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D E C I S I O N
of 21 February 2002

Case Number: T 0413/99 - 3.3.6

Application Number: 89202297.1

Publication Number: 0360330

IPC: C11D 1/04

Language of the proceedings: EN

Title of invention:
Process for preparing detergent powders having improved dispensing properties

Patentee:
UNILEVER N.V., et al

Opponent:
PROCTER & GAMBLE EUROPEAN TECHNICAL CENTER N.V.

Headword:
Detergent/UNILEVER

Relevant legal provisions:
EPC Art. 123(2), 111(1), 104, 83,84
EPC R. 71a

Keyword:
"Main and first auxiliary request: admissibility of amendments - no"
Second auxiliary request: admissibility of amendments - yes"
"Sufficiency - yes (interpretation of indeterminate parameters)"
"Remittal - yes (essential issues not yet considered)"
"Apportionment of costs - yes"

Decisions cited:

G 0009/91, G 0010/91

Catchword:
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Case Number: T 0413/99 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 21 February 2002

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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 24 February 1999 revoking European patent No. 0 360 330 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Krasa
Members: G. Dischinger-Höppler
C. Rennie-Smith

Summary of Facts and Submissions

I. European patent No. 0 360 330, based on application No. 89 202 297.1 and relating to a process for preparing detergent powders having improved dispensing properties, was granted on the basis of 10 claims.

II. The Respondent (Opponent) filed a notice of opposition requesting revocation of the patent on the grounds of insufficiency of disclosure (Article 100(b) and 83 EPC), and lack of novelty and lack of inventive step (Article 100(a), 54(2), (3) and 56 EPC) in view of several cited documents.

The ground of insufficient disclosure was based on the argument that the devices to be used in accordance with the description of the patent in suit to measure the dynamic flow rate (DFR, feature of Claim 1) and the dispenser residue (feature of Claims 4 and 5) were not adequately defined since, in the first case, the apparatus dimensions (orifice diameter of 225 mm in relation to a tube diameter of 35 mm) were impractical and obviously meaningless and, in the latter case, the machine to which the dispenser drawer for determining the residue was fitted (Hoover Matchbox (Trade Mark) 3263H washing machine) had never existed, with the consequence that neither size nor shape of the required dispenser drawer could be established by a person skilled in the art.

In a communication dated 18 April 1996 and annexed to the summons to a first oral proceedings on 6 November 1996, the Opposition Division, referring to the one month period prescribed by Rule 71a(1) EPC, directed the Appellants (Proprietors) to file in relation to the

DFR measurement the results of tests using particular apparatus dimensions (orifice diameters of 22, 25 and 22.5 mm) and in relation to the dispenser drawer evidence as to how this could be identified.

With a letter of 23 October 1996, i.e. only about two weeks prior to those first oral proceedings on 6 November 1996, the Appellants filed comparative data concerning the orifice diameter and a letter from Hoover concerning its "Matchbox" washing machine range.

The oral proceedings, in the course of which the Opposition Division gave its provisional opinion on sufficiency of disclosure, was terminated with a direction that the proceedings were to be continued in writing to give the Respondent, as it had requested, an opportunity to submit its own test results within four months.

These tests were filed with a letter dated 28 January 1997. Following an auxiliary request made by the Respondent, second oral proceedings took place before the Opposition Division on 11 February 1999.

III. In its decision which was based on amended claims, the Opposition Division, by accepting inter alia the Appellant's argument that the skilled worker would have realized that the figure 225 mm was a mistake and that the correct orifice diameter was 22.5 mm, found that the invention was sufficiently disclosed in accordance with Article 83 EPC. The patent was, however, revoked for the reason that the amendments made to Claim 1 of the then pending main request did not meet the requirements of Article 123(2) EPC. An auxiliary request was not admitted into the proceedings under

Rule 71a EPC. Upon the Respondent's request, the Opposition Division further held that, in accordance with the provisions of Article 104 EPC, the Proprietor should bear the Opponent's costs incurred by having to attend the second oral proceedings.

IV. During the appeal proceedings, the parties filed new evidence and the Appellants refiled the claims of the above mentioned auxiliary request as their main request and filed amended claims as new first and second auxiliary requests, the complete sets of claims being enclosed with their letter dated 21 January 2002.

Claim 1 of the main request reads as follows:

"1. A process for the preparation of a detergent powder, which includes the steps of preparing an intermediate powder, and spraying on to the intermediate powder an intimate mixture of a C_{8-22} fatty acid having an iodine value of less than 20, and a liquid or liquefiable nonionic surfactant, the fatty acid being employed in an amount of 0.1 to 1% by weight, based on the final detergent powder, the final detergent powder having a dynamic flow rate (as defined in the description) of at least 90 ml/s."

V. Oral proceedings were held before the Board on 21 February 2002, in the course of which the Appellant further amended the claims of the auxiliary requests.

Claim 1 of the first auxiliary request differs from that of the main request by insertion of the term "composed wholly or predominately of a C_{16-22} saturated fatty acid" between "intimate mixture of C_{8-22} fatty acid" and "having an iodine value".

Claim 1 of the second auxiliary request differs from that of the first auxiliary request in that the term "having an iodine value of less than 20," has been omitted.

During these proceedings only issues regarding Articles 123, 84, 83 and 104 EPC were discussed.

VI. The arguments submitted by the Appellants can be summarized as follows:

- The amendments made to the claims were supported by the original disclosure and delimited the claimed subject-matter in its scope of protection. The requirements of Article 123(2), (3) EPC were, therefore, met.

- The invention was sufficiently disclosed in the patent in suit (Articles 100(b) and 83 EPC) since it was not only evident to the skilled reader that mistakes were contained in the description but, at the same time, clear what measures had to be taken in order to remedy those mistakes in the sense of finding out what the originally intended meaning had been.

- No ambiguity in the sense of Article 84 EPC was introduced into the claims by the amendments effected. On the contrary, it was now clear that the amount of fatty acid has to be varied within the range of 0.1 to 1% by weight according to circumstances in order to arrive at the desired DFR.

- As regards the apportionment of costs, while the

Appellants acknowledged that the experimental evidence supporting correction of the orifice size to 22.5 mm was filed late, they argued that the principal reason for the second oral proceedings was not the late filing of that evidence but to allow the Respondent to investigate the prior art in the light of the correct orifice diameter. The Respondent was not prevented from testing the DFR of the prior art by not having the correct diameter which was supplied anyway by the Appellants' letter of 20 October 1995 which contained a request to correct "225 mm" to "22.5 mm".

VII. The Respondent argued in essence as follows:

- The amendments made to the claims amounted to a generalization of features originally disclosed in a particular context only and, therefore, broadened the content of the application as filed (Article 123(2) EPC).

- The patent in suit did not meet the requirements of Article 83 EPC, in particular in view of the insufficiency in the methods of measurement used for calculating the DFR and determining the dispenser residue.

- The Opposition Division's order that the Appellants pay the Respondent's costs of the second oral proceedings was correct because the Appellants filed their experimental evidence so late (with their letter of 23 October 1996 and not by 6 October 1996 as would have been appropriate in view of Rule 71a EPC) that the Respondent only

had fourteen days in which to make any investigations using that data. It therefore required an adjournment and the Appellants should pay the additional costs thereby caused.

VIII. The Appellants request that the decision under appeal be set aside and that the case be remitted to the first instance for further prosecution on the basis of either the main request filed with their letter of 21 January 2002 or the first or second auxiliary request filed during oral proceedings.

The Respondent requests that the appeal be dismissed.

Reasons for the Decision

1. *Amendments*

1.1.1 The effect of the amendments made to Claim 1 of the main request is that protection is now sought for a process extending to the use of an intimate mixture of a C_{8-22} fatty acid **having an iodine value of less than 20** to be sprayed onto the intermediate powder and wherein the amount of fatty acid is limited to **0.1 to 1%** by weight, based on the final detergent powder, whereas in the claims as originally filed (and granted) the C_{8-22} fatty acids were independent of a particular iodine value and their amount to be used was not restricted to an upper limit of 1%.

1.1.2 In Claim 1 of the first auxiliary request it is further specified that the **C_{8-22} fatty acid** is **composed wholly or predominantly of a C_{16-22} fatty acid having an iodine**

value of less than 20, and in Claim 1 of the second auxiliary request it is specified that the **C_{8-22} fatty acid** is **composed wholly or predominantly of a C_{16-22} fatty acid**. Claim 1 of both auxiliary requests contains the same limitation of the amount of fatty acid as Claim 1 of the main request.

1.2 Amendments made to a European patent application are only permissible if they do not "contain subject-matter which extends beyond the content of the application as filed" in accordance with Article 123(2) EPC.

1.3.1 Concerning the first amendment, the Appellants submitted that a basis for the iodine value could be found on page 6, last paragraph to page 7, first paragraph of the application as filed.

1.3.2 It is, however, uncontested that the now claimed use of a C_{8-22} fatty acid having an iodine value of less than 20 is not explicitly disclosed in the application as filed. Therefore, it has to be determined whether claiming this particular embodiment can be based on implicit disclosure.

1.3.3 The feature in question relates to the composition of the fatty acids to be used in the claimed process. The following passages in the application as filed concern this crucial point:

- first full paragraph of page 2 where the wording of Claim 1 as granted is set out;

- the paragraph bridging pages 6 and 7 referred to above which reads

"Good results have been obtained if the fatty acid

is wholly or predominantly composed of C_{16-22} saturated fatty acids. Suitable fatty acids are those derived from hardened oils and fats; for example, tallow, palm oil, rapseed oil and marine oils hardened to an iondine value of less than 20 and preferably less than 5.";

- the Examples which all mention fully hardened tallow fatty acid (page 10, lines 10 to 11, page 11, lines 7 to 8 and 28 to 29, and page 12, line 34); and

- said Claim 1 and, dependent thereon, Claim 7 which reads:

"7. A process as claimed in any preceding Claim, wherein the fatty acid is wholly or predominantly composed of C_{16-22} saturated fatty acids."

1.3.4 The parties agreed that iodine value is a well-known means for measuring the average degree of unsaturation of a fatty material and is expressed in terms of grams of iodine adsorbed by 100 g of fat. They further agreed on the resulting implication that for a given iodine value the molecular degree of unsaturation is dependent on the chain-length of the fatty material.

1.3.5 The Appellants contended that a person skilled in the art would understand the said paragraph bridging pages 6 and 7 of the application as filed to indicate that any mixture of fatty acids to be used should have an iodine value of less than 20 in the sense of low average unsaturation.

1.3.6 Whilst considering that it would have been easy to put

such a meaning unambiguously into words if it was intended, the Board does not see how it can be derived from the content of the application as filed:

The paragraph in question consists of two phrases only, the first saying that "Good results have been obtained if the fatty acid is wholly or predominantly composed of C_{16-22} saturated fatty acids". This phrase corresponds to dependent Claim 7 of the application as filed and includes two preferred embodiments within the ambit of original Claim 1, namely that C_{16-22} saturated fatty acids are either the only fatty acids used or the predominant part thereof. Consequently, no degree of unsaturation is present in the first case of those composed "wholly" of C_{16-22} saturated fatty acids and the iodine value must be zero. In the second case of "predominantly" saturated fatty acids, however, a remainder exists which is not C_{16-22} saturated fatty acids but any other saturated or unsaturated fatty acid within the C_{8-22} fatty acid range of original Claim 1.

1.3.7 In the second phrase of the paragraph it is said that "Suitable fatty acids are those derived from hardened oils and fats; for example, tallow, palm oil, rapeseed oil and marine oil hardened to an iodine value of less than 20 and preferably less than 5".

There is no evidence whatsoever for the Appellants' suggestions that the semicolon after "fats" must be replaced by a comma and that another comma must be read into the phrase after the term "marine oils".

The punctuation used in this paragraph is quite clear and indicates that only tallow, palm oil, rapeseed oil and marine oil are hardened to an iodine value of less

than 20 and that these particular embodiments are examples for those fatty acids which are suitable. This is corroborated in the examples given in the application as filed which are all worked with fully hardened tallow fatty acid.

1.3.8 In contrast, there is no indication in the description of the application as filed that any other fatty acid or mixture of fatty acids should have or be hardened to an iodine value of less than 20; and the claims as originally filed are also silent on this issue. Considering further that a particular iodine value would indicate different degrees of molecular unsaturation in long-chain fatty acids and in short-chain fatty acids, the Board holds that any combination of the iodine value of less than 20 with other fatty acids than those explicitly mentioned (page 7, lines 2 to 3) amounts to an unallowable generalization of a physico-chemical property of a particular group of fatty acids to other fatty acids contrary to the requirements of Article 123(2) EPC.

1.3.9 The Board, therefore, concludes that the amendments made to the claims of the main request and first auxiliary request do not meet the requirements of Article 123(2) EPC.

1.4 The iodine value not being a feature of the claims of the second auxiliary request, no problem arises in this respect. However, the second amendment, the upper limitation of the amount of fatty acid, is also present in Claim 1 of this request.

1.4.1 The Appellants referred in this respect to page 6, last full paragraph of the application as filed as a

suitable basis. The Respondent, however, argued that according to this paragraph the upper limit of 1% by weight of fatty acid was necessarily interrelated with powders having a particle size of up to 1 mm and concluded that, therefore, introducing into Claim 1 the upper limit of the amount alone was also unallowable under Article 123(2) EPC.

1.4.2 The relevant passage of the said paragraph on page 6 contains the following statement:

"For powders having an average particle size of 1 mm or less, the amount of fatty acid sprayed on preferably does not exceed 1% by weight based on the final powder. A range of 0.1 to 1% by weight is preferred,....".

The Board agrees with the Respondent insofar as this indicates unmistakeably that for particles of up to 1 mm in size, the **preferred** amount of fatty acid used is within this range of 0.1 to 1% by weight. The Board does not, however, share the Respondent's opinion that higher amounts of fatty acids **must** be used if the particle size is larger. Relevant in this respect is only the last phrase of the paragraph in question (last full paragraph on page 6) according to which higher fatty acid levels **can** be tolerated for powders having an average particle size greater than 1 mm.

1.4.3 The Board, therefore, concludes that the claims of the second auxiliary request meet the requirements of Article 123(2) EPC.

2. *Sufficiency of disclosure*

2.1.1 Claim 1 of the second auxiliary request is directed to

a process for the preparation of a detergent powder including, in addition to several process steps, the feature "the final detergent powder having a dynamic flow rate (as defined in the description) of at least 90 ml/s".

2.1.2 According to the description (page 3, lines 30 to 47) of the patent in suit, this parameter is measured in an apparatus consisting of a cylindrical glass tube, having an internal diameter of 35 mm and a length of 600 mm, which is clamped in such a position that its longitudinal axis is vertical. The lower end of the tube terminates in a cone having an internal angle of 15° and a lower outlet orifice diameter of "225 mm". To determine the dynamic flow rate (DFR) of a sample powder, the tube is filled with the powder while the outlet orifice is closed and, after opening the outlet, the time taken for the powder to fall from a first to a second level is measured.

2.1.3 The parties agreed that this description was defective, since it was self-evident that the diameter of the outlet orifice should be smaller than that of the tube. As a consequence, there was obviously a mistake in the figures given for one diameter or the other.

2.1.4 The Appellants argued that - the particle size of the powder being of the order of 1 mm - the internal diameter of the tube was probably correct, so that it was apparent to the skilled reader that the mistake must be in the orifice diameter which, instead of 225 mm, should probably have read 22 mm, 25 mm or 22.5 mm. The correct figure would then be obtained by comparative tests, such as those made and filed by the Appellants during the opposition proceedings (with

their letter of 23 October 1996) in which Examples 2 and 3 of the patent in suit were worked using those three alternative diameters.

In the light of such tests, so the Appellants argued, a skilled person would find it obvious that the lower orifice diameter in the description of the patent in suit should read 22.5 mm instead of 225 mm, since this produced the closest results to the DFR values in the Examples, the deviations being only within the margin of error due to sample preparation.

2.1.5 As a preliminary observation on this argument, the Board notes that it is merely an assumption that the selection of the correct orifice diameter should be confined to the three possible figures mentioned above. The Board then acknowledges that, if any examples are to be used to clarify the DFR measurement, it must be those examples based on particular embodiments in the patent in suit where the DFR is known. Since only Examples 2 and 3 contain DFR-values for the respective compositions, only they can be considered for this purpose. These examples do not, however, fully describe the powders used, but simply refer to Example 1 for both the procedure of preparing the powder and its composition. Example 1 discloses in detail the method of preparation on the basis of lists of ingredients for a base powder, a "sprayed on" composition and a "post-dosed" material in particular percentages by weight (page 4, lines 44 to 45 and page 6, lines 5 and 16) which amount to a total of 100.0%. In Examples 2 and 3, however, the following ingredients are used in a different amount as compared to Example 1:

- 7% (Example 3) instead of 6% of alkylbenzene

sulphonate;

- 4.5% (Example 2) or 1% (Example 3) instead of 4% of nonionic surfactant in the base powder;

- 0.3% (Example 2) or 1% (Example 3) instead of 0.2% of fatty acid and

- 3.5% (Example 2) or 2% (Example 3) instead of 3% of nonionic surfactant in the spray on composition.

Examples 2 and 3 do not indicate how to adapt the amounts of the remaining ingredients in order to achieve a total of 100% by weight. Since any of the other ingredients could be used in compensating quantities or percentages, it follows that the powders used in the Examples 2 and 3 are undefined and, consequently, that the Appellants' comparative test results submitted with their letter of 23 October 1996 share the same lack of definition.

2.1.6 The Respondent based its insufficiency objection on the argument that the DFR parameter was an essential feature of Claim 1 but, owing to the uncertainty of the DFR measurement, the skilled worker would be unable to determine whether a detergent powder was within the scope of Claim 1 or not.

2.1.7 The Board agrees that the disclosure concerning the DFR measurement in the patent in suit is so uncertain that a person skilled in the art, even if relying on the Appellants' assumptions that only three possibilities exist, would not be able to ascertain the correct orifice size and, therefore, would not be able to

determine the DFR. Nor is the Board aware of any common general knowledge which would allow the skilled person to supplement the defective disclosure of the patent in suit in this respect. The technical consequence is that the DFR value itself is vague in the patent in suit. The legal consequence is to be viewed as a matter of clarity (Article 84 EPC) rather than one of sufficiency (Article 83 EPC).

In the present case, the unclarity was already present in the claims as originally filed and granted, as to which Article 84 EPC cannot be a ground of opposition (Article 100 EPC). In such circumstances, if an essential feature in a patent is unclear, it is necessary for those skilled in the art to interpret it in the widest possible sense.

2.1.8 For the reasons set out above under 2.1.5, the Board concludes that the value given in Claim 1 of at least 90 ml/s for the DFR "as defined in the description" is not limiting for the product of the claimed process with the consequence that the only meaning which can be attributed to the last feature of Claim 1 is that the product of the process, the final detergent powder, must have a dynamic flow rate but this can be of any value whatsoever and thus cannot be a distinguishing feature for the product of the claimed process.

It is evident that this unclarity does not affect the feasibility of the process in the sense of Article 83 EPC.

2.2.1 Similar considerations apply to the feature concerning the dispenser residue contained in Claims 4 and 5 of the second auxiliary request which is defined using the

test in the description. This test requires use of a dispenser drawer as fitted to a Hoover Matchbox (Trade Mark) 3263H washing machine (page 3, lines 16 to 17).

2.2.2 The Respondent objected during the opposition proceedings, and the Appellants agreed, that a Hoover Matchbox (Trade Mark) 3263H never existed.

2.2.3 The Appellants, with their letter of 23 October 1996, provided a letter (dated 11 October 1996) from Hoover European Appliance Group which indicated that the term "Matchbox" refers to the compact size of washing machines and tumble dryers in a range marketed by Hoover in the early to mid 70's and that the first washers in this range were the 3235, 3236H and 3243H models.

In the Appellants' view it would, therefore, be obvious to a skilled person that the correct model number should be 3236H instead of the erroneous number 3263H.

2.2.4 Apart from it being doubtful whether any such information can be used at all to correct misinformation in a patent, the limited information in the Hoover letter does not allow the conclusion that one and the same dispenser drawer was fitted to all the machines in question from mid 70's to September 1988, the priority date of the patent in suit. In addition, the letter suggests that there were further washers within the "Matchbox" range, over and above the three early models actually identified by their numbers. Most important, however, is the fact that even if one had good reasons to confine the selection to just the three models identified in the Hoover letter, the Board (like the Respondent) sees no justification for the

assumption that the error necessarily consisted in misprinting "3236H" as "3263H" when, for example, the intended number could just as easily have been "3243H".

2.2.5 Therefore, and for similar reasons as those in point 2.1.8 above, the Board concludes mutatis mutandis that sufficiency of disclosure (Article 83 EPC) is also met for the process of Claims 4 and 5, but that the values given for the dispenser residue in those claims must (in the same way as the DFR value in Claim 1) be ignored as non-distinguishing features when it comes to the evaluation of novelty and inventive step of the respective claimed subject-matter.

3. *Remittal to the first instance (Article 111(1) EPC)*

In accordance with decisions G 9/91 and G 10/91 (OJ EPO 1993, 408 and 420, in particular reasons, n° 18), the essential function of an appeal is to consider whether the decision issued by the first instance department is correct. Therefore, the Boards normally consider remittal of a case if essential questions regarding the patentability of the claimed subject-matter have not yet been examined and decided by the first instance.

In the present case, the Opposition Division decided on the issues of Articles 123, 83 and 104 EPC, but left the issues of novelty and inventive step (Articles 54 and 56 EPC) undecided.

Moreover, the Opposition Division did not consider the amended version of the claims according to the present second auxiliary request or the interpretation to be attributed to essential features contained therein.

Given those circumstances, the Board concludes that it is justified to remit the case to the Opposition division for further prosecution on the basis of Claims 1 to 8 of the second auxiliary request.

4. *Apportionment of Costs*

The Board considers the apportionment of costs ordered by the Opposition Division was correct for the following reasons. It must be borne in mind that the genesis of this issue was the Appellants' own error, which they have admitted throughout the opposition and appeal proceedings, in using the orifice diameter figure of "225 mm" in their patent.

4.1 Neither at the time nor since have the Appellants given a satisfactory reason for the late filing of their test evidence. In their 23 October 1996 letter they said only that they had not received the results of their inquiries of Hoover (a separate matter on which the Opposition Division had directed the Appellants to file evidence) until after the deadline of 6 October 1996 had passed. The clear implication is that the test evidence was or could have been finalised and filed by that deadline even if the Hoover inquiries were still incomplete; and at the oral proceedings before the Board the Appellants could offer no information to rebut that implication.

4.2 The Appellants' argument (see paragraph VI. above) that the chief reason for adjournment of the oral proceedings was not the late filing of their test evidence but the Respondent's wish to conduct tests on the prior art using the correct orifice figure is manifestly unacceptable. That suggestion seeks to draw

a distinction which does not exist. The correct orifice diameter could only be known (if at all) from the results of the tests the Opposition Division directed the Appellants to make; without the results of those tests, the Respondent was clearly unable to make any inquiries using that figure. No party to any proceedings can respond to another party's evidence until that evidence is produced.

4.3 It is true that, when the erroneous figure "225 mm" was highlighted by the Respondent in its Notice of Opposition (in which 22 mm, 25 mm and 22.5 mm were all suggested as possible correct figures), the Appellants in their letter of 20 October 1995 made a request to correct "225 mm" to "22.5 mm". It was not however for the Respondent to accept that as the correct figure when, on the information then available, any of three or more figures could be the correct one. Indeed, by making a request for correction under Rule 88 EPC, the Appellants had asked the Opposition Division to find that "22.5 mm" was obviously the correct figure in the sense that it was immediately evident that no other figure would have been intended. The Respondent was clearly under no obligation to accept that before the Opposition Division had decided the request. Indeed, as both the subsequent decision dismissing that request (a decision the Appellants elected to exclude from their appeal) and paragraphs 2.1.1 to 2.1.8 above show, "22.5 mm" was not the obvious figure. The Respondent behaved quite properly in waiting for directions from the Opposition Division which were given in paragraphs 1.1 and 4 of its communication, sent by fax on 23 March 1996, which required the Appellants to make comparative tests using diameters of 22 mm, 25 mm and 22.5 mm and file the results by 6 October 1996, a period of some

six months ending one month before the oral proceedings. The results were in fact filed on 23 October 1996, giving the Respondent only fourteen days before the oral proceedings to consider and reply to evidence the Appellants took over six months to prepare and file.

4.4 In ordering an apportionment of costs, the Opposition Division was exercising its discretion. The Board should only interfere with that discretionary decision if it is manifestly wrong. In fact, it appears manifestly right: it is quite clear that the Respondent incurred the additional and avoidable costs of having to attend the second oral proceedings because the Appellants filed their test evidence late, contrary to the Opposition Division's clear direction under Rule 71a EPC, and without any explanation at all let alone a satisfactory explanation. The Opposition Division was entirely justified to order, for reasons of equity (see Article 104 EPC), that the Appellants pay the Respondent's additional costs.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance for further prosecution on the basis of Claims 1 to 8 of the second auxiliary request filed during oral proceedings.

3. The request that the apportionment of costs by the Opposition Division be set aside is refused.

The Registrar: The Chairman:

G. Rauh P. Krasa