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Datasheet for the decision of 9 January 2018

Case Number: T 1960/14 - 3.3.09

Application Number: 08766780.4

Publication Number: 2157865

IPC: A21D13/08, A23G3/40

Language of the proceedings: EN

Title of invention:
BISCUITS AND CRACKERS CONTAINING REDUCED LEVELS OF SATURATED FAT AND METHOD FOR THE MANUFACTURE THEREOF

Patent Proprietor:
Sime Darby Malaysia Berhad

Opponent:
Loders Croklaan BV

Headword:

Relevant legal provisions:
EPC Art. 100(b)

Keyword:
Main request (claims as granted) - sufficiency (yes)

Decisions cited:
T 0378/11, T 0593/09, T 0482/09, T 0815/07, T 0608/07, T 0583/05, T 0575/05, T 0619/00, T 0256/87

Catchword:

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Case Number: T 1960/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 9 January 2018

Appellant: (Patent Proprietor)	Sime Darby Malaysia Berhad 19th Floor, Wisma Sime Darby Jalan Raja Laut Kuala Lumpur, 50350 (MY)
Representative:	Nederlandsch Octrooibureau P.O. Box 29720 2502 LS The Hague (NL)
Respondent: (Opponent)	Loders Croklaan BV Hogeweg 1 1521 AZ Wormerveer (NL)
Representative:	Potter Clarkson LLP The Belgrave Centre Talbot Street Nottingham NG1 5GG (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 15 July 2014 revoking European patent No. 2157865 pursuant to Article 101(3)(b) EPC**

Composition of the Board:

Chairman W. Sieber
Members: N. Perakis
D. Prietzel-Funk

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor against the decision of the opposition division revoking European patent No. 2 157 865.

II. Independent claims 1, 10 and 13 as granted read as follows:

"1. A method of preparing biscuits or crackers, said method comprising(i) preparing a dough by combining flour, water, leavening agent, a fat blend and optionally further bakery ingredients; and (ii) baking the dough; wherein the fat blend contains at least 30 wt.% of polyunsaturated fatty acids and comprises:

- 50-85 wt.% of a highly unsaturated oil selected from the group consisting of sunflower oil, soybean oil, rapeseed oil, cottonseed oil, safflower oil, marine oil, corn oil, olive oil, linseed oil and combinations thereof; and

- 15-50 w.% of a palm oil fraction having a melting point within the range of 27-38 °C;

and wherein said fat blend is further characterised by a solid fat content at 25°C of less than 10 wt.%."

"10. Biscuit dough or cracker dough containing 15-50% of fat by weight of flour, 10-20% water by weight of flour and baking soda, said fat containing at least 30 wt.% of polyunsaturated fatty acids and comprising:

- 50-85 wt.% of a highly unsaturated oil selected from the group consisting of sunflower oil, soybean oil, rapeseed oil, cottonseed oil, safflower oil,

marine oil, corn oil, olive oil, linseed oil and combinations thereof; and

- 15-50 w.% of a palm oil fraction having a melting point within the range of 27-38 °C;

wherein said fat is further characterised by a solid fat content at 25°C of less than 10 wt.%."

"13. Biscuit or cracker containing 15-50% of fat by weight of flour, said fat containing at least 30 wt.% of polyunsaturated fatty acids and comprising:

- 50-85 wt.% of a highly unsaturated oil selected from the group consisting of sunflower oil, soybean oil, rapeseed oil, cottonseed oil, safflower oil, marine oil, corn oil, olive oil, linseed oil and combinations thereof; and

- 15-50 w.% of a palm oil fraction having a melting point within the range of 27-38 °C;

and wherein said fat blend is further characterised by a solid fat content at 25°C of less than 10 wt.%."

III. In its notice of opposition the opponent requested that the patent be revoked in its entirety on the grounds of Article 100(a) (lack of novelty and lack of inventive step) and (b) EPC. The documents submitted during the opposition proceedings included:

D1: W.G. Mertens, "Fat Melting Point Determinations: a Review", *JAOCS*, 1973, pp. 115-119;

D2: EP 0 206 850 A2;

D3: US 4 388 339 A;

D11: Introduction to Fats and Oils Technology, edited by Peter J. Wan, American Oil Chemists' Society, 1991, pp. 32-33; and

D12: K. Sato *et al.*, "Polymorphism of POP and SOS. I. Occurrence and Polymorphic Transformation", *JAOCS*, 1989(66), pp. 664-674.

IV. The opposition division held that the invention underlying the subject-matter of claims 1, 10 and 13 as granted was not sufficiently disclosed since the skilled person was not able to rework a crucial feature, namely the melting point of the palm oil fraction, with the certainty required in order to estimate whether or not he was working inside the claimed invention. Since the same objection applied to the four auxiliary requests, the opposition division revoked the patent.

V. On 15 September 2014 the patent proprietor (in the following the appellant) filed a notice of appeal against the opposition division's decision. The statement setting out the grounds of appeal was filed on 25 November 2014 accompanied by auxiliary requests 1 to 4 and the following new documents:

D17: WO 2009/012982 A2;

D18: US 2006/0088652 A1;

D19: EP 1 006 806 B1;

D20: EP 0 702 899 A1;

D21: WO 95/24831 A1;

D22: EN ISO 6321 "Animal and vegetable fats and oils - Determination of melting point in open capillary tubes (slip point) (ISO 6321:2001)", December 2001; and

D23: Codex Standard for Named Vegetable Oils CODEX-STAN 210 (amended 2003, 2005), 1-13.

The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or alternatively in amended form according to one of auxiliary requests 1 to 4.

VI. With letter of 1 April 2015, the opponent (in the following the respondent) filed its observations on the appeal, as well as the following document:

D24: Malaysian Palm Oil Board, "About Palm Oil", http://www.palmoilworld.org/about_palmoil.html

VII. With letter of 2 September 2015, the appellant replied to the respondent's observations.

VIII. On 29 September 2017, the board issued a communication under Article 15(1) RPBA in preparation for the scheduled oral proceedings, indicating that it intended to remit the case to the opposition division for further prosecution if it found that any of the requests satisfied the requirements of sufficiency of disclosure.

IX. With letter of 8 November 2017, the appellant commented on the board's communication. It also requested that the board remit the case to the opposition division if

it found that any of the requests satisfied the requirements of sufficiency of disclosure.

X. On 9 January 2018 oral proceedings took place before the board.

XI. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:

- The invention underlying claims 1, 10 and 13 as granted fulfilled the requirements of sufficiency of disclosure. The absence in the patent in suit of a specification of a measurement method for determining the melting point, a common parameter for which standard methods were known, did not inherently mean that the palm oil fraction was so ill-defined that the skilled person, on the basis of the disclosure of the patent as a whole and using common general knowledge, was not able to solve the problem underlying the patent. Although D1 showed that various methods provided different results, D1 was irrelevant because it was an old document - published in 1973 - and did not concern palm oil or palm oil fractions.

- Methods for measuring the melting point of fats belonged to the common general knowledge of the skilled person as apparent from D17-D21. These documents were patent applications and a patent of the respondent which contained patent claims that referred to the melting point of a fat or fat blend, but the claims or the description did not provide any information as to how the melting point should be determined.

- As ISO standard methods were disclosed in the patent specification for determining other parameters regarding the palm oil fraction (paragraphs [0011] and [0013]), it was reasonable to assume that the skilled person would also use a standard ISO method to determine its melting point.

- Contrary to the respondent's assertion, the skilled person would not have considered the method of D2 which was mentioned in paragraph [0005] of the patent in suit, namely AOCS Method Cc 2-38, since this was an old method which had been used 30 years before the priority date of the patent in suit.

- Standard ISO methods for measuring vegetable oils and fats were disclosed by D22. They were ISO 6321 Method A and ISO 6321 Method B (page 1, point 1, "Scope"). The appellant had used method A. This could be determined by the skilled person reproducing example 1 of the patent in suit. Certainly the application of either Method A or Method B depended on the polymorphism of the fat/ oil, but the skilled person knew the problems related to polymorphism of palm oil fractions and would have pretreated them.

- D23 (page 4, section 8.2) also disclosed standard methods for determining the melting point of palm oil fractions at the priority date of the patent in suit. They were ISO 6321:2002 and AOCS Cc 3-25(97). These methods must have been equivalent in view of section 3.3 of D23, in which melting points of palm oil fractions were disclosed without specifying which method had been used.

- D22 also showed that the melting points were similar irrespective of the method used. Thus, table B.2 compared method AOCS Cc 3-25 with ISO 6321 Method A and ISO 6321 Method B, and while AOCS Cc 3-25 and ISO 6321 Method B gave almost identical melting point values for palm oil RBD, those of AOCS Cc 3-25 and ISO 6321 Method A showed a marginal difference. According to the respondent's submissions, the mean values varied by only 1.9°C for palm oil RBD.

- It should be borne in mind that the results of table B.2 of D22 arose from inter-laboratory tests carried out in 1982 and 1986 on palm oil samples using ISO 6321 and AOCS methods which were not the same as the standard ISO and AOCS methods used at the priority date of the patent. Thus these results should only be considered at face value.

- The shown similarity of the three available standard methods would enable the skilled person to carry out the claimed invention without undue burden. If an uncertainty/ambiguity of the melting point had resulted from the standard method used, this would have been limited at the edges of the claimed range of 27-38°C. According to the case law of the boards of appeal of the EPO, it was not enough to show that an uncertainty/ambiguity existed in order to deny sufficiency of disclosure. The respondent had to show that such an uncertainty/ambiguity deprived the skilled person of the merits of the invention (T 608/07, Reasons 2.5.1 and 2.5.2, and T 593/09, Reasons 4). Therefore, an alleged uncertainty/ambiguity in the present case did not lead to insufficiency of disclosure.

- The present case was different from that of T 575/05 because only three standard methods were suitable at the priority date of the patent in suit for determining the melting point of palm oil and palm oil fractions, and these three methods were clearly defined and provided reproducible and comparable results.

- It was irrelevant for the issue of sufficiency of disclosure whether the skilled person knew if he was working within or outside the forbidden area of the claims. In fact, this was not a requirement for sufficiency of disclosure under Articles 83/100(b) EPC but a requirement for clarity of the claims under Article 84 EPC, the latter not being a ground for opposition (T 619/00, Reasons 5.3; T 482/09, Reasons 2.1; T 593/09, Reasons 4; T 378/11, Reasons 5.5).

XII. The relevant arguments put forward by the respondent in its written submissions and during the oral proceedings may be summarised as follows:

- The inventions underlying claims 1, 10 and 13 as granted did not fulfil the sufficiency requirements. Neither the claims nor the patent specification disclosed how the melting point of the palm oil fraction was to be determined, with the consequence that the skilled person was unable to reliably identify whether a given palm oil fraction was inside or outside the required melting point of 27 to 38°C. According to the case law of the boards of appeal (see T 256/87, T 583/05 and T 815/07) a patent failed to fulfil the requirements of sufficiency of disclosure if a

parameter in a claim could not be reliably determined so as to allow a skilled person to know whether he is operating inside the scope of the claim.

- The melting point of the palm oil fraction was an essential feature of the claimed invention since it was one of the features that differentiated the claimed process from that of D3 (see the grounds of appeal, page 10, fifth paragraph). Thus, the disclosure of its measuring method was necessary in order to enable the skilled person to reproduce the invention.

- It was admitted that D17-D21 did not disclose a method for measuring the melting point of fats/ oils. This, however, did not mean that it belonged to the skilled person's common general knowledge. In those documents the melting point was disclosed only in the dependent claims, i.e. it was not an essential feature of the inventions disclosed therein.

- Contrary to the appellant's assertions, the skilled person would not have assumed that an ISO method should also be applied for determining the melting point. Besides the methods disclosed in paragraphs [0011] and [0013] of the patent in suit, there was a further method disclosed in paragraph [0014] which was not an ISO method. In fact, the skilled person looking for guidance in the patent regarding the measurement of the melting point of palm oil fractions would have consulted D2 (see paragraph [0005]) and there would have found a suitable method for this purpose, namely the AOCS Method Cc

2-38, which also was not an ISO method (D2: page 8, lines 18-19).

- The skilled person would also not have derived the required method from his common general knowledge. In view of D1 the melting point of a fat containing a mixture of different triglycerides was not a well-defined single temperature, since it depended on the polymorphism of the triglycerides, the sample pretreatment and the method used (page 115, right column, lines 7-21 and 30-32). Thus the skilled person knew that several different methods had been developed for determining the melting point of a fat, whose results differed substantially and not marginally (page 116, right column, lines 7-11, tables II and III). Hence the appellant's assertion that the known methods gave comparable results was wrong.

- D23 (page 4, section 8.2) disclosed methods available for measuring the melting point of palm oil, and D22 disclosed the variation in the results obtained by some of the available methods. The comparison in Table B.2 of ISO 6321 Method A (the method the appellant admitted to have used) with either AOCS CC 3-25 or ISO 6321 Method B for palm oil RBD showed that there was a variation of 1.9°C between the mean values for RBD palm oil and a variation of 2.5°C between the values for the specific sample 3. In conclusion, the difference between the methods was not marginal but substantial.

- The appellant had argued that the method used in the patent was ISO 6321 Method A. This was contrary to the normal understanding of D22 by the skilled

reader, who would have used ISO 6321 Method B and not ISO 6321 Method A, because (i) ISO 6321 Method A was disclosed as giving different and less satisfactory results than ISO 6321 Method B when applied to fats with pronounced polymorphism, and (ii) Method B was disclosed in Table B.1 specifically for palm oil (D22: page 1, section 1. Scope, page 8, table B.1).

- The polymorphism of fats and its impact on their properties was known to the skilled person (D11: page 32, lines 5-8). Pronounced polymorphism of POP and thus of palm oil fractions was known from D12 (page 668, table 2). POP was the major triglyceride of the palm mid fraction according to D24 (page 4, section "palm mid fraction"), the palm mid fraction being the preferred palm oil fraction of the patent in suit (paragraph [0023]).

- D1 also disclosed that the pretreatment of a fat prior to its melting point determination could significantly affect the value measured (page 115, right column, lines 30-33). However, neither the method of determining the melting point nor the pretreatment of the fat had been disclosed in the patent, and the skilled person was unable to reliably identify whether the melting point of a given palm oil fraction lay inside or outside the claimed range of 27-38°C.

- Nor could the skilled person infer from the experimental part of the patent in suit that ISO 6321 Method A had been used to determine the melting point of the unspecified palm oil, which according to example 1 was 38°C. The disclosed palm oil could not be considered a generic one, since

the skilled person was aware that the composition of a palm oil and thus its melting point were not constant but varied depending on the country of production and the growing season. D24 disclosed in Table 2 that the palmitic acid content and the stearic acid content in the fatty acid content of palm oils typically varied from 39.2 to 45.8% and 3.7 to 5.4%, respectively, and that the melting point of palm oils varied from 33.8 to 39.2°C. Neither example 2 nor 3 provided the required information, because they both concerned mixtures with an unidentified sunflower oil and involved more than one palm oil fraction, making it even more difficult for the skilled person to derive any information therefrom regarding the measuring method that had been used.

- The present case, where the skilled person could equally use any of the standard methods AOCS CC 2-38 and ISO 6321, was similar to that of T 575/05, where standards were available but the patent did not provide guidance as to which one should be chosen.

XIII. The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted, or alternatively maintained on the basis of any of the sets of claims submitted as auxiliary requests 1 to 4 with the statement setting out the grounds of appeal, or that the case be remitted to the opposition division if the board arrived at the conclusion that the claims as granted or one of the auxiliary requests complied with the requirements of Article 83 EPC.

XIV. The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. This decision deals exclusively with the ground for opposition under Article 100(b) EPC, which was the only ground for opposition assessed by the opposition division in the decision under appeal.

2. One aspect of the invention as defined in the patent in suit relates to a special fat blend for use in biscuits and crackers that contains reduced levels of saturated fatty acids and a considerable amount of polyunsaturated fatty acids. Among the requirements of the fat blend is that it contains a palm oil fraction having a melting point within the range of 27-38°C. Other aspects of the invention relate to a method for the manufacture of such biscuits and crackers and to a biscuit dough or a cracker dough (paragraphs [0001], [0006], [0008] and [0030]). The three aspects of the invention are the subject of independent claims 1, 10 and 13 as granted.

   The palm fraction having a melting point within the range of 27-38°C is a crucial feature of the composition of the fat blend. In this context, the appellant pointed out that the respondent had failed to demonstrate that the fat blend disclosed in D3 met the requirements of claim 1 as granted, notably that the palm mid fraction had a melting point of not more than 38°C (see grounds of appeal: page 10, fifth paragraph).

3. During the opposition proceedings the respondent/ opponent contested the sufficiency of disclosure of the inventions underlying claims 1, 10 and 13 as granted. It argued that the sufficiency requirement would have been met only if the skilled person had been able to

determine without undue burden which palm oil fraction had a melting point between 27-38°C on the basis of the disclosure in the patent and his common general knowledge. However, this was not possible because the skilled person would not know which of the many available methods, each giving a different result, should be used to determine the melting point. Thus the skilled person using the same palm oil fraction might arbitrarily operate inside or outside the claimed invention, since the melting point measurement depended on the method which was used for its determination (see notice of opposition, points 4.7 and 4.15).

4. In the decision under appeal the opposition division confirmed the view of the respondent/opponent and held that the inventions underlying independent claims 1, 10 and 13 as granted lacked sufficiency of disclosure because in the absence of the disclosure of a measurement method they could not be reworked by the skilled person with the certainty required to estimate whether or not he was working inside the defined range (see decision under appeal, point 2.2.3 of the reasons).

5. Accordingly, the board analysed the content of the patent in order to establish whether the skilled person taking into account the information provided by the patent and his common general knowledge was able to put the claimed inventions into practice, namely to determine a palm oil fraction with a melting point within the range of 27-38°C.

5.1 The patent in suit

5.1.1 The board acknowledges that the patent in suit does not contain any explicit information concerning the method

for determining the melting point of a palm oil fraction within the range of 27-38°C. It thus lacks explicit guidance on how to determine a suitable palm oil fraction.

5.1.2 The appellant argued that this information was obviously derivable from the general disclosure of the patent in suit because the skilled person would logically assume that the melting point should be determined by means of a commonly used ISO method. The appellant referred to paragraphs [0011] and [0013] of the patent, which disclose that ISO standard methods were used for determining the solid fat content of a fat (ISO 8292), the fatty acid concentration in the fat (ISO 5509) and the analysis of methyl esters of fatty acids (ISO 5508).

The board, however, does not agree. The patent does not contain any statement that ISO methods should be used exclusively. On the contrary, paragraph [0014] discloses a method for determining the triglyceride composition of fats which, as the respondent explained at the oral proceedings, is not an ISO method. Also, prior-art document D2, cited in paragraph [0005] of the patent, discloses that the melting point of palm oil had been measured using AOCS Method Cc 2-38 (page 8, lines 18-19). Furthermore, the appellant itself provided evidence that not only ISO methods were available at the priority date of the patent in suit for the measurement of the melting point of vegetable oils. Thus D23 (page 4, point 8.2) discloses:

"8.2 Determination of slip point
According to ISO 6321: 2002 for all oils;
AOCS Cc 3b-92 (02) for all oils except for pal oils;
AOCS Cc 3-25 (97) for palm oils only".

[The definition of slip point is provided by D22 (page 1, point 3.1), i.e. the melting point (in open capillary tubes).]

5.1.3 Nor is there any information that could be deduced from the experimental part of the patent in suit. The board acknowledges that the tables of paragraphs [0043] and [0044] provide information about the palm oil (product B) and the 70/30 blend of sunflower oil and a palm fraction (product C) used in example 1, in particular a melting point for the palm oil (38°C) and the 70/30 blend (22°C).

However, it is not possible to use these figures as reference points to deduce which method of measurement was used in the patent in suit.

Thus, the palm oil is not a constant but varies depending, for example, on the country of production and the growing season. Reference is made to D24 (page 2, table 2), which shows the variation in fatty acid content of palm oil, with the palmitic acid content typically varying from 39.2 to 45.8% and the stearic acid content varying from 3.7 to 5.4%. Therefore, the melting point of 38°C in example 1 for palm oil of an unspecified type cannot lead the skilled person to any conclusion as to which melting point method should be used.

Regarding the 70/30 blend of sunflower oil and a palm fraction, the melting point that is quoted provides the skilled person with no information about the melting point of the palm oil fraction, particularly since the precise identity of the sunflower oil is not specified. When both the type of sunflower oil and the type of

palm fraction are unknown variables, there are multiple combinations that could possibly lead to a particular melting point.

To conclude, the examples of the patent in suit do not provide the skilled person with the information necessary to determine which method was used in the patent in suit.

5.2 The common general knowledge

5.2.1 The board agrees with the appellant that at the priority date of the patent in suit the skilled person was aware of suitable standard methods for measuring the melting point of fats and oils. It appears even from D17 to D21 that it was common practice to refer to melting points of palm oil fractions without specifying the measurement method.

5.2.2 Information about these standard methods can be found in D22 and D23. D22, a European standard from December 2001, and D23, a Codex Standard from 2005, appear to belong to the common general knowledge of the skilled person.

D23 discloses two standard methods which were available to the skilled person at the priority date of the patent in suit for the determination of the slip point (i.e. the melting point in open capillary tubes) of palm oils and palm oil fractions (page 4, point 8.2).

These are:

(i) ISO 6321:2002, which is applicable to all oils, and thus also to palm oils and palm oil fractions, and

(ii) AOCS Cc 3-25 (97), which is applicable to palm oils only and obviously to palm oil fractions.

D22 relates to ISO 6321 and discloses on page 1 that:

"This international Standard specifies two methods for the determination of the melting point in open capillary tubes, commonly known as the slip point, of animal and vegetable fats and oils (referred to as fats hereinafter.

- *Method A is only applicable to animal and vegetable fats which are solid at ambient temperature and which do not exhibit pronounced polymorphism.*

- *Method B is applicable to all animal and vegetable fats which are solid at ambient temperature, and is the method to be used for fats whose polymorphic behaviour is unknown.*

  ...

Note 1 If applied to fats with pronounced polymorphism, method A will give different and less satisfactory results than method B.

Note 2 Fats which exhibit pronounced polymorphism are principally cocoa butter and fats containing appreciable quantities of 2-unsaturated, 1,2-saturated triacylglycerols."

Thus D22 discloses two ISO 6321 methods, ISO 6321 Method A and ISO 6321 Method B, the applicability of which depends on the polymorphic behaviour of the triglycerides of the fat to be examined. It is known in the art that the polymorphism of fats greatly affects

their properties (see D11: page 32, lines 3-8), and also that palm oil fractions are polymorphic. Reference is made to D12, which discloses that POP - which according to D24 (page 4, under "Palm mid fraction") is a major triglyceride of palm mid fraction, i.e. the preferred palm oil fraction of the claimed invention (see paragraph [0023]) - has seven polymorphs (page 665, right column, lines 12-13; page 668, left column, table 2). On the basis of the above, the skilled person would normally use ISO 6321 Method B to measure the melting point of a palm oil fraction and consequently determine its suitability for reproducing the fat blend of the claimed invention.

Nevertheless, both in writing (grounds of appeal, page 7, penultimate paragraph) and during the oral proceedings the appellant submitted that Method A was used in the experimental part of the patent in suit.

To conclude, at the priority date of the patent in suit the skilled person was aware of three methods, namely AOCS Cc 3-25 (97), ISO 6321 Method A and ISO 6321 Method B, which he could apply for determining whether the melting point of a palm oil fraction lay within the range of 27-38°C and for evaluating whether this palm oil fraction was suitable for the fat blend of the claimed invention.

5.2.3 The respondent argued that besides these methods the skilled person would also take into account the method used in D2, which is cited in paragraph [0005] of the patent in suit, namely AOCS Cc 2-38 (see D2: page 8, lines 18-19). The board does not agree. As pointed out by the appellant, AOCS Cc 2-38 would not have been considered as a standard method at the priority date of the patent in suit because (i) it was an old standard

method applicable at the priority date of D2 (thirty years before the patent), and (ii) old standard methods are typically amended or become obsolete (see D22: page 8, footnote 1; and D23: title).

5.2.4 The question which remains to be answered is whether the uncertainty over which of the above-mentioned standard methods is to be used for measuring the melting point amounts to insufficiency of disclosure.

The respondent has asserted that these methods provide significantly different results, but has not submitted any experimental evidence in support of its assertions.

The board therefore relies on the results of the inter-laboratory tests disclosed in Annex B of D22 (table B.2), showing a comparison of these methods for determining the melting point using various palm oil samples. The board acknowledges that this comparison does not include a palm oil fraction as required in the claims. In fact the only palm oil fraction in this table is a palm stearin fraction with a melting point, depending on the method used, varying between 44.8 and 53.4°C. This is, however, much higher than the melting point of the palm oil fraction of the claimed invention. On the other hand, palm oil RBD (Refined, Bleached & Deodorised) has a melting point which is rather close to that of the palm oil fraction of the claimed invention.

For this sample, five different laboratories obtained almost identical melting points when using AOCS Cc 3-25 and ISO 6321 Method B. The mean value from the five laboratories for both methods is 35.9°C. For ISO 6321 Method A the mean value is slightly higher at 37.8°C.

However, this cannot be considered to be a significant variation from the other two methods as asserted by the respondent.

In this context, the board agrees with the appellant that all three methods with reasonable certainty provide very similar results for the melting point of palm oil fractions. In any case, there appears to be uncertainty only at the edges of the claimed range.

The board endorses the finding in T 608/07 (Reasons 2.5.2) that for an insufficiency arising out of ambiguity it is not enough to show that an ambiguity exists, in this case at the edges of the claimed melting point range due to the lack of any indication of the measuring method. It will normally be necessary to show that this ambiguity deprives the skilled person of the promise of the invention. In the present case, the respondent has not submitted any technical evidence in that direction.

5.2.5 The respondent argued that it had not submitted any technical evidence because the evidence of D1 itself (page 116, lines 4-11) was sufficient. The board does not agree. As pointed out by the appellant, D1 is a very old document (published in 1972) which does not concern the standard methods suitable for determining the melting point at the priority date of the patent in suit, but relates to outdated standard methods used for determining the melting point of natural fats in general, not of palm oil fractions. Thus this argument of the respondent must fail.

5.2.6 The respondent also referred to T 575/05 and argued that in a similar situation a board had decided that although standards were available, the patent did not

provide sufficient guidance as to which one should be used and had held that the invention was insufficiently disclosed. However, unlike in T 575/05, where many commonly used but not clearly defined methods of determining a parameter were available and thus led to a high degree of uncertainty for the skilled person trying to carry out the invention, at the priority date of the patent in suit there were only three clearly defined standard methods of determining the melting point of palm oil fractions, which produced very similar results with a fairly minor degree of ambiguity/uncertainty only at the edges of the claimed range.

5.3 To conclude, the skilled person on the basis of his common general knowledge is able without undue burden to identify the parameter, i.e. the melting point of a palm oil fraction, necessary to solve the problem underlying the patent at issue, namely the provision of a suitable fat blend. Thus the claimed invention is sufficiently disclosed.

5.4 The board does not agree with the reasoning of the opposition division and the respondent that the claimed invention was insufficiently disclosed because the skilled person would not know whether he was working within or outside of the scope of the claim. As pointed out in T 593/09 (Headnote and Reasons 4.1.4) - followed by T 482/09 (Reasons 2.1), T 593/09 (Reasons 4) and T 378/11 (Reasons 5.5) - this, by itself, is not a reason to deny sufficiency of disclosure as required by Articles 83 and 100(b) EPC. Hence, the board does not follow the decisions cited by the respondent, namely T 256/87 (Reasons 17), T 583/05 (Reasons 3.6) and T 815/07 (Reasons 6).

6. The opposition division's decision dealt exclusively with the issue of sufficiency of disclosure. Since, however, further outstanding issues raised in the notice of opposition have not yet been dealt with, the case is remitted to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution on the basis of the claims as granted.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated