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**Datasheet for the decision
of 18 February 2010**

Case Number: T 0442/07 - 3.2.07

Application Number: 00906018.7

Publication Number: 1150779

IPC: B05B 17/06

Language of the proceedings: EN

Title of invention:

Piezoelectric spraying system for dispensing volatiles

Patent Proprietor:

S. C. Johnson & Son, Inc.

Opponent:

Reckitt Benckiser Corporate Services Limited

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)
RPBA Art. 12, 13

Relevant legal provisions (EPC 1973):

-

Keyword:

"Admissibility of a new main request filed one month before the date of the oral proceedings (no - creates a new case and extends beyond content of application as originally filed)"
"Admissibility of auxiliary requests 1 and I filed at the oral proceedings (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0442/07 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 18 February 2010

Appellant:
(Patent Proprietor)

S. C. Johnson & Son, Inc.
1525 Howe Street
Racine, WI 53403 (US)

Representative:

Ruschke, Hans Edvard
RUSCHKE HARTMANN MADGWICK & SEIDE
Patent- und Rechtsanwälte
Postfach 86 06 29
D-81633 München (DE)

Respondent:
(Opponent)

Reckitt Benckiser Corporate Services Limited
103-105 Bath Road
Slough
Berkshire SL1 3UH (GB)

Representative:

Hayes, Adrian Chetwynd
Boult Wade Tennant
Verulam Gardens
70 Gray's Inn Road
London WC1X 8BT (GB)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 17 January 2007
revoking European patent No. 1150779 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: H. Meinders
Members: H. Hahn
I. Beckedorf

Summary of Facts and Submissions

I. The patent proprietor (appellant) lodged an appeal against the decision of the Opposition Division to revoke European patent No. 1 150 779. Together with the grounds of appeal dated 8 May 2007 the appellant filed a single request consisting of only apparatus claims, which replaced the claims of the granted patent (involving method and apparatus claims), and requested that the case be referred to the Opposition Division to consider novelty and inventive step.

II. Claim 1 as filed with the grounds of appeal reads as follows (amendments compared to apparatus claim 7 as granted are in bold; emphasis added by the Board):

"1. An apparatus for forming a finely dispersed liquid mist in the atmosphere, said apparatus comprising: an orifice plate (3) having a plurality of small orifices extending therethrough, a vibrator (2) arranged to cause said orifice plate (3) to vibrate at a rapid rate, a liquid containing container (5); and a **wick** (7) through which liquid is delivered from said container (5) to a surface of said orifice plate (3) while it is vibrating, characterized in that said liquid has, at said surface, a viscosity of less than 6 mPas (6 centipoise) and a surface tension in the range of 20-35 mNm⁻¹ (20-35 dynes per centimeter); **the orifice plate (31) is domed; and the wick (7) is looped in juxtaposition with the domed orifice plate (3).**"

III. The opposition had been directed against the patent in its entirety under Article 100(a) EPC, for lack of novelty and inventive step.

The Opposition Division held in its decision that claim 1 of the main request, i.e. method claim 1 as granted, lacked novelty over D1. According to the minutes the appellant at that stage withdrew the seven auxiliary requests it had filed previously and submitted a new auxiliary request I. The Opposition Division further decided to admit a final auxiliary request II into the proceedings since after the discussion in the oral proceedings auxiliary request I had also been withdrawn by the appellant. The Opposition Division then considered that the subject-matter of independent product claim 1 ("supply package") and independent system claim 2 ("system comprising apparatus ... and a liquid") of auxiliary request II as filed at the oral proceedings of 7 November 2006 met the requirements of Articles 123(2) and (3) EPC but lacked an inventive step with respect to a combination of the teachings of D1 (Journal of the Acoustical Society of Japan, Vol. 44, No. 6, pp 425-431, 1988 (English Translation)) and either D2 (WO-A-96 31289) or D4 (US-A-5 758 637).

IV. With a communication annexed to the summons dated 14 October 2009 the Board arranged for oral proceedings and presented its preliminary opinion on apparatus claims 1-12 of the single request as filed with the grounds of appeal.

The Board stated amongst others that the amendments made to claim 1 were considered not to comply with Article 123(2) EPC.

The Board further stated that it - in accordance with Article 111(1) EPC - intended to deal with all aspects of the case for reasons of process economy and not to remit it to the first instance for further examination of novelty and inventive step as requested by the appellant. This consideration was based on the fact that the application originated from 9 February 2000, that no new documents were introduced at the appeal stage and that the subject-matter of claim 1 of the single request presently on file was similar to that of claim 2 of auxiliary request II which subject-matter was discussed with both parties and which the Opposition Division considered to lack an inventive step in view of D1 with either D2 or D4.

Although the request appeared not to be allowable for formal reasons the Board remarked that the subject-matter of apparatus claim 1 appeared to be novel over the cited prior art.

With respect to inventive step it remarked that neither the appellant nor the respondent submitted arguments based on the problem-solution approach, which would be applied by the Board in the oral proceedings. D1 was considered to represent the closest prior art from which apparatus claim 1 appeared to differ in that it comprised a looped wick in juxtaposition to a domed orifice plate.

The Board further concurred with the Opposition Division that a surprising effect of the claimed combination of apparatus with a liquid had not been demonstrated. Furthermore, domed orifice plates appeared to be known in the field of liquid mist dispersers, see D4, figures 19-22. Looped wicks appeared to be one of the normal design choices of the skilled person, depending on the necessary flexibility of use. Wicks juxtaposed to domed orifices were also considered known from D4.

The parties were given the opportunity to file observations to the communication which should be filed at least one month before the date of the oral proceedings. It was, however, remarked that the admittance of facts and evidence was still subject to the provisions of Article 114(2) EPC and Articles 12 and 13 RPBA.

- V. With letter dated 18 January 2010 the appellant submitted amended sets of claims according to a main request and auxiliary requests II to VI in combination with arguments concerning the allowability of the amendments made therein and with respect to inventive step. Auxiliary request I involved the set of claims as filed with the grounds of appeal, amended in response to the communication of the Board.

- VI. With fax of 2 February 2010 the respondent (opponent) submitted arguments concerning the non-admissibility of the new requests with respect to the RPBA.

VII. With fax of 8 February 2010 the appellant submitted arguments with respect to the admissibility of the new main request.

VIII. Oral proceedings before the Board were held on 19 February 2010, at which first the issue of the admissibility in respect of the seven requests was discussed. In view of the result of the Board's deliberation on that issue the appellant withdrew its auxiliary requests II to VI and filed a new auxiliary request 1 to be dealt with in the order of requests after the main request. In view of the subsequent discussion concerning inventive step with respect to auxiliary request I filed with letter of 18 January 2010 the appellant replaced it during the oral proceedings by a (new) auxiliary request I of which the admissibility and the question of inventive step was then discussed.

(a) The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of one of the sets of claims filed as main request with letter of 18 January 2010 or, alternatively, as auxiliary request 1 and auxiliary request I, both filed during the oral proceedings.

(b) The respondent requested that the appeal be dismissed.

At the end of the oral proceedings the Board announced its decision.

IX. Claims 1 and 6 of the main request read as follows (amendments made with respect to the claim category and compared to the features of apparatus claim 1 of the request filed together with the grounds of appeal are in bold, with deletions in square brackets; emphasis added by the Board):

"1. **A method for atomizing a liquid**, which comprises the steps of:

providing a liquid to be dispensed;

providing an orifice plate (3); and

transferring said liquid to said orifice plate (3)

while vibrating the plate **using a battery powered piezoelectric element (2)**;

wherein said liquid **is an air-freshener, a fragrance or an insecticide formulation and** has a viscosity of less than 10 mPas (10 centipoise) and a surface tension in the range of from 20 mNm⁻¹ (20 dynes per centimeter) to 35 mNm⁻¹ (35 dynes per centimeter)."

"6. **A system comprising** an apparatus for forming a finely dispersed liquid mist in the atmosphere **and a liquid**, said apparatus comprising:

an orifice plate (3) having a plurality of small orifices extending therethrough,

a **battery powered** vibrator (2) **comprising a piezoelectric element in communication with the orifice plate (3)** arranged to cause said orifice plate (3) to vibrate at a rapid rate,

a container (5) **containing the liquid**; and

a **[wick] liquid conduit (7) capable of delivering the** liquid from said container (5) to a surface of said orifice plate (3) while it is vibrating,

wherein said liquid **is an air-freshener, a fragrance or**

an insecticide formulation, and has, at said surface, a viscosity of less than 6 mPas (6 centipoise) and a surface tension in the range of 20-35 mNm⁻¹ (20-35 dynes per centimeter) [**; the orifice plate (31) is domed; and the wick (7) is looped in juxtaposition with the domed orifice plate (3)]**]."

X. The subject-matter of apparatus claims 1-12 of auxiliary request 1 corresponds to that of the claims 6-17 of the main request.

XI. Claim 1 of (new) auxiliary request I reads as follows (amendments compared to claim 1 as filed with the grounds of appeal are in bold; emphasis added by the Board):

"1. **A system comprising** an apparatus for forming a finely dispersed liquid mist in the atmosphere **and a liquid**, said apparatus comprising:
an orifice plate (3) having a plurality of small orifices extending therethrough,
a vibrator (2) arranged to cause said orifice plate (3) to vibrate at a rapid rate,
a container (5) **containing the liquid**; and
a **liquid conduit (7) capable of delivering the** liquid from said container (5) to a surface of said orifice plate (3) while it is vibrating,
characterized in that said liquid has, at said surface, a viscosity of less than 6 mPas (6 centipoise) and a surface tension in the range of 20-35 mNm⁻¹ (20-35 dynes per centimeter);
the orifice plate (31) is **outwardly** domed; and
the **liquid conduit is a** wick (7) looped in juxtaposition with the domed orifice plate (3) **thereby**

being in surface tension contact with the rear side of the domed orifice plate (3) to feed the liquid to said rear side of the orifice plate; and the container (5) has a closure (8) with an opening (9), the wick (7) being held by a wick holder/positioner (10) located in the opening (9)."

The remaining claims 2 to 12 of (new) auxiliary request I are identical with those of auxiliary request 1.

XII. The appellant argued essentially as follows:

The change of the appellant's case should be allowed because any amendment may be considered with the Board's discretion according to Article 13 RPBA. Although the grounds of appeal include only one independent apparatus claim 1, it should be allowed to further include in the main request an independent method claim. The structure of that claim is basically the same as the apparatus claim filed with the grounds of appeal and relates basically to subject-matter which has been discussed at the first instance proceedings so that no new subject-matter is brought forward in the appeal proceedings. For the same reasons there exists also no need to defer the oral proceedings. The main request is similar to claims discussed as auxiliary request 5 before the Opposition Division which were, in view of that discussion, withdrawn subsequently and are therefore not treated in the impugned decision.

With respect to a question of the Board concerning the scope of the appeal - namely whether it is possible to go back to a new claim category which was not the subject of the grounds of appeal and not comprised in

the claims filed with the grounds of appeal - the appellant contends that the entire decision was appealed and that it is always possible to change the category of the claims, e.g. from product claims to method claims. It, however, agreed that the single request submitted with the grounds of appeal contained no method claims.

However, the case is not so complex that it cannot be handled at the oral proceedings since everything is already on file as stated in point 4 of the Board's communication. Furthermore, the new main and auxiliary requests have been filed one month before the oral proceedings and thus within the time limit as set by the Board in point 8 of its communication. The reason for them lies in the negative opinion expressed by the Board with respect to the features of claim 1 as filed with the grounds of appeal.

The improved efficiency and low battery consumption are related to the viscosity and surface tension of the liquid which represent a problem different from the one solved by the "wick" alternative as filed with the grounds of appeal. Furthermore, the claims of the new main request have now been restricted to a household apparatus - because of the use of batteries - so that D1 no longer forms the closest prior art document.

There exist no issues of added subject-matter (see application as originally filed, WO-A-00 47335, page 1, lines 2 and 11). The skilled person would apply this broad disclosure of the invention on page 1 to all the subject-matter claimed so that the added features do not represent added subject-matter. A battery has

always been part of the dependent claims (see e.g. claim 9 of auxiliary request II before the Opposition Division).

The man skilled in the art would understand "in juxtaposition" to mean a certain form of contact or a degree of contact. Said definition is used more than once in the description of the application as originally filed (see e.g. page 7, line 30; page 8, line 11).

A one month period for carrying out any necessary further searches should be sufficient for the respondent who had been able to do so during the opposition proceedings, by filing two additional documents.

In order to overcome the problem with the added method claims in the main request a new auxiliary request 1 is filed which comprises only the system claims 6 to 17 of the main request, to be dealt with in the order of requests after the main request. This request emerged from the discussion in the oral proceedings on the admissibility of the main request and should thus be admissible.

Original auxiliary request I was a response to the Article 123(2) EPC objection raised in point 3 of the Board's communication. Taking account of the inventive step discussion at the oral proceedings (new) auxiliary request I now additionally defines the relationship between the domed plate and the wick. The basis for the amendment is page 3, lines 27 to 30 of the originally filed description, but the term "back side" has been

replaced by "rear side" to use proper English. Furthermore, "outwardly" and "rear side" have clear meanings so that Article 84 is complied with. Inventive step of the subject-matter claimed is now given since the other possibilities for the arrangement of wick vs. domed plate are now excluded. This embodiment has another advantage in that it helps to properly locate the wick within the domed plate.

Therefore this (new) auxiliary request I should be admitted in view of Articles 12 and 13 RPBA.

XIII. The respondent argued essentially as follows:

All new requests should not be allowed for being late filed and for representing an important change to the appellant's case.

The respondent originally had no intention to attend the oral proceedings before the Board in view of the claims filed with the grounds of appeal but was now forced to do so due to the important change in the appellant's case.

Already in the opposition proceedings seven auxiliary requests had been filed only one month before the oral proceedings but were withdrawn without discussion. Two further requests were filed at the oral proceedings so that in total ten requests had to be dealt with by the respondent. The purpose of the appeal is to contest the decision but the appellant with its grounds of appeal simply filed a new set of claims replacing the claims on file and requested that the case should be remitted to the Opposition Division for further examination.

This does not represent an appeal but an attempt to continue the first instance proceedings which should be considered inadmissible.

Apparatus claim 1 as filed with the grounds of appeal had no relation to the apparatus claims, nor to the method claim valid in the opposition proceedings.

According to Article 12 RPBA the appeal shall be based on the notice and grounds of appeal and should contain the **complete** case of the appellant. The appellant limited itself to the apparatus claims defining a wick and a domed orifice plate. According to the independent method and apparatus claims of the new main request said wick and said domed plate are no longer required but claim 1 specifies three specific liquids, particularly an air freshener, as well as a battery. These features were taken from the description and were never claimed before and were also not searched. Thus the claims of the new main request are totally different from those of the opposition proceedings and to those of the grounds of appeal. Thereby the argumentation concerning novelty, inventive step and added subject-matter is completely changed, particularly with respect to all the issues mentioned in the Board's communication. Auxiliary request 5 of the opposition proceedings - quoted by the appellant as the basis for the new main request - has never been examined as to substance since it was withdrawn at the oral proceedings without being discussed. There is also only one problem mentioned in the patent in suit, i.e. the efficiency of the battery.

Furthermore, clarity and added subject-matter objections are raised with respect to the new main request. There is no basis in the application as originally filed that the air freshener has the specific viscosity and surface tension range as now defined in claim 1. Likewise the battery is not disclosed in this general manner and the quoted passage on page 1 provides no support for this amendment. The feature "a wick looped in juxtaposition with the domed orifice plate" is unclear since it is not known how close to the plate this should be. Particularly as the wick is consistently mentioned as being in contact with said plate (see page 6, line 31, page 7, line 28 and page 8, line 15) no gap should be possible, contrary to what the appellant argues. This is important to later determine what constitutes infringement. Furthermore, nothing in the application as filed suggests anything other than contact of the wick and the domed plate.

The new auxiliary request 1 is not acceptable for the same reasons as the main request. It further should not be admitted as the deadline for new requests was 19 January 2010. Such a new request brings up new issues which add to complexity since new searches are necessary and added matter has to be checked. Therefore also these requests should not be admitted.

The (new) auxiliary request I is objectionable under Articles 123(2) and 84 EPC: The definition "wick ... being in surface tension contact with a plate" has no basis in the application as originally filed since page 3, lines 28 to 30 concerns the surface tension contact of liquid but not of the wick. The definitions "outwardly" and "rear side" of the orifice plate in

claim 1 of this request additionally have no clear meaning. Furthermore, since the liquid is still referred to in respect of the plate but not to the dome claim 1 does not overcome the problem of inventive step, i.e. that it solves the problem over the whole scope of the claim, and this feature would bring further delay as it needs remittal to the first instance to deal with this alternative wick arrangement. The dome can be arranged somewhere on said orifice plate.

Therefore (new) auxiliary request I should not be admitted into the proceedings.

Reasons for the Decision

1. *Admissibility of the appeal*

The appealed decision finds the two apparatus claims of the single remaining auxiliary request to lack inventive step over D1 in view of D2 as well as D4.

With the grounds of appeal a single set of claims has been filed with one independent apparatus claim, supported by arguments on inventive step.

As all other formal requirements are met, the appeal is admissible.

2. *Admissibility of the requests (Articles 12 and 13 RPBA and Article 123 EPC)*

2.1 Article 12(1) of the Rules of Procedure of the Boards of Appeal (RPBA) defines that "**Appeal proceedings shall be based on**

(a) **the notice of appeal and statement of grounds of appeal** filed pursuant to Article 108 EPC;

(b) in cases where there is more than one party, **any written reply of the other party or parties** to be filed within four months of notification of the grounds of appeal;

(c) **any communication sent by the Board and any answer thereto** filed pursuant to directions of the Board."

Article 12(2) RPBA then defines that "**The statement of grounds of appeal and the reply shall contain a party's complete case.** They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied on".

Article 12(4) further defines that "Without prejudice to the power of the Board to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first-instance proceedings, everything presented by the parties under (1) shall be taken into account by the Board if and to the extent it relates to the case under appeal and meets the requirements in (2)."

The following Article 13 RPBA deals with amendments to a party's case and paragraph (1) thereof defines "**Any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion.** The discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy" while paragraph (3) states that "**Amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings**".

2.2 With its notice of appeal dated 9 March 2007 the appellant requested to set aside the decision to revoke the patent and oral proceedings for the situation in which the appeal could not simply be allowed as a result of the written procedure.

With the grounds of appeal dated 8 May 2007 the appellant then stated "We are also filing herewith a new set of 12 claims to replace the claims of the granted patent". Furthermore, in said grounds of appeal the appellant only presented arguments concerning the nature and basis of the amendments made to the now single independent (apparatus) claim 1 and the thereby resulting advantage. Additionally it requested that the case be referred to the Opposition Division to consider novelty and inventive step, while the auxiliary request for oral proceedings was reiterated.

2.3 In the decision under appeal the Opposition Division considered the method claim as granted to lack novelty over D1 (main request). The two apparatus claims of the single remaining auxiliary request II were considered not to fulfil the requirements of Article 56 EPC (inventive step), see point III, above.

Neither in the notice of appeal, nor in the statement of the grounds of appeal does the appellant challenge this decision. Moreover, with the single request filed with the grounds of appeal (explicitly **replacing** the claims of the granted patent) which limits the request to the more restricted apparatus claims 1-12 (see point I above), the appellant implicitly accepts the Opposition Division's conclusion regarding the independent method claim and restricts the scope of its appeal to only apparatus (or system) claims with a particular wick in its relationship to the form of an orifice plate (see point II, above).

Main request

2.4 By filing the new main request comprising **method claims 1-6** in addition to apparatus (system) claims 7-17, which independent claims 1 and 7 no longer require a particular wick in its relationship to the form of an orifice plate but instead require a battery powered piezoelectric element and an air-freshener, a fragrance or an insecticide formulation as the liquid (see point IX, above) the appellant creates a new case exactly **one month** before the date of the oral proceedings (see point V above), which is not only outside the scope of its appeal as concerns the method claims, but also is significantly different as concerns

the subject-matter of the independent claims. Thus it needs to be considered whether or not such an amendment of the appellant's case may be allowed by the Board in accordance with Article 13 RPBA.

- 2.4.1 The Board in its communication preparing for the oral proceedings has dealt only with the independent apparatus claim 1 as filed with the grounds of appeal and it has raised objections under Article 123(2) EPC and/or made remarks with respect to clarity, novelty and inventive step of the subject-matter of this claim, which requires a looped wick juxtaposed to the domed orifice plate (see point IV above). No directions have been given by the Board.

Consequently, the incorporation of the method claims 1-6 and the replacement of essential features of said apparatus claim 1 by totally different features as done by the appellant in claims 1 and 7 of the new main request **cannot be considered to represent a response** to the Board's communication as argued by the appellant.

Actually the preliminary opinion of the Board concerning the looped wick/domed orifice plate embodiment was the reason for amending its case as admitted by the appellant during the oral proceedings. A negative preliminary opinion of the Board, however, cannot justify such a significant amendment of the appellant's case, particularly as the factual framework of the opposition procedure had not been changed.

- 2.4.2 Furthermore, even if this request is based on auxiliary request 5 filed in the opposition proceedings the timing of this significant change of the appellant's

case (only one month before the oral proceedings) is such that the examination has to start from scratch again, i.e. the Board and the respondent have to re-examine the full compliance with the EPC, in particular the requirements of Articles 54, 56, 84, 123(2) and (3) EPC, particularly since the impugned decision in this respect is entirely silent on these questions. The latter is due to the appellant withdrawing all the relevant auxiliary requests even before they were discussed, at the oral proceedings before the Opposition Division.

The two new features "**battery powered piezoelectric element**" and "**air-freshener**" are not contained in any of the originally filed or granted claims but are derived from the description of the patent in suit. As reply to the late filing of the main request the respondent already objected since it did not have sufficient time to carry out a proper additional search for these features. As regards their origin, it could also not be expected to anticipate such a request (see point VI above). The appellant on the contrary argued that the one month period was sufficient for carrying out such a search.

The Board agrees with the respondent. It is up to the proprietor/appellant to file requests involving amended claims sufficiently early in the appeal proceedings such that not only the opponent/respondent can prepare itself, (including possibly carrying out a further search), but also the Board. The question as to when is sufficiently early depends upon the nature of the amendments made. It is not reasonable to expect the opponent/respondent to have carried out a search on

every aspect of the patent, let alone for all aspects of the description. In the present case there was also no reason for the respondent to expect that the appellant would revert back to a request containing method claims and apparatus claims directed to an apparatus comprising a battery powered piezoelectric element and a liquid being an air freshener resembling the fifth auxiliary request filed in the opposition proceedings since at no stage was there any indication that the nature of these embodiments could play a role in the proceedings, particularly as no new documents were introduced at the appeal stage.

To deal with these issues would require adjournment of the oral proceedings, to which the Board is not prepared to have recourse.

- 2.4.3 Furthermore, it needs to be considered that the subject-matter of the independent claims 1 and 7 of the new main request was objected to under Articles 84 and 123(2) EPC by the respondent.

In the Board's view the feature "using a battery powered piezoelectric element (2)" of claim 1 and the feature "a battery powered vibrator (2) comprising a piezoelectric element in communication with the orifice plate (3)" represent an intermediate generalisation of the most general atomizer embodiment disclosed on page 3, line 21 to page 4, line 6 and the subject-matter of apparatus claim 7 of the application as originally filed which generalisation, however, has no basis in said application. The passage offered by the appellant - page 1, lines 10 and 11 of the application as originally filed - only refers to a "battery

operated dispenser utilizing an orifice plate in communication with a piezoelectric element" and thus cannot serve as a basis since it does not disclose the necessary other elements of the apparatus.

The atomizer according to said passage on page 3, starting at line 30, involves the following functionally related features (in bold): "**The piezoelectric element may be driven by circuitry powered by a small battery, causing the element to vibrate and forcing liquid through the orifice plate, which has one or more small tapered or conical holes therein, perpendicular to the surfaces thereof, the exit of said holes being on the order of from 1 to about 25 microns, ... in diameter. It has been found that by limiting the use of liquids to those which exhibit viscosity below 10 centipoise, and which have surface tensions below about 35, and preferably in the range of from about 20 to about 30 dynes per centimetre, superior results are attained.**"

Consequently, the orifice plate according to this specific embodiment requires a specific shape and size of the hole(s) for atomizing the liquids having the claimed viscosity and surface tension ranges, to work with a battery operated piezoelectric element. Apparatus claim 7 as originally filed, on the other hand, cannot help here as it neither defines a piezoelectric element nor that it is battery driven.

Since neither method claim 1 nor system claim 6 of the new main request comprises these features concerning the specific shape and size of the hole(s) it is evident that the subject-matter of claims 1 and 6

extends beyond the content of the application as originally filed, contrary to the requirements of Article 123(2) EPC.

Since the Board comes to the conclusion that independent method claim 1 and system claim 6 of the new main request contravene Article 123(2) EPC and are thus *prima facie* not allowable, there is no need to deal with the other objections raised by the respondent.

- 2.5 Taking account of the above aspects the Board, in exercising its discretion in accordance with Article 13 RPBA, decides not to admit the new main request into the appeal proceedings.

Auxiliary request 1

- 2.6 Since the subject-matter of system claim 1 of auxiliary request 1 is identical with that of system claim 6 of the main request the conclusions of above points 2.4.3 and 2.5 apply *mutatis mutandis*.

Consequently, the Board decides that auxiliary request 1 is also not admitted into the appeal proceedings.

(New) auxiliary request I

- 2.7 The Board considers that auxiliary request I filed with letter of 18 January 2010 is the only request which actually represents a response to the Board's communication. The amendments to this request, resulting in it being filed in amended form at the oral proceedings as (new) auxiliary request I, substituting

the previous one, can be considered a reaction to the inventive step discussion at the oral proceedings.

With respect to the Article 123(2) EPC objection raised by the respondent against claim 1 of this request the Board comes to the following conclusion:

- 2.7.1 The appellant offered page 3, lines 27 to 30 of the application as originally filed as the basis for the amended feature of claim 1 of (new) auxiliary request I, the latter being "the liquid conduit is **a wick (7)** looped in juxtaposition with the domed orifice plate (3) thereby **being in surface tension contact with the rear side of the domed orifice plate (3)** to feed the liquid to said rear side of the orifice plate" (emphasis added by the Board).
- 2.7.2 The quoted passage of the description, however, reads "The fragrance, insecticide formulation, or other desired liquid is supplied to the back side of the orifice plate through a liquid transport means such as a capillary feed system that delivers the liquid in surface tension contact with the plate" (underlining added by the Board). Thus the liquid is in surface tension contact with the plate and it is **not** the looped wick which is in surface tension contact. This feature is repeated in that form on page 8, lines 12 and 13 and page 9, lines 31 to 33.
- 2.7.3 Consequently, it is evident that the subject-matter of claim 1 of (new) auxiliary request I as filed during the oral proceedings contravenes Article 123(2) EPC.

Therefore there is likewise no need to deal with all other objections raised by the respondent with respect to this request.

2.7.4 Taking account of the above points the Board decides not to admit auxiliary request I into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders