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**Datasheet for the decision
of 30 October 2012**

Case Number: T 1097/11 - 3.3.05
Application Number: 03813097.7
Publication Number: 1572333
IPC: B01F 3/04, A45D 44/00,
B01F 13/10
Language of the proceedings: EN

Title of invention:

Two stage mixing process for personal care products

Patentees:

Unilever PLC
Unilever N.V.

Opponents:

Henkel AG & Co. KGaA
The Procter & Gamble Company
Beiersdorf AG

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)(3)

Keyword:

"Subject-matter extending beyond the contents of the application
as filed (main request, auxiliary requests 1 to 7): yes"
"Extension of protection (auxiliary requests 1, 3 and 7): yes"
"Clarity (auxiliary requests 2, 4, 5 and 6): no"

Decisions cited:

-

Catchword:

-



Case Number: T 1097/11 - 3.3.05

DECISION
of Technical Board of Appeal 3.3.05
of 30 October 2012

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Decision under appeal: Decision of the Opposition Division of the European Patent Office posted 17 March 2011 revoking European patent No. 1572333 pursuant to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: G. Raths
Members: H. Engl
S. Hoffmann

Summary of Facts and Submissions

- I. European patent EP-B-1 572 333 was granted with eight claims.

The only independent claim reads as follows:

"1. A process for manufacture of a personal care composition comprising:

(i) forming a first aqueous phase portion of a personal care base composition in a first vessel;

(ii) optionally forming a second phase portion of the personal care base composition in a second vessel;

characterized by

(iii) feeding the first aqueous phase into a blending tube which forms part of a homogenizer, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi);

(iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;

(v) mixing the first aqueous phase and, when present, the second phase within the blending tube;

(vi) downstream from the homogenizer feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and

(vii) recovering the resultant personal care composition."

Dependent claims 2 to 8 define further embodiments of the process of claim 1.

II. The European patent was opposed under the grounds of opposition according to Articles 100(a),(b) and (c) EPC.

III. In the contested decision, the opposition division held that claim 1 of the European patent as granted contained subject-matter which extended beyond the content of the application as originally filed. As the claims of the auxiliary requests also contravened Article 123(2) EPC, the patent in suit was revoked.

IV. The patentees (henceforth: the appellants) filed a notice of appeal by letter dated 9 May 2011. The grounds of appeal, received by letter dated 19 July 2011, were accompanied by new claims constituting auxiliary requests 1 to 5. The appellants' main request was directed to the claims as granted.

A further submission of the appellants was received by letter dated 28 September 2012, containing new auxiliary requests 1 to 6.

V. These auxiliary requests read as follows:

Auxiliary request 1, claim 1:

1. A process for manufacture of a personal care composition comprising:

(i) forming a first aqueous phase portion of a personal care base composition in a first vessel;

(ii) optionally forming a second phase portion of the personal care base composition in a second vessel;

characterized by

(iii) feeding the first aqueous phase into a blending tube **which forms part of a homogenizer**, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute, **wherein the first phase is pumped into the blending tube under a pressure ranging from 68.94 kPa to 34.47 mPa [sic] (10 to 5,000 psi)**;

(iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;

(v) mixing the first aqueous phase and, when present, the second phase within the blending tube;

(vi) downstream from the homogeniser feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and

(vii) recovering the resultant personal care composition."

Auxiliary request 2, claim 1:

"1. A process for manufacture of a personal care composition comprising:

(i) forming a first aqueous phase portion of a personal care base composition in a first vessel;

(ii) optionally forming a second phase portion of the personal care base composition in a second vessel;

characterized by

(iii) feeding the first aqueous phase into a blending tube which forms part of a homogeniser, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per **minute, under** a pressure ranging from 68.94 kPa to 34.47 **mPa [sic]**(10 to 5,000 psi);

(iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;

(v) mixing the first aqueous phase and, when present, the second phase within the blending tube;

(vi) downstream from the homogeniser feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and

(vii) recovering the resultant personal care composition."

Auxiliary request 3, claim 1:

"1. A process for manufacture of a personal care composition comprising:

(i) forming a first aqueous phase portion of a personal care base composition in a first vessel;

(ii) optionally forming a second phase portion of the personal care base composition in a second vessel;

characterized by

- (iii) **feeding the first aqueous phase into a blending tube at a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi), the blending tube forming part of a homogeniser**, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;
- (iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;
- (v) mixing the first aqueous phase and, when present, the second phase within the blending tube;
- (vi) downstream from the homogeniser feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and
- (vii) recovering the resultant personal care composition."

Auxiliary request 4, claim 1:

"1. A process for manufacture of a personal care composition comprising:

- (i) forming a first aqueous phase portion of a personal care base composition in a first vessel;
 - (ii) optionally forming a second phase portion of the personal care base composition in a second vessel;
- characterized by**
- (iii) feeding the first aqueous phase into a blending tube which forms part of a homogeniser, the first aqueous phase moving through the blending tube at a

rate from 2.27 to 2,270 kg (5 to 5000 lbs.) per minute, **under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi);**

(iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;

(v) mixing the first aqueous phase and, when present, the second phase within the blending tube;

(vi) downstream from the homogeniser feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition, **whilst the mixed phases of the base composition are moving through the conduit piping leading to a static mixer**, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and

(vii) recovering the resultant personal care composition."

Auxiliary request 5, claim 1:

The wording of claim 1 is the same as that of claim 1 of the fourth auxiliary request, except that the passage

"whilst the mixed phases of the base composition are moving through the conduit piping leading to a static mixer"

has been deleted and the following passage is appended at the end of the claim:

"wherein the promotional ingredients are selected from the group consisting of vitamins, plant extracts and mixtures thereof".

Auxiliary request 6, claim 1:

"1. A process for manufacture of a personal care composition comprising:

(i) forming a first aqueous phase portion of a personal care base composition in a first vessel;

(ii) optionally forming a second phase portion of the personal care base composition in a second vessel;

characterized by

(iii) feeding the first aqueous phase into a blending tube which forms part of a homogenizer, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per **minute, under** a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi);

(iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;

(v) mixing the first aqueous phase and, when present, the second phase within the blending tube;

(vi) downstream from the homogeniser feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition **whilst the mixed phases of the base composition are moving through the conduit piping leading to a static mixer,** the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and

(vii) recovering the resultant personal care composition;
wherein the promotional ingredients are selected from the group consisting of vitamins, plant extract and mixtures thereof."

VI. Respondent II filed its observations by letter dated 2 December 2011.

Respondent III filed its observations by letters dated 10 January 2012 and 1 October 2012.

VII. The board issued a preliminary communication dated 13 August 2012 in which it summarized the parties' requests and announced that it intended to remit the case to the department of first instance if the claims should be found allowable under Article 123(2) and (3) EPC.

VIII. Oral proceedings took place before the board on 30 October 2012. The appellants filed new claims in accordance with auxiliary request 7, claim 1 thereof worded as follows:

Auxiliary request 7, claim 1:

"1. A process for manufacture of a personal care composition comprising:
(i) forming a first aqueous phase portion of a personal care base composition in a first vessel;
(ii) optionally forming a second phase portion of the personal care base composition in a second vessel;
characterized by

(iii) feeding the first aqueous phase into a blending tube which forms part of a homogeniser, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute, **wherein the first phase is pumped into the blending tube** under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi);

(iv) optionally feeding when present the second phase into the blending tube, the second phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute;

(v) mixing the first aqueous phase and, when present, the second phase within the blending tube;

(vi) downstream from the homogeniser feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition whilst the mixed phases of the base composition are moving through **a conduit into** a static mixer, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition; and

(vii) recovering the resultant personal care composition."

IX. The appellants essentially argued as follows:

The opposition division had misinterpreted the language of the claim in assuming that the phrase

"under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi)"

in element (iii) of claim 1 as granted could only relate to the pressure at which the first aqueous phase moved through the blending tube. The appellants maintained instead that this pressure feature referred to the pressure of the feeding of the first aqueous phase into the blending tube. The appellants referred to claim 6 and to the description, page 9, lines 15 to 19 of the application as originally filed, where it was stated that the pumping pressure of 10 to 5,000 psi was the pressure at which the first phase was pumped into the blending tube (the pumping pressure range). Claim 1 as granted could be read in this way, and this was the way the appellants construed the claim.

With respect to sub-paragraph (vi) of claim 1 as granted (in particular the claim feature reading "*feeding in a continuous manner a late variant addition phase*"), the appellants relied on page 3, lines 18 to 22, of the original application documents as a basis for the feature in question. This part of the disclosure contained a literal statement of a "continuous manner" in which the variant was added. In the appellants' understanding, the term "variant" designated the finished end product. The terms "continuous flow manner" and "continuous manner" were essentially synonymous. In fact the term "flow" had been deleted as superfluous, and even possibly unclear in the context, because "flowing" was an intrinsic feature of the claimed processes.

As a first auxiliary request, the appellants proposed a new claim 1 into which the subject-matter of original claim 6 had been inserted as near *verbatim* as possible. This claim clearly addressed all the added subject-

matter objections upheld by the opposition division and remedied any deficiencies under Article 123(2) EPC.

Newly-filed auxiliary request 7 was based on auxiliary requests 4 and 6 filed previously and should therefore be admitted into the proceedings. The amended claim addressed the objections raised by the respondents by additional amendments to the critical sub-paragraphs (iii) and (vi).

X. The respondents essentially argued as follows:

- *Regarding step (iii) of claim 1:*

According to the laws of physics, the pressure of a first aqueous phase being "pumped into" the blending tube at a pressure within the range specified could not be the same as the pressure of the said aqueous phase "moving through" the blending tube, because of the pressure drop that inevitably occurred. Therefore, said feature of original claim 6 could not provide a basis for granted claim 1. The requirements of Article 123(2) EPC were thus not met.

Contrary to the appellants' submission, there was no ambiguity in the claim as granted. It required that the first aqueous phase moved through the blending tube under a pressure within the range specified in the claim. Therefore, it was not necessary to refer to the description in order to construe the claim.

- *Regarding claim 1 of the main request:*

The claim feature

"(iii) feeding the first aqueous phase into a blending tube which forms part of a homogenizer, the first aqueous phase moving through the blending tube at a range from 2.27 to 2,270 kg (5 to 5,000 lbs) per minute under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi)"

had no basis in the originally filed documents. The passage "moving through the blending tube" had a meaning different from that of the passage of claim 6, which reads:

"wherein the first phase is pumped into the blending tube at a pressure ranging from 10 to 5,000 psi".

The reason for this different meaning was the fact that a liquid moving in a conduit had a lower pressure than the liquid pumped into the conduit.

Therefore, the requirement of Article 123(2) EPC was not met.

- *Claim item (vi), reading*

"(vi) downstream from the homogenizer feeding in a continuous manner a late variant addition phase..., the late variant addition phase comprising a material selected from ...",

also contravened Article 123(2) EPC, for the following reasons. According to the originally filed documents, the term "late variant addition phase" referred to the finished product, not to the additive; originally disclosed was continuous mixing, not continuous feeding; and the definition of the additive was changed by insertion of the term "*late variant addition phase*" before the word "comprising".

- *Regarding claim 1 of the first auxiliary request:*

Claim 1 was unclear, contrary to Article 84 EPC. By the insertion of a comma between "per minute" and "under", it remained unclear whether the cited pressure range referred to the pressure in the feeding step or to the pressure of the moving aqueous phase.

The claim also contravened Article 123(3) EPC, because it now covered embodiments in which the feeding pressure was 68.94 kPa, which the granted claim did not.

- *Regarding claim 1 of the further auxiliary requests, essentially the same arguments applied.*

XI. Requests

The appellants requested that the contested decision be set aside and the European patent be maintained as granted or in the alternative, that the patent be maintained in amended form on the basis of the claims in accordance with auxiliary requests 1 to 6, filed with letter dated 28 September 2012, or on the basis of

the claims in accordance with auxiliary request 7, filed during oral proceedings.

The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. Amendments to claim 1, sub-paragraph (vi)

1.1 *Main request (claims as granted)*

1.1.1 Sub-paragraph (vi) of claim 1 as granted reads:

"(vi) downstream from the homogenizer feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition, the late variant addition phase comprising a material selected from a fragrance, a colorant, a promotional ingredient and mixtures thereof, to form a resultant personal care composition"

(emphasis added by the board).

1.1.2 The original disclosure serving as a basis on which the appellants relied for the highlighted claim feature was the description, page 3, lines 18 to 22, in the version as originally filed. The board is also not aware of any other part of the originally filed application documents which could serve as a basis for the said claim feature.

1.1.3 With respect to said claim feature, respondents II and III raised the objection that there was no disclosure

in the application documents as originally filed of a process of continuous feeding of the late variant addition phase into the mixed phases. Disclosed was only a process of "blending in a continuous flow manner" (see page 3, lines 18 and 19).

Respondent II referred in this context to the description (*loc.cit.*) and argued that it was the blending of the "variant" (not of the "late variant addition phase") that was disclosed as occurring "in a continuous flow manner". The granted claim allowed the base composition to be static, for instance in a kettle. This was not supported by page 3, lines 18 to 22: the variant chemicals (additives) were introduced downstream (*i.e.*, after the continuous blending of the variant and after the homogenizer), but nothing was said about the way in which the feeding of the "late variant addition phase" occurred.

Respondent III pointed out that Figure 3 of the opposed patent disclosed a process in which the mixed aqueous phases were fed into a storage vessel (41), and portions of the mixture were then sent to a static mixer (20). The late variant addition phases were injected into the conduit connecting the storage vessel (41) and the static mixer (20). The static mixer was explained on page 7, lines 13 to 20, to be a discontinuous mixing device. Therefore, the appellants' interpretation of the disclosure on page 3, lines 18 to 22, and consequently also granted claim 1, were at odds with the disclosure of Figure 3 and the relevant parts of the description referring to it (page 6, line 21 to page 7, line 20).

1.1.4 The board agrees with the objections of the respondents.

The description, page 3, lines 18 to 22, does not directly and unambiguously disclose a step of continuous feeding of a late variant addition phase. On the contrary, Figure 3 and page 6, line 21 to page 7, line 20, clearly suggest that the feeding of the late variant addition phase occurs in a discontinuous manner, in a discontinuous mixing device, following a (batch wise) withdrawal of the mixed aqueous phases from storage vessel (41). Therefore, the claim feature

"downstream from the homogenizer feeding in a continuous manner a late variant addition phase into the mixed phases of the base composition"

extends beyond the content of the application documents as originally filed and contravenes Article 123(2) EPC.

The main request is therefore rejected.

1.2 *Auxiliary requests 1 to 7*

The same claim passage as above also appears in subparagraphs (iv) of the independent claims in accordance with auxiliary requests 1 to 7. Therefore, the same objections and arguments apply and the same conclusion is reached.

The first to seventh auxiliary requests are also not allowable (Article 123(2) EPC).

2. Amendments to claim 1, sub-paragraph (iii)

2.1 *Main request (claims as granted)*

2.1.1 Sub-paragraph (iii) of claim 1 as granted reads:

"(iii) feeding the first aqueous phase into a blending tube which forms part of a homogenizer, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi)"

(emphasis added by the board).

2.1.2 According to the respondents, a clear difference existed between the pressure of the first aqueous phase while moving through the blending tube, and the pressure of the said first aqueous phase while being pumped (or fed) into the said tube. Physics dictated that the pumping pressure had to be higher than the pressure at which the liquid moved through the blending tube. This fact was not disputed by the appellants.

2.1.3 The appellants argued in writing that the pressure range referred to at page 9, lines 15 to 19, of the description (version as originally filed) did not relate to the pressure at which the first phase moved in the blending tube, but simply stated it as being a pumping pressure range. It could also relate to the pumping pressure at other stages of the claimed process and therefore serve as a basis of disclosure for the claim feature in question.

During the oral proceedings, the appellants identified the pressure range defined in sub-paragraph (vi) of claim 1 as granted as the feeding or pumping pressure of the first aqueous phase. According to the appellants, the sentence at issue has, as its most common meaning in English, the sense that the feeding pressure and the moving pressure are identical. In the appellants' view, a proper construction of the claim must lead to this interpretation. Thus, in the appellants' view, claim 1 was perfectly based on the original disclosure of the description, page 9, lines 15 to 19, and of claim 6, which provided a literal basis for the claim feature in question.

In fact, claim 6, in combination with claim 1 to which it refers, discloses a process wherein

"the first phase is pumped into the blending tube at a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi)"

(emphasis added by the board).

The originally filed description, page 9, lines 15 to 19, literally discloses a process wherein

"first and second phases are pumped at relatively high pressures which may range from about 10 to about 5,000 psi"

(emphasis added by the board).

According to the appellants' own submission and interpretation - with which the board agrees - the

"pumping" pressure denotes the pressure with which the first and second phases are fed into the blending tube, or in other words, the pumping pressure is equivalent to the feeding pressure.

2.1.4 The board's interpretation of granted claim 1 is as follows:

The board considers firstly that the wording of the claim, in particular sub-paragraph (vi) thereof, is unambiguous and clear *per se* and hence does not require interpretation or construction in the light of the description.

Secondly, in the board's view, sub-paragraph (vi) clearly comprises two different aspects which are presented in the form of a main clause and a subordinate clause, respectively. The first aspect relates to the feeding of the first aqueous phase and a second aspect relates to its movement through the blending tube. Said movement of the phase is defined by a flow rate (2.27 to 2,270 kg per minute) and by a pressure (ranging from 68.94 kPa to 34.47 MPa).

In the opinion of the board, plain English meaning of the claim cannot suggest anything else. The board sees no reason why the skilled reader should associate the pressure range, which appears in the context of the second aspect (the subordinate clause), with the first aspect which relates to the feeding of the phase (in the main clause). Therefore, the pressure range of from 68.94 kPa to 34.47 MPa can only refer to the pressure of the first aqueous phase moving through the blending tube. Exactly the same conclusion was also reached by

the opposition division in the contested decision (see page 7, first paragraph).

This result is in conformity with the description, paragraph [0006], of the granted patent.

- 2.1.5 It follows from the above, and from the undisputed fact that the moving pressure and feeding pressures are necessarily different, that claim 1 as granted lacks a basis in the application documents as originally filed, which only disclose the following pressure features:

"the first phase is pumped into the blending tube at a pressure ranging from 68.94 kPa to 34.47 MPa" (claim 6)

and

"first and second phases are pumped at relatively high pressures which may range from about 10 to about 5,000 psi" (equal to 68.94 kPa to 34.47 MPa) (description, page 9, lines 15 to 19).

Consequently, claim 1 of the patent as granted extends beyond the content of the application documents as originally filed, contrary to the requirements of Article 123(2) EPC.

The main request is therefore rejected (see point 1.1.4) for this reason, too.

2.2 *First auxiliary request*

- 2.2.1 Claim feature (iii) of claim 1 as amended reads:

"(iii) feeding the first aqueous phase into a blending tube which forms part of a homogenizer, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute, **wherein the first phase is pumped into the blending tube under a pressure ranging from 68.94 kPa to 34.47 mPa [sic] (10 to 5,000 psi)**".

- 2.2.2 Due to the insertion of the **highlighted** phrase after the comma, as a subordinate clause, the stated pressure range does not refer to the pressure of the moving phase, but to the feeding or pumping pressure. By consequence, the pressure of the moving phase is left entirely undefined.

This amendment extends the protection conferred by the claim and is in violation of Article 123(3) EPC, because granted claim 1 required the pressure of the moving phase to be in the range of 68.94 kPa to 34.47 MPa (10 to 5,000 psi).

2.3 *Third auxiliary request*

Essentially the same objection as outlined under point 2.2 arises against claim 1 in accordance with the third auxiliary request. The same conclusion of violation of Article 123(3) EPC is therefore reached.

2.4 *Second, fourth, fifth and sixth auxiliary requests*

- 2.4.1 Sub-paragraph (iii) of claim 1 in accordance with the second auxiliary request reads:

*"(iii) feeding the first aqueous phase into a blending tube which forms part of a homogeniser, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per **minute, under** a pressure ranging from 68.94 kPa to 34.47 **mPa** [sic](10 to 5,000 psi)"*

Sub-paragraphs (iii) of claim 1 in accordance with the fourth, fifth and sixth auxiliary requests read:

*"(iii) feeding the first aqueous phase into a blending tube which forms part of a homogeniser, the first aqueous phase moving through the blending tube at a rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per **minute, under** a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi)"*

- 2.4.2 The proposed amendments render the claim passages ambiguous, because it is not clear whether the pressure ranging from 68.94 kPa to 34.47 MPa relates to the feeding of the first aqueous phase or to the moving of the first aqueous phase.

The claims are therefore not allowable (Article 84 EPC).

2.5 *Seventh auxiliary request*

- 2.5.1 Sub-paragraph (iii) of claim 1 in accordance with the seventh auxiliary request reads:

"(iii) feeding the first aqueous phase into a blending tube which forms part of a homogeniser, the first aqueous phase moving through the blending tube at a

rate from 2.27 to 2,270 kg (5 to 5,000 lbs.) per minute, wherein the first phase is pumped into the blending tube under a pressure ranging from 68.94 kPa to 34.47 MPa (10 to 5,000 psi)"

- 2.5.2 The proposed amendment has the effect of defining the pressure of the first phase while being pumped into the blending tube as ranging from 68.94 kPa to 34.47 MPa; however, it leaves the pressure of the moving phase undefined.

Because granted claim 1 required the pressure of the moving phase to be in the range of 68.94 kPa to 34.47 MPa (10 to 5,000 psi), the proposed amendment extends the protection conferred by the claim and is in violation of Article 123(3) EPC.

The seventh auxiliary request is therefore not allowable.

3. As there is no allowable request on file, there is no version in which the opposed patent could be maintained and the patentees' appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

C. Vodz

G. Rath