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**Datasheet for the decision
of 28 January 2022**

Case Number: T 2635/18 - 3.3.03

Application Number: 12726921.5

Publication Number: 2705390

IPC: G02B1/04

Language of the proceedings: EN

Title of invention:

MEDICAL DEVICES HAVING HOMOGENEOUS CHARGE DENSITY AND METHODS
FOR MAKING SAME

Patent Proprietor:

Johnson & Johnson Vision Care, Inc.

Opponent:

Novartis AG

Relevant legal provisions:

EPC Art. 84, 123(2), 54, 56

Keyword:

Novelty - main request (no)

Amendments - added subject-matter (no)

Claims - clarity - auxiliary request (yes)

Inventive step - auxiliary request - non-obvious alternative

Decisions cited:

T 1023/02



Beschwerdekammern

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Case Number: T 2635/18 - 3.3.03

D E C I S I O N
of Technical Board of Appeal 3.3.03
of 28 January 2022

Appellant: Johnson & Johnson Vision Care, Inc.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 August 2018 concerning maintenance of the
European Patent No. 2705390 in amended form.**

Composition of the Board:

Chairman D. Semino
Members: M. Barrère
K. Kerber-Zubrzycka

Summary of Facts and Submissions

I. The appeals of the patent proprietor and of the opponent lie from the interlocutory decision of the opposition division posted on 17 August 2018 concerning maintenance of European Patent number 2 705 390 in amended form on the basis of the claims of auxiliary request 1 filed during oral proceedings on 22 June 2018 and an adapted description. The contested decision was also based on a main request filed during the same oral proceedings.

II. Claim 11 of the main request corresponded to granted claim 14 and read as follows:

"11. A silicone hydrogel formed from a reactive mixture comprising

major polymerisable components comprising at least one reactive silicone-containing component, at least one reactive ionic monomer, optional reactive hydrophilic components and crosslinker; and

minor polymerisable components selected from the group consisting of visibility tint and dyes, UV absorbers, photochromic compounds, pharmaceutical compounds, nutraceutical compounds, and mixtures thereof;

wherein said major polymerisable components comprise a single reactive functionality,

wherein said single reactive functionality is selected from the group consisting of acrylate, methacrylate, acrylamide, and methacrylamide."

Claim 11 of auxiliary request 1 read as follows:

"11. A silicone hydrogel formed from a reactive mixture comprising

major polymerisable components comprising at least one reactive silicone-containing component, at least one reactive ionic monomer, ~~optional~~ reactive hydrophilic components and crosslinker; and

minor polymerisable components selected from the group consisting of visibility tint and dyes, UV absorbers, photochromic compounds, pharmaceutical compounds, nutraceutical compounds, and mixtures thereof;

wherein said major polymerisable components comprise a single reactive functionality,

wherein said single reactive functionality is selected from the group consisting of ~~acrylate, methacrylate,~~ acrylamide, and methacrylamide." (deletions in comparison to granted claim 14 in ~~striketrough~~)

The remaining claims of the main request and auxiliary request 1 are not relevant to the present decision. It is only pointed out that the main request and auxiliary request 1 included claims 1-10 which covered contact lenses.

III. The following document was *inter alia* cited in the contested decision:

HBP5: WO 2010/039653 A1

IV. In that decision the opposition division held, among others, that:

- The main request complied with the requirements of Rule 80 and Articles 83, 84 and 123(2) EPC. However the subject matter of claim 11 of the main request was not novel in view of document HBP5.
- Auxiliary request 1 was admitted into the opposition proceedings. It was held that said request complied with the requirements of Articles 84, 83 and 54 and Rule 80 EPC. The closest prior art for the subject-matter of claim 11 was HBP5. Starting from this document, the problem to be solved was the provision of an alternative silicone hydrogel with improved balance of lysozyme/PQ1 uptake. The solution to that problem was neither disclosed nor hinted at in the cited prior art. Therefore the subject-matter of claim 11 of auxiliary request 1 involved an inventive step.

V. With the statement setting out the grounds of appeal the patent proprietor (appellant 1) filed a main request (corresponding to the main request on which the contested decision was based) and auxiliary requests 1 and 2.

With the rejoinder to the statement of grounds of the opposing party appellant 1 additionally filed auxiliary requests 1.i to 1.iv, 2.i to 2.iv, 3, 3.i to 3.iv, 4, 4.i to 4.iv, 5, 5.i to 5.iv, 6, 6.i to 6.iv, 7, 7.i to 7.iv, 8, 8.i to 8.iv, 9, 9.i to 9.iv, 10, 10.i, 11, 11.i, 12, 12.i, 13 and 14.

Claim 1 of auxiliary request 1.iv only differs from granted claim 14 in that the word "optional" is deleted (see point II. of the present decision).

Claim 1 of auxiliary request 2.iv is identical to claim 11 of auxiliary request 1 dealt with by the opposition division.

Claim 1 of auxiliary request 13 is identical to granted claim 14.

Furthermore in auxiliary requests 1.iv, 2.iv and 13 the claims directed to contact lenses (granted claims 1-13) were deleted.

The remaining requests are not relevant to the present decision.

VI. With its statement setting out the grounds of appeal the opponent (appellant 2) requested that the decision under appeal be set aside and that the patent be revoked.

VII. With letter of 7 December 2021 appellant 1 withdrew

the main request and auxiliary requests 1, 1.i to 1.iii, 2, 2.i to 2.iii, 3, 3.i to 3.iii, 4, 4.i to 4.iii, 5, 5.i to 5.iii, 6, 6.i to 6.iii, 7, 7.i to 7.iii, 8, 8.i to 8.iii, 9, 9.i to 9.iii, 10, 10.i, 11, 11.i, 12, 12.i, and 14

and requested maintenance of the opposed patent on the basis of

auxiliary requests 13 or 1.iv to 9.iv (in the given order of preference).

VIII. Oral proceedings were held before the Board on 28 January 2022 by video conference.

IX. Appellant 1's arguments, insofar as relevant to the decision, may be summarised as follows:

(a) Auxiliary request 13

(i) Novelty over HBP5

Claim 1 of auxiliary request 13 covered a hydrogel formed from a reactive mixture comprising major silicone components wherein said major components had the same reactive functionality (feature "single reactive functionality" of claim 1).

While the preamble of the claim referred to "a reactive mixture comprising ... ", the term "comprising" did not mean that major polymerisable components could be present with reactive functionalities different from the ones of the other major polymerisable components because this would be inconsistent with the requirement for a single reactive functionality. Instead, the term "comprising" meant that other components (e.g. an initiator or a diluent) could be present in the mixture, as long as the other requirements of claim 1 were met. Therefore claim 1 did not include a composition wherein all the major components (i.e. the reactive silicone-containing components, the reactive ionic monomers, the reactive hydrophilic components and the crosslinkers) did not have the same functionality.

This interpretation of the term "comprising" was in line with decision T 1023/02 in which the Board held that

"a claim using "comprising" language should generally not be construed as covering subject-matter which included further steps of a nature that would manifestly counteract the specified technical purpose of the step(s) recited in the claim."

Furthermore, although claim 1 was clear from its wording alone, all inventive examples of the opposed patent were consistent with this interpretation while, in comparative examples 7 and 8, the reactive mixture included major polymerisable components with different reactive functionalities.

With regard to HPB5, this document did not disclose a composition wherein all major polymerisable components had the same reactive functionality as required by present claim 1. For instance the reactive mixture in table 4 of HBP5 comprised N,N-dimethylacrylamide (DMA) which

was a reactive hydrophilic monomer and therefore a major polymerisable component and

had a reactive functionality (acrylamide) different from the reactive functionality of the other major polymerisable components (methacrylate).

Therefore the subject-matter of claim 1 was novel over HBP5.

(b) Auxiliary request 1.iv

(i) Novelty over HBP5

The above arguments equally applied to claim 1 of auxiliary request 1.iv.

(c) Auxiliary request 2.iv

(i) Article 123(2) EPC

Claim 1 of auxiliary request 2.iv was derived from claim 36 as filed wherein :

i) the group "vinyl" was deleted from a list of 3 possible reactive functionalities ("acrylamide, methacrylamide and vinyl") and

ii) the term "optional" was deleted.

Contrary to the view of appellant 2, the choice of a dependent claim (here claim 36) was not a selection. Likewise the deletion of the term "optional" and "vinyl" were not to be considered as selections but as limitation to a preferred embodiment of the invention. Besides the examples of the application as filed were clear pointers to the subject-matter of claim 1 of auxiliary request 2.iv.

Therefore the subject matter of present claim 1 complied with the requirements of Article 123(2) EPC.

(ii) Article 84 EPC

The deletion of "optional" did not lead to a lack of clarity. Moreover, the issues alleged by appellant 2 were present in granted claim 14, and "optional" features were assessed for clarity during examination. Therefore, the deletion of "optional" could not have introduced a lack of clarity into the claim, and this

amendment could not be examined under Article 84 EPC, following G 3/14.

(iii) Inventive step

HBP5 was the closest prior art for the subject-matter of claim 1. Claim 1 differed from this document in that the reactive composition comprised major polymerisable components (including at least one reactive silicone-containing component, at least one reactive ionic monomer, reactive hydrophilic components and a crosslinker) with the same reactive functionality selected from acrylamide and methacrylamide.

Since the major reactive components had the same reactive functionality, it was credible that the structure of the polymer obtained therefrom was that of a random copolymer with an improved distribution of charges along the polymer chain. Furthermore, based on the experimental evidence provided in the opposed patent, it was shown that the distinguishing features of present claim 1 lead to a reduced PQ1 (polyquaternium disinfecting compound) uptake compared to copolymers with an irregular distribution of charges. Therefore the objective problem to be solved was to provide a copolymer with an improved distribution of charges.

As none of the cited documents suggested to use monomers with the same reactive functionalities, the solution to the above problem was not obvious.

Furthermore, should the problem to be solved be formulated as the provision of an alternative reactive composition for the manufacture of contact lenses (second problem), the following was argued:

HBP5 did not suggest to replace all major reactive components by acrylamide or methacrylamide based monomers. In fact HBP5 did not even disclose a (meth)acrylamide-base crosslinker or a contact lens wherein the majority of the reactive components were (meth)acrylamides. The solution to the second problem was therefore also not obvious for a person skilled in the art.

X. Appellant 2's arguments, insofar as relevant to the decision, may be summarised as follows:

(a) Auxiliary request 13

(i) Novelty over HBP5

Table 4 of HBP5 disclosed a reactive composition comprising major reactive components with the same reactive functionality (methacrylate). Although DMA (corresponding to a hydrophilic acrylamide monomer) was also present, this was not excluded by present claim 1 due to the wording "comprising".

Contrary to appellant 1's view, "comprising" should be given its normal meaning in patent claims. Furthermore, the cited decision T 1023/02 did not apply to the present case since it related to a method claim wherein further possible steps would counteract the purpose of the step(s) recited in the claim. However no such contradiction was present in present claim 1.

Therefore the subject-matter of claim 1 of auxiliary request 13 was not novel over HBP5.

(b) Auxiliary request 1.iv

(i) Novelty over HBP5

The above arguments equally applied to claim 1 of auxiliary request 1.iv.

(c) Auxiliary request 2.iv

(i) Article 123(2) EPC

The subject-matter of claim 1 relied on multiple selections. A first selection was the choice of a specific dependent claim (such as claim 36 as filed) in a list of alternative embodiments of the originally filed application. A further selection was the choice of specific reactive functionalities, which were restricted to acrylamide and methacrylamide. These specific functionalities were combined with selected components, in particular reactive hydrophilic components and a crosslinker, which were no longer optional.

The specific combination of features of present claim 1 found therefore no basis in the application as filed, contrary to Article 123(2) EPC. The same conclusion applied to dependent claims 2 and 3.

(ii) Article 84 EPC

Claim 1 of auxiliary request 2.iv corresponded to granted claim 14 in which the word "optional" was deleted. This amendment led to a lack of clarity, since it was unclear:

whether the major polymerisable component comprised at least two hydrophilic components or only one and

whether the hydrophilic components and the crosslinker were necessarily different or not.

(iii) Inventive step

HBP5 was the closest prior art for the subject-matter of claim 1. Claim 1 differed from the disclosure of HBP5 in that the reactive mixture comprised major polymerisable components with the same reactive functionality selected from acrylamide and methacrylamide.

It was neither shown nor made credible that the choice of (meth)acrylamide-based monomers led to an improvement of the charge distribution in the polymer chain or to a reduction of the PQ1 uptake in the contact lenses. The problem to be solved was therefore the provision of an alternative to the silicone hydrogel of HBP5.

HPB5 disclosed that the major polymerisable components could have an acrylamide or methacrylamide functionality. It was therefore an obvious option for a person skilled in the art to replace the reactive functionalities of the major polymerisable components of HBP5 by acrylamide or methacrylamide groups.

Thus, the subject-matter of claim 1 of auxiliary request 2.iv lacked an inventive step over HBP5 alone.

XI. Appellant 1 requested that the decision under appeal be set aside and the patent be maintained on the basis of

one of auxiliary requests 13 or 1.iv to 9.iv filed with the rejoinder to the statement of grounds of appeal.

XII. Appellant 2 requested that the decision under appeal be set aside and that the patent be revoked.

Reasons for the Decision

1. Auxiliary request 13

1.1 Novelty

1.1.1 Interpretation of claim 1

Claim 1 of auxiliary request 13 covers a silicone hydrogel formed from a reactive mixture comprising:

"major polymerisable components" ...

"wherein said major polymerisable components comprise a single reactive functionality, wherein said single reactive functionality is selected from the group consisting of acrylate, methacrylate, acrylamide, and methacrylamide." (emphasis added by the Board)

Appellant 1 considers that the requirement that the major polymerisable components comprise the same reactive functionality (in short: functionality A), limits the scope of claim 1 in the sense that the reactive mixture may not comprise any further component falling under the classes of components listed for the major component having a different functionality B (B≠A).

The Board cannot follow this interpretation of claim 1 for the following reasons:

The narrow interpretation of "comprising" contradicts the meaning of this word in the generally established case law (see Case Law of the Boards of Appeal, 9th edition 2019, II.A.6.2). In the Board's view the use of the word "comprising" leaves no doubt that further components may be present in the reaction mixture as long as major polymerisable components and minor polymerisable components according to claim 1 are present.

Contrary to appellant 1's view the fact that the reactive mixture comprises major polymerisable components with the same reactive group A does not exclude the presence of further (major) polymerisable components with a different reactive group B. The Board cannot recognise any contradiction or incompatibility within claim 1, even if it may have the consequence that a comparative example might fall under the scope of claim 1.

Appellant 1 cited the decision T 1023/02 of 19 May 2006 according to which

"a claim using 'comprising' language should generally not be construed as covering subject-matter which included further steps of a nature that would manifestly counteract the specified technical purpose of the step(s) recited in the claim." (see point 12 of the Reasons)

While this interpretation of the word "comprising" may be valid in a method claim (as it is the case in

T1023/02), present claim 1 is a product claim with no such manifest contradiction.

Consequently, the Board considers that the wording of claim 1 does not *per se* exclude silicone hydrogels formed from a reactive mixture comprising a major reactive component having a different reactive functionality B than the required major reactive components with the reactive functionality A (B≠A).

1.1.2 Document HBP5

In the contested decision (see point 2.6.2), the opposition division came to the conclusion that present claim 1 (corresponding to claim 11 of the main request as dealt with in the decision) was not novel over the silicone hydrogel obtained from the reactive mixture in table 4 of HBP5.

Appellant 1 did not contest that HBP5 disclosed a silicone hydrogel derived from a reactive mixture comprising the required polymerisable components of claim 1 (taken individually), and in particular major polymerisable components having the same methacrylate functionality. It was only argued that the reactive composition of HBP5 further comprised DMA (a hydrophilic monomer with a reactive acrylamide group that is different from the reactive methacrylate groups of the other major components) which would be excluded from the scope of claim 1.

However, as explained above (see point 1.1.1 of the present decision), the Board considers that the use of the word "comprising" in claim 1 implies that the presence of DMA with a reactive functionality different

from the other main polymerisable components is not excluded from the scope of claim 1.

Therefore the Board does not see any reason to deviate from the findings of the opposition division with the consequence that claim 1 of auxiliary request 13 lacks novelty over HBP5.

2. Auxiliary request 1.iv

2.1 Novelty over HBP5

Both parties in appeal had no additional and separate arguments on novelty for claim 1 of auxiliary request 1.iv, thereby accepting that any conclusion reached for claim 1 of auxiliary request 13 equally applied to it. The Board has no reason to come to a different conclusion (see point 1.1.2 of the decision). Therefore claim 1 of auxiliary request 1.iv lacks novelty over HBP5.

3. Auxiliary request 2.iv

3.1 Article 123(2) EPC

3.1.1 According to appellant 2, claim 1 of auxiliary request 2.iv is based on the following selections:

1. selection of a dependent claim (such as claim 36) in the set of claims of the application as filed,

2. selection of specific reactive functionalities, which are now limited to acrylamide and methacrylamide and

3. selection of a reactive mixture comprising reactive hydrophilic components and crosslinker.

Furthermore there would be no direct and unambiguous basis for the combination of present claim 1 in the application as filed. The same would apply to dependent claims 2 and 3.

The Board cannot follow this objection for the following reasons:

Contrary to appellant 2's view, the choice of a specific dependent claim in the original set of claims is not considered to be a selection but an individualised (preferred) embodiment of the application as filed. Thus, no selection is necessary to assess whether original claim 36 may be seen as a basis for the subject-matter of present claim 1.

Original claim 36 further discloses that the reactive functionalities may be selected from the group consisting of "acrylamide, methacrylamide and vinyl". Consequently the choice of "acrylamide and methacrylamide" can be seen as the deletion of "vinyl" in a list of three reactive groups. According to the boards' consistent case law (see Case Law of the Boards of Appeal, 9th edition 2019, II.E.1.6.3), deleting an element from a list of alternative options does not result in singling out a particular element in the list and therefore does not constitute a selection.

Finally the choice of a reactive mixture comprising reactive "hydrophilic components and crosslinker" (through the deletion of the term "optional") corresponds merely to the limitation of present claim 1 to an optional embodiment which was

originally present in original claim 36 with back reference to original claim 34. The Board does not consider that the choice of said optional embodiment can be seen as a selection of an element from a list of multiple options.

Consequently the subject-matter of present claim 1 is not the result of multiple selections and the Board considers that present claim 1 finds a clear and unambiguous basis in original claim 36.

With regard to dependent claims 2 and 3, the Board considers that said claims find a direct and unambiguous basis in original claims 40-42 and on page 12, lines 11-15 of the application as filed.

Therefore claims 1 to 3 of auxiliary request 2.iv fulfil the requirements of Article 123(2) EPC.

3.2 Clarity

According to appellant 2, claim 1 of auxiliary request 2.iv corresponds to granted claim 14 in which among others the word "optional" was deleted (see statement of grounds of appeal, paragraph 5.2). This amendment would lead to a lack of clarity, since it would be unclear

whether the major polymerisable component should comprise at least two hydrophilic components or only one and

whether the hydrophilic components and the crosslinker are necessarily different or not.

The Board cannot identify any lack of clarity resulting from the deletion of the word "optional" in claim 1. In view of the formulation of claim 1, there is no doubt that the use of the plural for the reactive hydrophilic components means that the polymerisable main component should contain at least two reactive hydrophilic components. As to the question whether the crosslinker may be also hydrophilic, the Board does not see any reason that would speak against it.

Therefore, the amendments in present claim 1 do not lead to a lack of clarity.

3.3 Inventive step

3.3.1 Closest prior art

The parties agreed that HBP5 represented the closest prior art for claim 1 of auxiliary request 2.iv.

The Board sees no reason to deviate from that view.

3.3.2 Distinguishing features

It was not disputed between the parties that claim 1 differed from HBP5 in that the reactive mixture comprised major polymerisable components with the same reactive functionality selected from acrylamide and methacrylamide.

The Board agrees with the technical differences identified by the parties.

3.3.3 Objective technical problem

According to appellant 1, it was made credible that the structure of a polymer obtained from monomers having the same reactive functionality was that of a random copolymer with an improved distribution of charges along the polymer chain. Therefore the objective problem to be solved was to provide a copolymer with an improved distribution of charges.

The Board cannot follow this assessment of a technical effect for the following reasons:

It is first pointed out that the examples provided in the opposed patent do not investigate the distribution of charges in the copolymer of the hydrogel. It has also not been shown that any improvement is obtained compared to HBP5 in which a hydrogel is obtained from a reactive mixture wherein the major reactive components are all methacrylates (see HBP5, page 31, table 4 with back reference to pages 25-26).

Nonetheless, the Board considers that the final purpose of the opposed patent should be taken into consideration for the definition of the objective technical problem. It has indeed been shown that the silicone hydrogels according to present claim 1 can be used as contact lenses (see opposed patent, table 3 and paragraph [0144]). The same applies to the silicone hydrogels of HBP5 (see page 2, summary of the invention).

Thus the problem to be solved should be formulated as to provide an alternative silicone hydrogel for use in contact lenses.

3.3.4 Obviousness

It remains to be assessed whether it is obvious for the skilled person wishing to provide an alternative to the silicone hydrogels of HBP5, to select a reactive mixture wherein the major polymerisable components (including a reactive silicone containing component (i), a reactive ionic monomer (ii), reactive hydrophilic components (iii) and a crosslinker (iv)) have all the same reactive functionality selected from acrylamide or methacrylamide.

According to appellant 2, HPB5 discloses that the reactive groups of the monomers used as building block of the hydrogel may be acrylamide or methacrylamide. Consequently, it would be obvious to replace the reactive groups of each of the monomers (i)-(iv) by said groups in order to provide an alternative to the hydrogel of HBP5.

It is not disputed that HBP5 discloses that the reactive functionality of the polymerisable components may be acrylamide or methacrylamide (see HBP5, page 4, penultimate paragraph). However in order to show a lack of inventive step it must be considered whether the skilled person:

would have been able on the basis of the teaching of HBP5 to replace the reactive group in each of the monomers (i)-(iv) and

would have made these modifications with the expectation to obtain a silicone hydrogel for use as a contact lens.

The reactive silicone containing component (i) and the crosslinker (iv) are considered first.

With regard to the silicone monomer (i), the only specific examples of polymerisable groups present in component (i) are (meth)acrylate, vinyl carbonate or vinyl carbamate (see HBP5, page 8, first and last paragraphs). Furthermore in the examples of HBP5, the silicone based monomers are all (meth)acrylates (see HBP5, pages 25-26, bridging paragraph). It is furthermore pointed out that HBP5 does not teach how to obtain a (meth)acrylamide based silicone component (i). Besides appellant 2 has not shown that the preparation of said component (i) would belong to common general knowledge. Already for that reason the Board considers that it would not be obvious for the skilled person to replace the reactive silicone components of HBP5 by a reactive silicone having acrylamide or methacrylamide groups in view of the sole disclosure cited by appellant 2 for lack of inventive step, namely the one of HBP5.

With regard to the crosslinker (iv), the general part of the description of HBP5 only mentions that a crosslinker may be used without further details (see HBP5, page 4, lines 3-5 and page 13, third full paragraph). The only specific examples of crosslinkers in HBP5 are ethyleneglycol dimethacrylate and tetraethyleneglycol dimethacrylate (see HBP5, pages 25-26, bridging paragraph). Thus HBP5 does not disclose any specific (meth)acrylamide based crosslinker (iv) let alone a crosslinker (iv) suitable for contact lenses. It is furthermore pointed out that also in this respect appellant 2 did not rely on any other document for the attack of lack of inventive step than HBP5.

Finally, the Board is not convinced that the skilled person would expect that any modification made within the ambit of HBP5 could lead to a material suitable as contact lenses. In the present case, the concrete examples of contact lenses are derived from reactive mixtures wherein all major reactive monomers are methacrylates (see HBP5, examples). To arrive at the subject-matter of present claim 1, the skilled person would have to replace five methacrylate monomers (comprising a reactive silicone containing component (i), a reactive ionic monomer (ii), at least two reactive hydrophilic components (iii) and a crosslinker (iv)) by corresponding (meth)acrylamides, which represents a complete change in the basic structure of the hydrogel. Thus albeit HBP5 discloses various embodiments such as the possible reactive groups and the possible structures of the silicone polymeric structure (see HBP5, page 4, penultimate paragraph and page 7, formula), the person skilled in the art would have no reason to assume on the basis of the teaching of HBP5 alone that a hydrogel as set out in present claim 1 may still lead to a hydrogel for use as a contact lens.

Consequently, the Board considers that it is not an obvious option for the skilled person wishing to provide an alternative to the hydrogel of HBP5, to select a reactive mixture wherein the major polymerisable components (i)-(iv) have the same reactive functionality selected from acrylamide and methacrylamide in view of HBP5 alone, and in particular to choose a reactive silicone containing component (i) and a crosslinker (iv) as set out in claim 1 as none of these components is hinted at in HBP5.

Therefore the subject-matter of claim 1 involves an inventive step over HBP5 alone.

- 3.4 As all of the objections of appellant 2 against auxiliary request 2.iv fail, the patent is to be maintained on the basis of the said request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of the claims of auxiliary request 2.iv filed with the rejoinder to the statement of grounds of appeal and after any necessary consequential amendment of the description.

The Registrar:

The Chairman:



B. ter Heijden

D. Semino

Decision electronically authenticated