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**Datasheet for the decision
of 13 March 2008**

Case Number: T 0624/05 - 3.3.09

Application Number: 97948871.5

Publication Number: 0939593

IPC: A23F 3/14

Language of the proceedings: EN

Title of invention:

Black leaf tea

Patentees:

UNILEVER PLC, et al

Opponent:

Premier International Foods UK Limited

Headword:

-

Relevant legal provisions:

EPC Art. 54
RPBA Art. 13

Relevant legal provisions (EPC 1973):

-

Keyword:

"Main and Auxiliary Requests 1 to 5 - Novelty (no)"
"Auxiliary Requests 6 to 8 - Admissibility (no)"

Decisions cited:

T 0198/84, T 0279/89, T 0666/89

Catchword:

-



Case Number: T 0624/05 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 13 March 2008

Appellant: Premier International Foods UK Limited
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 28 February 2005
rejecting the opposition filed against European
patent No. 0939593 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: P. Kitzmantel
Members: N. Perakis
K. Garnett

Summary of Facts and Submissions

I. Mention of the grant of European patent No 0 939 593 in respect of European patent application No 97948871.5 in the name of UNILEVER PLC and UNILEVER N.V., which had been filed on 29 October 1997, was announced on 17 July 2002 (Bulletin 2002/29). The patent, entitled "BLACK LEAF TEA", was granted with ten claims. Independent product Claims 1, 4 and 5 read as follows:

"1. A leaf tea comprising a blend of a first substantially fermented tea and a second substantially unfermented tea, characterised in that the blend contains catechins and phenols in a ratio of between 0.15 and 0.4, but preferably between 0.2 and 0.3."

"4. A fast infusing leaf tea comprising a blend of green Assam tea and black tea in proportions that contain catechins and phenols in a ratio of between 0.15 and 0.4 and delivers at least 5.5% catechins per gram of tea after infusing in water for 3 minutes."

"5. A fast infusing leaf tea comprising a blend of green Assam tea and black tea in proportions that contain catechins and phenols in a ratio of between 0.15 to 0.4 and provides at least a 10% increase in antioxidant activity compared to the mass of black tea after infusing in water for 3 minutes."

Claims 2, 3, 6-8 and 10 were directly dependent on Claim 1. Claim 9 was directly dependent on Claim 8.

II. Opposition was filed against the patent by Premier International Foods UK Ltd on 16 April 2003. The

Opponent requested the revocation of the patent in its full scope, relying on Article 100(a) (lack of novelty and lack of inventive step) and 100(b) EPC (insufficient disclosure).

The opposition was *inter alia* supported by the following documents:

- D3: Affidavit of Catherine Donnelly dated 16 April 2003, including exhibits CD-1 to CD-3
- D5: SU 1 102 554 and its English translation [The Board in this decision will exclusively refer to the translation because its accuracy has not been objected to and because this has been the version used by the parties throughout the appeal proceedings]

III. By its decision orally announced on 7 December 2004 and issued in writing on 28 February 2005 the Opposition Division rejected the opposition.

The Opposition Division held in the appealed decision that the claimed invention met the requirements of Article 83 EPC because the patent contained sufficient information to enable the skilled person to reproduce the invention without undue burden. It also held that the claimed subject-matter was novel because neither the alleged prior use nor the documents D4 to D8 made available to the public blends of black and green teas having a catechins to phenols ratio of 0.15 to 0.4. With regard to the novelty issue the Opposition Division also considered that the claimed subject-matter satisfied the requirements for the novelty of a selection invention. Concerning inventive step, the

Division held that the skilled person, considering black tea to represent the closest state of the art and aiming at a leaf tea product which looked and tasted like black tea but contained a higher amount of catechins, would not have found in any of the citations the motivation to blend green tea with black tea in order to elevate the latter's catechins to phenols ratio into the range specified by the claimed invention.

- IV. On 5 May 2005 the Opponent (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day.

With the Statement setting out the Grounds of Appeal filed on 8 July 2005, the Appellant reiterated the grounds for opposition raised before the Opposition Division. With regard to lack of sufficiency of disclosure it essentially argued that the patent did not disclose the test conditions for determining the features of Claims 4 to 7. With regard to lack of novelty it based its objection on prior public sales and on the disclosure of documents D4 to D8. With regard to the lack of inventive step it relied on the one hand on D5, which disclosed blends of black and green tea having the taste and the quality of black tea, and on the other on common general knowledge of the person skilled in the art, namely that blends of green and black tea necessarily contained more catechins than black tea.

- V. With the letter dated 23 January 2006, the Patent Proprietors (Respondents) requested that the appeal be rejected and the decision of the Opposition Division be maintained. Alternatively they requested that the

patent be maintained on the basis of the claims of one of the Auxiliary Requests 1 to 5 filed on that date. The Respondents essentially argued along the lines of the decision under appeal.

Claim 1 of each of these Auxiliary Requests 1, 3, 4 and 5 reads as follows (Claim 1 of Auxiliary Request 2 corresponds to its granted version):

Auxiliary Requests 1 and 3

"1. A leaf tea comprising a blend of a first substantially fermented tea and a second substantially unfermented tea, characterised in that the blend contains catechins and phenols in a ratio of between 0.2 to 0.4."

Auxiliary Requests 4 and 5

"1. A leaf tea comprising a blend of a first substantially fermented tea and a second substantially unfermented tea, characterised in that the blend contains catechins and phenols in a ratio of between 0.2 and 0.3."

VI. With the letter dated 28 November 2006 the Appellant contested the patentability of the subject-matter of all the Auxiliary Requests not only on the basis of the previously raised grounds but additionally for lack of clarity (Article 84 EPC) and inadmissible amendments (Article 123(2) EPC).

VII. With the letter dated 12 February 2008 the Appellant stated that it withdrew "the ground of appeal relating to lack of novelty".

VIII. The Board in its preliminary opinion dated 6 March 2008 expressed doubts with regard to novelty and inventive step.

IX. Oral proceedings were held before the Board on 13 March 2008. At those proceedings the Patent Proprietors filed three further auxiliary requests, Auxiliary Requests 6 to 8, which were considered inadmissible by the Board (see section 9 of the Grounds). For its part, the Appellant filed a further document D28, which consisted of two pages of calculations headed "D5 black tea / green tea ratios".

X. The relevant arguments presented by the Appellant in its written submissions and at the oral proceedings may be summarized as follows:

- The subject-matter of Claim 1 of the Main Request lacked novelty over the disclosure of D5.
- The Patent Proprietor has simply tried to get protection for known blends of black and green tea by reliance on inherent properties of these known blends.
- These inherent properties involved the ratio of the content of catechins and (poly)phenols ("phenols" for short, as in the patent in suit) in the tea blends.
- It belonged, however, to the common general knowledge of the skilled person (i) that all tea contained catechins and phenols, the weight ratio catechins/phenols being lower in fermented (ordinary) black tea than in unfermented green tea, and (ii) that the amount of catechins in a blend of black and green tea was enhanced over that of the black tea alone in strict accordance with proportion of catechins contributed by each of the teas.

- That common general knowledge was recognised in the patent specification and illustrated in its examples as well as in D3 (Exhibit CD-2).
- D5, which disclosed blends of black with green tea in ratios varying between 50:50 to 80:20, implicitly disclosed a ratio of catechins to phenols which overlapped with the claimed ratio.
- The claimed subject-matter which comprised a catechins/phenols ratio ranging from 0.15 to 0.40 therefore corresponded, according to the criteria set out in T 198/84 (OJ 1985, 209), to a non-novel selection from the disclosure of D5.
- Indeed, the calculations set out in D28 showed that the realistically broadest ratio range of catechins to polyphenols in the 50:50 to 80:20 low-quality baikhovi black and green tea blends of D5 varied between 0.215 to 0.534, ie broadly overlapping the range specified in present Claim 1.
- For those calculations, the black tea blend (F) of the patent in suit was taken as the standard black tea which was considered to correspond to the low quality baikhovi black tea of D5. The reason was that the skilled person knew that the catechin/phenol ratio in black teas was relatively narrow (see patent, paragraph [0032]). This choice was also justified by the fact that the actual values of catechins and polyphenols in the black tea (F) of 2.1% and 17.5%, respectively (see patent, Table 1), lay very close to the average values of 2.1% and 14.7%, respectively, according to the 53 black teas tested in D3 (Exhibit CD-2).
- As regards the green tea, the Appellant relied for its calculations on the one hand on the low catechins containing green tea (B) of the patent in suit (see

Table 1), taken to determine the lowest possible ratio, and on the other hand on the high catechins containing green tea (C) (see Table 1), taken to determine the highest possible ratio.

- As to the criteria for novelty by selection set out in decision T 198/84 the following could be concluded on the basis of the above assumptions:
- The first criterion, that the selected sub-range should be narrow, was not fulfilled when comparing the disclosed range of 0.215 to 0.534 with the claimed range of 0.15 to 0.40.
- The second criterion, that the selected sub-range should be removed from the preferred part of the known range was also not fulfilled. Indeed the claimed catechins/polyphenols ratio of 0.15 to 0.40 was not removed from the catechins/polyphenols ratio value calculated for the preferred 30:70 green:black tea blend of D5. In fact, D28 showed that the catechins/polyphenols ratios calculated on the basis of the data of the patent in suit were: 0.327 (for the blend A+F), 0.266 (for the blend B+F), 0.389 (for the blend C+F) and 0.362 (for the blend D+F) and fell squarely within the disclosed range.
- Finally the last criterion, that the selected sub-range should not be arbitrarily chosen but be a purposive selection, was also not fulfilled. The claimed leaf tea had the same properties and capabilities as the tea blends known from D5.
- Though the opposed patent referred to certain advantages for the claimed tea blends, namely the retention of a black tea character and the high amount of catechins, the tea blends of D5 also retained a black tea character and had a higher amount of catechins, leading to an enhanced

antioxidant activity as compared to the black tea on its own. The latter was, in fact, an inevitable consequence of blends comprising black and green tea.

- With regard to the antioxidant properties of the green tea, they were general common knowledge and did not add anything beyond the disclosure of D5.
- The lack of novelty objection raised for the Main Request applied for the same reasons to the five Auxiliary Requests.
- The additional Auxiliary Requests, sixth to eighth, should not be admitted in the procedure because they were late filed without any valid excuse.
- The novelty objection referred to by the Board in its communication setting out its provisional opinion was not a new objection. It had been raised before the Opposition Division and was extensively discussed by the Appellant prior to dropping this objection in a later stage in favour of an attack on inventive step. The latter involved the same arguments but using a different approach.
- Furthermore, the late filed requests did not *prima facie* overcome the previously raised objections.
- Moreover, the amendments introduced in Auxiliary Request 7, by taking up features from the description, required additional time for study and could not be dealt with at the oral proceedings.

XI. The relevant arguments presented by the Respondents in their written submissions and at the oral proceedings may be summarized as follows:

- The argument of the Appellant, that the claimed ratio was a non-novel selection from D5, was incorrect for the following reasons:
- D5 disclosed blends of low quality baikhovi black and green tea with no explicit disclosure of their catechins and phenols content, which content was moreover influenced by many factors.
- In order to unambiguously derive the catechins and polyphenols content of a tea, it was not sufficient to simply know if the tea was unfermented (green tea) or fermented (black tea). The catechins and polyphenols content depended on the exact nature of the teas used and it was possible for a blend of teas having the lowest disclosed level of unfermented tea to exhibit a catechin to phenols ratio above the upper limit of Claim 1.
- Thus D5 did not directly and unambiguously disclose the catechins to polyphenols ratio of those blends.
- The Appellant derived the catechins and phenols content from D5 by making sweeping generalisations and unsubstantiated assumptions, such as that the prior art used average and not more specific tea varieties.
- Common general knowledge could not substitute the lack of information in D5 concerning the unknown actual catechins to phenols ratio content of low quality baikhovi black and green tea used.
- The skilled person would not have used the average catechins and polyphenols content disclosed by D3 (Exhibit CD-2) in order to supplement the missing information in D5, because the D3 data did not disclose the baikhovi tea varieties.

- Furthermore, these average (mean) values were not reliable because they were calculated from distributions of catechins:polyphenols ratios which did not fall within a normal (Gaussian) distribution.
- Moreover, the term "low quality" used in D5 related to the tea-particle size and not to the catechins and polyphenols content of the black and green tea.
- Additionally, D5 disclosed that fresh tea leaves were used for the preparation of the blends which, it should be noted, were submitted to a specific heat treatment before blending which necessarily altered the catechins to phenols ratio.
- Even if the claimed subject-matter was considered to be a selection over D5, such a selection was novel because it fulfilled the three criteria for novel selections.
- In particular with regard to the purposiveness of the claimed selection, it aimed at increasing the amount of catechins in the tea blend, which was not disclosed by D5; this was shown in Example 3 of the patent in suit.
- With regard to the admissibility of Auxiliary Requests 6 to 8, these requests should be admitted because they were filed as a reaction to the provisional opinion of the Board.
- Only with the Board's communication did the criticality of the novelty issue became apparent.
- The subject-matter of Claim 1 of Auxiliary Requests 6 and 8 resulted from a combination of granted claims and that of Auxiliary Request 7 from the combination of granted Claim 1 with a feature taken from the description (see patent, page 4, lines 13-14).

XIII. The Appellant (Opponent) requested that the decision under appeal be set aside and that the European patent No. 0 939 593 be revoked.

The Respondents (Patent Proprietors) requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained on the basis of the first to fifth Auxiliary Requests filed with the letter dated 23 January 2006, alternatively on the basis of the sixth to eighth Auxiliary Requests filed during the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.
2. *Main Request, Auxiliary Requests 1 to 5*

Novelty (Article 54 EPC)

- 2.1 As elaborated below in detail, the subject-matter of Claim 1 of the Main Request and of each of the Auxiliary Requests 1 to 5 lacks novelty over the disclosure of D5.

This document (see page 5, lines 1 to 5) discloses a tea leaf comprising a blend of a fermented tea, *ie* a black tea, and an unfermented tea, *ie* a green tea. It is beyond doubt that the tea blend of D5 contains catechins and phenols, since it belongs to the common general knowledge of the skilled person that blends of fermented and unfermented teas contain catechins and phenols. This is confirmed in the discussion of the

background and prior art in the opposed patent (see paragraphs [0004] to [0008]). The only feature of the claimed subject-matter that D5 does not explicitly disclose is that the ratio of catechins to phenols lies within the range of 0.15 to 0.40 as specified in Claim 1 of the Main Request and Auxiliary Request 2, or within the narrower ranges specified in Claim 1 of the Auxiliary Requests 1, and 3 to 5. However, in the Board's judgment this feature is implicit in the disclosure of D5, as set out below.

2.2 According to page 5, lines 1 to 5 of D5, the blends of fermented (black) and unfermented (green) tea are obtained by mixing them in a ratio ranging from 1:1 to 4:1. Consequently the two limits of the disclosed ratio range correspond to blends of the mixing ratio 50:50 and 80:20 by weight percentage of fermented to unfermented tea, respectively.

2.3 The content of catechins and phenols in each of these blends can be calculated by simple arithmetic operations (see Formulae 1, 2 and 1', 2' below) once the catechins and phenols content of the fermented and unfermented tea is known. These operations are based on the fact, which has not been contested by the Respondents, that there is a direct linear relationship between the proportion of fermented and unfermented tea in the blends and the amount of catechins and phenols they contain.

The contents of catechins and phenols for the blend of tea with the first ratio limit, namely fermented:unfermented **50:50**, is then expressed by the following equations 1 and 2, in which CaF stands for

catechins in fermented tea, CaU stands for catechins in unfermented tea, PhF stands for phenols in fermented tea and PhU stands for phenols in unfermented tea:

$$\text{catechins content} = (0.5 \times \text{CaF}) + (0.5 \times \text{CaU}) \quad (\text{equation 1})$$

$$\text{phenols content} = (0.5 \times \text{PhF}) + (0.5 \times \text{PhU}) \quad (\text{equation 2})$$

The content of catechins and phenols for the blend of the other ratio limit, namely fermented:unfermented tea **80:20**, is expressed by the following equations 1' and 2':

$$\text{catechins content} = (0.8 \times \text{CaF}) + (0.2 \times \text{CaU}) \quad (\text{equation 1'})$$

$$\text{phenols content} = (0.8 \times \text{PhF}) + (0.2 \times \text{PhU}) \quad (\text{equation 2'})$$

The catechins to phenols ratio for the blend 50:50 is the ratio of equation 1 / equation 2 and

the catechins to phenols ratio for the blend 80:20 is the ratio of ratio of equation 1' / equation 2'.

2.4 The catechins to phenols ratio range defined by the limit blends 50:50 and 80:20 of D5 can then be determined by replacing in the above equations the terms CaF, CaU, PhF, and PhU by the actual values corresponding to the fermented and unfermented tea used in the blends of D5.

2.5 The fermented and unfermented teas disclosed in D5 (page 2, lines 32-36) which are mixed in a ratio from 50:50 up to 80:20 (page 5, lines 1 to 5: before heat treatment, ie ordinary leaf tea) are a "low-quality

black baikhovi tea" (*ie* a low-quality fermented tea) and a "low-quality green baikhovi tea" (*ie* a low-quality unfermented tea). As D5 does not provide any further information for the catechins and phenols content of these teas, the skilled reader will fill this gap taking into account his common general knowledge concerning the "low-quality" teas referred to in D5.

2.5.1 In this regard the Board considers that in all probability this "low-quality black baikhovi tea" corresponds to ordinary black tea, and certainly not to exceptional varieties like Black Uva from Ceylon or Black Darjeeling from India (see patent, page 4, lines 36-39), both of which have an anomalous high catechins content. On this basis it is reasonable to put the "low-quality black baikhovi tea" on a level with the standard black tea blend (F) of the patent in suit (see Table 1) with a catechins content 2.1%, a phenols content 17.5% and a catechins to phenols ratio of 0.119. The plausibility of this assumption is strengthened by the equivalent information in D3 (Exhibit CD-2), reporting analysis results presented to the ISO secretariat, according to which the catechins content mean value of 53 black teas was 2.1%, and the corresponding phenols content mean value was 14.7%, corresponding to a mean value of the ratio of catechins to phenols of 0.139; these values being very close to those of the standard black tea blend (F) of the opposed patent. Furthermore, the patent in suit itself provides support for the plausibility of the above considerations as it states that the choice of the black tea is less critical (see paragraph [0032]) and that the black tea typically contains catechins and

phenols in a ratio of less than 0.15 (see paragraph [0024]).

2.5.2 Turning to the "low-quality green baikhovi tea", the Board concurs with the Appellant that the catechins and phenols contents should in all probability lie within the ranges defined by two unfermented (green) teas of the opposed patent, namely teas (B) and (C) (see Table 1), whose catechins content lie the furthest apart, namely 10.6% and 20.6% respectively. It is reasonable to assume that, having regard to their catechins and phenols ratio, these two green teas define the lower and upper limits, the first one having a typically very low ratio, namely 0.584, and the second having a very high ratio, namely 0.824. These value ranges (10.6% and 20.6% for the catechins content and 0.584-0.824 for the catechins to phenols ratio) cover the mean values exhibited for green tea in D3 (see Exhibit CD-2), which reports a catechins mean value (for 95 green teas) of 13.3% and a corresponding mean ratio of 0.75, and therefore supports the ensuing calculations based on teas (B) and (C) of the patent in suit because it proves that that these teas represent the limits of a realistically broad range. This conclusion is furthermore in agreement with the information in the patent specification (see paragraph [0024]) which states that "green tea typically contains catechins and phenols in a ratio that is greater than 0.60" a value, albeit close to the lower ratio limit, also encompassed by the range calculated above.

2.5.3 The above considerations establish that in all probability the catechins and phenols contents of the "low-quality black baikhovi tea" of D5 can be

represented by the values 2.1% and 17.5%, respectively, whereas the catechins and phenols contents of the "low-quality green baikhovi tea" can be considered to be represented by the ranges from 10.6% to 20.6% and from 18.1% to 25.0%, respectively.

2.6 Using the above values in equations (1), (2), (1') and (2'), the catechins and phenols ratio for the range-limit tea blends (50:50 and 80:20) can be calculated. For the appropriate use of these values it should be borne in mind that the more unfermented (green) tea in the blend, the higher the catechins content therein, with the consequence that the blend 50:50 with the higher catechins content, namely 20.6%, will provide the upper limit for the ratio range of catechins to phenols. Similarly, the less unfermented (green) tea in the blend, the lower the catechins content therein, with the consequence that the blend 80:20 with the lowest catechins content, namely 10.6%, will provide the lower limit for the ratio range of catechins to phenols.

With the object of defining the broadest possible ratio range of catechins to phenols, the values calculated for the blend 50:50 are:

Total Catechins $(0.5 \times 2.1\%) + (0.5 \times 20.6\%) = 11.4\%$
Total Phenols $(0.5 \times 17.5\%) + (0.5 \times 25.0\%) = 21.3\%$
and **total catechins : total phenols = 0.53**

While the values calculated for the blend 80:20 are:

Total Catechins $(0.8 \times 2.1\%) + (0.2 \times 10.6\%) = 3.8\%$
Total Phenols $(0.8 \times 17.5\%) + (0.2 \times 18.1\%) = 17.6\%$

and **total catechins : total phenols = 0.22**

2.7 The Board thus comes to the conclusion that in all probability the blends disclosed by D5 (page 5, lines 1-5) cover a ratio range of catechins to phenols from 0.22 to 0.53. It is thus this range that has to be compared with the allegedly distinguishing feature of Claim 1, namely a catechins and phenols ratio ranging between 0.15 and 0.4, when considering the issue of novelty.

2.8 In this overlap situation the three criteria established in T 198/84 and confirmed in T 279/89 (dated 3 July 1991; not published in the OJ) for the appraisal of novelty by selection apply - as submitted by the Appellant (see section X above). It has to be stressed that in order for novelty by selection to be established all three criteria must be fulfilled, *ie* failure to meet only one of the criteria must lead to denial of novelty.

2.8.1 However, even the first criterion, requiring that the selected sub-range be narrow, is not met for the ratio range "between 0.15 and 0.4" according to Claim 1 of the Main Request and of Auxiliary Request 2, because the overlap with the range 0.22 to 0.53 calculated for D5 extends over more than 70% of the claimed range, which is certainly not narrow.

The same applies to the range "between 0.2 to 0.4" according to Claim 1 of Auxiliary Requests 1 and 3 and to the range "between 0.2 and 0.3" according to Auxiliary Requests 4 and 5. Though the extent of the overlap of these ranges is less, it still amounts to

more than 60% and more than 30%, respectively, of the range calculated for D5.

- 2.8.2 Moreover, even if the Board had doubts about fulfilment of the criterion of "sufficient narrowness" by the most narrow range of "between 0.2 and 0.3" according to Claim 1 of Auxiliary Requests 4 and 5 (where the extent of overlap is at least 30%), there cannot be any doubt that this range, as with the ranges according to Claim 1 of all Requests, does not meet the third criterion, *ie* that of the purposefulness of the selection.

To meet this criterion it is necessary that the claimed, selected sub-range does more than amount to a formal delimitation of the product concerned *vis-à-vis* the state of the art; it must contribute a new element in terms of a genuine technical effect for this range.

According to paragraphs [0018] and [0027] of the patent, the claimed blends of black and green tea having the specified catechins to phenols ratio resemble black tea but provide an antioxidant activity which is enhanced compared to that of black tea alone. It belongs to the common general knowledge of the person skilled in this art (and is not contested) that the antioxidant activity is due to the catechins content of the tea leaves. Therefore blending tea varieties of different catechins content must provide a total catechins content resulting from the individual contribution of the blend components. This situation is confirmed by the experimental evidence reported in the patent specification.

Comparison of this situation with the information contained in D5 leads to the conclusion that the blends disclosed therein provide the same effects: at page 5, lines 2-5, D5 expressly states that blends of fermented and unfermented tea mixed in a ratio of 1:1 - 4:1 provide a concentrate close to black tea with regard to aroma, flavour and infusion colour.

As concerns the increase of the antioxidant activity in a blend of fermented and unfermented tea when compared to the same mass of black tea alone (see patent, paragraphs [0018] and [0027]), this effect is the corollary of the presence of unfermented green tea in the blend which necessarily enhances the amount of catechins compared to fermented black tea alone, which compounds are essentially responsible for the antioxidant activity.

It follows that the technical effects achieved by the "selected" sub-range are not different from those explicitly and/or implicitly resulting from the broader range disclosed in D5 in accordance to the considerations set out above. In consequence the "selected" sub-range does not result from a purposeful selection but rather from an arbitrary one which is not capable of contributing a "new element" to this sub-range.

Looked at from another angle, the above considerations also lead to the conclusion that the person skilled in the art would seriously contemplate applying the technical teaching of the prior art document in the range of overlap (T 666/89, OJ 1933, 495; Headnote,

point 2), thus depriving the claimed subject-matter of novelty.

Since the criterion of "purposefulness" is not fulfilled for any of the catechins to phenols ratio ranges specified in Claim 1 of any of the requests (Main Request, Auxiliary Requests 1 to 5), novelty by selection is denied for all subject-matters concerned for this reason alone.

2.9 Thus none of these requests is allowable.

2.10 The above conclusion is not invalidated by the other arguments of the Respondents, as follows:

2.10.1 The Board does not concur with the Respondents' argument that the term "low-quality" used in D5 referred to the tea particle size. While this term is not explicitly defined in D5, the references to "the potential possibilities of the tea" which could not be achieved by mechanical mixing of "various types of starting material" (page 2, lines 3-9) and to "the improvement of the quality of the starting material" (page 2, lines 15-21) clearly suggest that D5 is concerned with the substance properties of the teas and not with their physical appearance. Moreover, in the Board's judgment and in accordance with normal commercial practice, tea compositions made of small particles and considered for that reason to be of "low quality", would normally comprise ordinary (inexpensive) tea varieties and not a special (expensive) tea variety.

2.10.2 With regard to the Respondents' argument that D5 only discloses the use of fresh leaves, the Board points out

that on the one hand the claimed subject-matter is not restricted to any special degree of "freshness" or "non-freshness" of the leaves and that on the other hand the qualification "fresh" has no particular meaning since teas of D5 may have different degrees of freshness: rolled leaf or semi-finished for the black fermented tea and rolled leaf, semi-finished or fresh leaf for the unfermented green tea (page 2, last paragraph).

2.11 In respect of the argument that the tea leaf of D5 is different from that of the claimed subject-matter, since it undergoes a heat treatment before blending, the Board considers this argument incorrect because the disclosure of D5 (page 5, lines 1-5) unambiguously refers to blends before such a treatment.

3. *Admittance of the late filed Auxiliary Requests 6, 7 and 8*

3.1 The Respondents filed these Auxiliary Requests at the oral proceedings held before the Board, *ie* at a very late stage, without providing any convincing justification for their late filing.

In this regard the Board does not accept the argument of the Respondents that "novelty by selection" became a crucial issue only after the dispatch of the preliminary opinion of the Board dated 6 March 2008 and that for this reason the filing of new requests at such a late stage should be permitted. The Board notes that the ground of lack of novelty based on a non-novel selection was extensively developed by the Appellant in its Statement setting out the Grounds of Appeal and in

its observations filed with a letter dated 28 November 2006, not to mention the discussions before the Opposition Division.

- 3.2 Moreover, the subject-matter of the late filed requests is not considered by the Board *prima facie* to overcome the objections raised during these opposition appeal proceedings. On the contrary, the subject-matters of these requests, by combining features of granted claims (Auxiliary Requests 6 and 8) and/or features only disclosed in the description (Auxiliary Request 7), rather render the issues under discussion more complex at this very late stage, and are likely to raise new issues (Auxiliary Request 7), with the consequence that adjournment of the oral proceedings would be required, contrary to the need for procedural economy enshrined in Article 13 RPBA (OJ 2007, 542).
- 3.3 The Auxiliary Requests 6 to 8 are thus not admitted in the proceedings.
4. Since none of the requests is allowable the patent is revoked.

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:

D. Sauter

P. Kitzmantel