically had been tested or demonstrated and to whom.

To that extent there was insufficient evidence to decide against the novelty of the claimed subject-matter.

The appellant also stated in its grounds of appeal that since the opposition division determined the prior use based on Mr Phadke's affidavits and testimony to be the closest prior art there was also an insufficient basis and support for the decision of lack of inventive step. Additionally, reference was made with respect to the further arguments in the oppositions proceedings concerning inventive step.

The appellant also requested remittal to the first instance for further prosecution in case the main request was found to be novel by the board, since the inventive step of the main request had not been discussed during the oral proceedings before the first instance.

No further arguments were submitted by the appellant in response to the board's communications.

XVI. The respondents stated during the oral proceedings that in view of the board's communications and the board's preliminary comments it would concentrate its arguments as follows:

With respect to the main request there was an insufficient disclosure and the subject-matter claimed lacked novelty and inventive step. As support for its arguments, the respondents cited affidavits A2, A7, A10, A13, the testimony of A. D. Phadke and document (8).

As regards the requirements of Article 83 EPC, the respondents considered that the process parameters (temperature, time of extraction, agitation mode) necessary for performing the extraction were not sufficiently disclosed.

With respect to the novelty analysis, it referred to affidavits A2, A7 and to Mr A. D. Phadke's testimony. The respondents shared the conclusions reached by the opposition division in its decision. All the features appearing in claim 1 were anticipated by the prior use supported by Mr A. D. Phadke's statutory declarations and testimony. The respondent further stressed that the feature "substantially free of azadirachtin" was redundant, since it was a direct result of the extraction with a hydrophobic solvent.

With respect to inventive step, the respondents considered either the prior use as closest prior art or, alternatively, document (8).

In the respondents' view the skilled person faced with the problem of finding an alternative to the known method of controlling fungi referred to in the prior use would have immediately arrived at the claimed invention.

With respect to the auxiliary request the respondents considered that it did not meet the requirements of Article 123(2) EPC.

In particular, amended claim 1 related to a combination of specific features which were not disclosed in such a

way in the original application. The contents of the patent application should not be taken as a reservoir from which it would be permissible to draw features pertaining to separate embodiments in order to create artificially a particular embodiment, which was now claimed. It cited decision T 305/87, Official Journal EPO, 1991, 429.

The respondent stated that it shared the board's preliminary opinion expressed in the communication of 9 December 2004 with respect to the process features "adding dried and ground neem seeds to the solvent and agitating same".

Furthermore, if example 1 was the basis for the amendments, then an unallowable generalisation had also taken place with respect to the temperature of the extraction. In example 1 the extraction took place at room temperature, whereas the extraction temperature was not mentioned in the claim. Hence the claim also encompassed the possibility of heating.

XVII. The appellant (patentee) had requested in writing that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, as auxiliary request, that the patent be maintained in amended form on the basis of the set of claims filed with letter dated 16.02.2004.

The respondents (opponents) requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of the opposition*

The matter of the admissibility of the opposition concerning the payment of only one opposition fee for an opposition filed in common by two or more persons has been answered by decision G 003/99, OJ EPO 2002, 347.

Point 1 of the Order in G 003/99 reads as follows:

"1. An opposition filed in common by two or more persons, which otherwise meets the requirements of Article 99 EPC and Rules 1 and 55 EPC, is admissible on payment of only one opposition fee."

Therefore the payment of only one opposition fee is not questionable in the present case.

With respect to the question arising in connection with the date of payment of the opposition fee (Article 99(1) EPC and Article 8(1)(a) of the Rules relating to Fees) in due time, the respondents alleged that the fee was paid cash to the European Patent Office's account on 14 June 1995 (last day).

In the opposition's file, the said date is to be seen in the "receipt payment to another account" from Banque Bruxelles Lambert in Brussels. In the said receipt, the European Patent Office appears as "Beneficiary". In

view of this evidence of payment, this date can be considered as the date on which the payment was made.

Moreover, even if assuming, as asserted by the appellant, that a debit order in respect of a payment from one account to another was made instead of cash payment to the EPO's account, a situation was created in which the payment to the EPO's account could not be revoked or changed by the remitter, either as regards the date or the amount (cf. T 214/83, OJ EPO, 1985, pages 10 to 14, especially point 4).

With respect to the appointment of a professional representative in accordance with Article 133(2) EPC, this requirement only applied to the second opponent, but not to the first and third opponents. This is because the first and third opponents had a residence or their principal place of business within the territory of one of the Contracting States (Belgium and Germany respectively).

Accordingly, even if the appellant's position was to be confirmed in respect of the second opponent, the admissibility of the opposition for the first and third opponents cannot be challenged.

With respect to the point raised by the appellant in relation to a possible insufficiency of the grounds for the opposition, it has to be distinguished between the case where the opposition was accompanied with sufficient reasons, as is the case here, and the case where the reasons given were likely to lead to a revocation of the contested patent. The latter being a

substantive matter, the formal requirement of Article 99(1) EPC is met anyway.

Accordingly, the opposition is admissible since it meets the requirements of Article 99 EPC and Rules 1 and 55 EPC and it is in conformity with the conclusions reached in G 003/99.

3. With respect to the appellant's request for remittal to the department of first instance, it has to be remembered that the board has the discretionary power to decide on the remittal to the first instance (Article 111(1) EPC) after consideration of the merits of each case. There is no absolute right to two instances in the sense of a party being in all circumstances entitled to have every aspect of its case examined by two instances. In the present case, considering the overall length of the opposition and appeal proceedings, remitting the case to the department of first instance is not justified since this would impair the legitimate interests of the other party and of the general public in having some degree of legal certainty as to the existence and scope of the European patent within a reasonable time span.

The oral proceedings before the board took place in the absence of the appellant who was duly summoned but decided not to attend, as announced with its letter of 24 November 2004. The present decision is based on facts and evidence put forward during the written proceedings. Therefore, the conditions set forth in decision G 004/92 (OJ EPO 1994, 149) are met in the present case.

4. *Main request*

4.1 Sufficiency of disclosure

When considering whether the requirements of sufficiency of disclosure are met, the contents of the whole patent have to be investigated in the light of the general knowledge in the field.

The board shares the opposition division's opinion that the description contains enough information to perform the invention. Moreover, the respondents have not contested the reproducibility of example 1.

The respondents have objected that the process parameters for the extraction were not sufficiently disclosed. However, even if the description does not go deeply into the details of the extraction process, the skilled person may use its general knowledge to supplement the information contained in the patent.

The person skilled in the art means the skilled person who is expected to have the same qualifications as the relevant skilled person referred to under Article 56 EPC for assessing inventive step. In the present case it is the skilled person working in the field of plant fungicides with technical general knowledge on natural products.

The board is convinced that in order to carry out the invention as claimed in the main request the skilled person does not require anything other than the contents of the description, including example 1, and

routine experimentation based on her or his general knowledge.

In conclusion, the requirements of Article 83 EPC are met.

4.2 State of the art

To prove the alleged public prior use, the respondents put forward affidavits A2, A7, A13 and the testimony of Mr A. D. Phadke. The appellant has disputed the validity of the evidence brought forward *inter alia* on the grounds that it casts doubt on the credibility of the evidence. This doubt was based on the long period which had elapsed between the actions and the affidavits and testimony. The appellant's main argument was that the recollection of dates and numerals was uncertain for most people and hence some supporting documents, such as laboratory books or notebooks, were required.

However, there is no dispute between the parties concerning the existence of the prior art document (8) as part of the state of the art within the meaning of Article 54(2) EPC.

In the board's view, document (8) is highly relevant for the ruling of the present case. Thus, it can be left open whether or not the prior use is proven as the case can be decided on the basis of document (8) alone.

4.3 Novelty

Although document (8) discloses the use of an extract of neem oil as fungicidal on plants, it does not disclose which is the solvent employed. Moreover, document (8) does not disclose the presence of an emulsifying surfactant in the formulations employed. Therefore the subject-matter claimed is novel over the contents of document (8).

4.4 Inventive step

Document (8) represents the closest prior art. This document relates to a scientific publication on the "Effect of Volatiles of Some Plant Extracts and their Oils on Conidia of *Erysiphe polygoni* DC." (cf. title). "The present study reports the effect of volatiles of garlic extract and oil, **neem oil** and ginger (*Zingiber officinale* Rosc.) rhizome extract on conidia of powdery mildew (*Erysiphe polygoni* DC) of pea (*pleum sativum* L.)." (*emphasis added*) (cf. end of first paragraph in the left-hand column on page 66).

Document (8) also refers to the known antifungal activity of neem extracts and oil. "Extracts and oils of garlic (*Allium sativum* L.) and neem (*Azadirachta indica* Juss.) exhibit strong antifungal activity (...) but their antifungal effect has not been studied so far on powdery mildews." (cf. first paragraph in the left-hand column on page 66).

The neem oil used in document (8) is an extracted neem oil, since it was obtained "by Soxhlet apparatus" (cf.

end of second paragraph in the left-hand column on page 66).

Moreover, for the tests performed disclosed in document (8) "Freshly produced mature conidia of *E. polygona* were dusted onto cover glasses from pea plants raised in the greenhouse" (cf. third paragraph in the left-hand column on page 66).

Different concentrations of oils were used according to document (8). Specific values for neem oil are shown on Table 1 in the right-hand column of page 66. These values are expressed as ppm (v/v) (cf. third paragraph in the left-hand column on page 66) and correspond to 0.01, 0.05, 0.1, 0.2, 0.3 and 0.5% respectively.

Document (8) further discloses that neem oil exhibited a marked inhibitory effect on spore germination and germ tube length. (cf. first paragraph in the right-hand column on page 66).

Document (8) also discloses that "The results of the present experiments reveal that the volatiles of oils and extracts of plant parts mentioned above have strong antifungal effect at relatively low concentrations **in vitro**. This prompted us to include them in our spraying program in the field for the control of powdery mildew of pea where ginger extract has given excellent results (...); studies on other oils and extracts are still in progress." (cf. second paragraph in the right-hand column on page 66).

In the light of this prior art, the problem underlying the patent in suit can be defined as putting into

practice a method of controlling fungi on plants by using an extracted neem oil.

The problem is solved by the features of claim 1 "contacting the fungi with a neem oil formulation containing 0.1 to 10% of a hydrophobic extracted neem oil which is substantially free of azadirachtin, 0.005 to 5.0% of emulsifying surfactant."

Having regard to examples 1 and 2 in the description of the contested patent, the board is satisfied that the problem has been plausibly solved.

It remains to be investigated whether the proposed solution is obvious to the skilled person in the light of the prior art.

Although not explicitly mentioned in document (8), it has not been disputed that the neem seeds are the source for obtaining the extracted neem oil. Additionally, claim 1 of the main request does not specify this feature.

The skilled person faced with the problem defined above knows that she or he has to put in contact the fungi with formulations containing neem oil in some concentration. This is an obvious requirement of the known methods of controlling fungi on plants.

Mildews are among the fungi to be controlled which are mentioned in the description of the patent in suit (cf. page 4, line 57).

Since document (8) specifies that the neem oil used is a neem oil obtained by Soxhlet apparatus the use of a solvent for the extraction is compulsory. However, document (8) does not disclose which solvent should be used. Accordingly, the skilled person would use his or her general knowledge of the isolation of natural products from plants. This commonly takes place by means of solvent extraction and solvent elution. These are well-known practices used in all laboratories of natural products and merely imply arranging the solvents to be used according to their solvent strength. Basically, whatever the technique chosen, it is normally started with a non-polar hydrophobic solvent (first option) and then it is continued in increasing degree of polarity up to hydrophilic solvents (water-included).

Since the method disclosed in document (8) is solvent extraction (by using a Soxhlet apparatus), the skilled person uses that method and would begin with a hydrophobic solvent.

In this context it has to be remembered that the claim does not specify the temperature of the extraction and hence extraction by Soxhlet apparatus is also encompassed by the claim wording.

As regards the concentrations of extracted neem oil to be used in the formulation suitable for the antifungal effect, the specific concentrations disclosed in document (8) clearly fall within the scope of claim 1 (0.1 to 10%).

With respect to the fact that an emulsifying surfactant is present in the formulation in a concentration of 0.005 to 0.5%, this is a usual measure when commonly providing formulations from hydrophobic plant extracts.

Moreover, the appellant has not alleged that any effect is achieved derived from the use of the surfactant in this specific range other than its usual function as additive for providing formulations suitable for use as pesticides in general.

It is a fact acknowledged by the appellant in the patent description that such formulations are known *per se* (page 3, lines 41 to 45, of the patent in suit).

Since the claimed subject-matter comprises formulations with water contents of 0% it is not necessary to comment on this aspect.

As regards the feature "which is substantially free of azadirachtin", this is a direct result of the hydrophobic extraction, since azadirachtin is a tetranortriterpenoid produced by the neem tree which is not soluble in hydrophobic solvents such as hydrocarbons (e.g. hexane). This is confirmed by the fact that example 1 of the patent in suit does not require any process step in addition to the extraction with hexane.

Consequently, the subject-matter of claim 1 of the main request lacks an inventive step since it was obvious to try to use formulations such as those defined in the claim for controlling fungi on plants.

Although the patentee was aware (board's communication sent as an annex to the summons for oral proceedings) that the board considered document (8) as relevant for the assessment of inventive step, it chose not to file any arguments in support of an inventive step for the claimed subject-matter.

The only argument on file with respect to document (8) can be seen in the minutes of the oral proceedings before the opposition division, where the appellant discards document (8) by stating without further reasoning that this document does not mention a hydrophobic solvent. This argument is an argument related to the novelty of the claim. Moreover, as set out above, the use of a hydrophobic extract derives from the systematic routine of laboratory work.

In conclusion, the main request fails for lack of inventive step (Article 56 EPC).

5. *Auxiliary request*

5.1 Article 123(2) EPC

Claim 1 of the first auxiliary request contains the feature "by way of adding dried and ground neem seeds to the solvent and agitating same". There are two passages in the application as originally filed which disclose the preparation of the neem oil by way of extraction: page 6, lines 10 to 26, and example 1, page 9, lines 2 to 8. None of these passages reflects identically the text appearing in the claims. The passage on page 6 (lines 12, 13) discloses that the neem oil is extracted from dried, **coarsely** ground neem

seeds (emphasis added) and states nothing about agitation. It is further stated on page 6 that "In accordance with this invention, dried neem seeds, typically containing about 5 to 15% water, are **coarsely** ground to about **5 mesh**. The ground neem seeds are then extracted with a non-polar hydrophobic solvent to remove neem oil" (emphasis added). Additionally, example 1 of the application as filed relates to specific conditions for the extraction with a specific solvent, namely: "Eighty (**80**) **kgs** of **dried** defruited neem seeds from Africa were ground in a cutting mill to **about 10 mesh**. The ground seeds were added to a 300 gallon agitated vessel together with 140 gallons (**259 kgs**) of **hexane** and **agitated for 18 hours**. The extracted seeds were then separated from the hexane-neem oil solution by centrifugation. The hexane-neem oil solution was transferred to a 500 ml jacketed agitated vessel where the solution was heated to 165°F [74°C] to remove the excess hexane." (emphasis added).

Therefore, the amendments mentioned above relate to unallowable generalisations of features of the application as originally filed (Article 123(2) EPC).

The patentee has not filed any counterarguments.

Consequently, the auxiliary request fails since it does not meet the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:

P. Martorana

U. Oswald