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**Datasheet for the decision
of 30 January 2007**

Case Number: T 0125/05 - 3.3.09

Application Number: 95941231.3

Publication Number: 0798965

IPC: A23G 1/00

Language of the proceedings: EN

Title of invention:

Process for manufacture of reduced fat chocolate

Patentee:

CADBURY SCHWEPPES PLC

Opponent:

NESTEC S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 83

Keyword:

"Late filed document (admitted - publicly available before
priority date)"

"Novelty (yes)"

"Inventive step (yes)"

"Sufficiency of disclosure (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 0125/05 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 30 January 2007

Appellant:
(Opponent)

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Decision under appeal:

Interlocutory decision of the Opposition
Division of the European Patent Office posted
3 December 2004 concerning maintenance of
European patent No. 0798965 in amended form.

Composition of the Board:

Chairman: P. Kitzmantel
Members: J. Jardón Álvarez
W. Sekretaruk

Summary of Facts and Submissions

I. The grant of European patent No. 0 798 965 in respect of European patent application No. 95941231.3 in the name of CADBURY SCHWEPPEES PLC, which had been filed on 21 December 1995, was announced on 13 June 2001 (Bulletin 2001/24) on the basis of 9 claims. Claim 1 read as follows:

"1. A process for the manufacture of a chocolate composition having a total fat content of 18 to 24.9 wt%, comprising the steps of:

- (1) intimately mixing (a) particles of solid chocolate-making ingredients comprising (i) at least one solid chocolate-making ingredient selected from the group consisting of nutritive carbohydrate sweeteners, sugar substitutes, bulking agents and intense sweeteners and (ii) at least one other solid chocolate-making ingredient selected from the group consisting of non-fat cocoa solids, cocoa powder, cocoa liquor, milk solids and emulsifier, with (b) at least one fat selected from the group consisting of cocoa butter, cocoa butter equivalents, butterfat and non-metabolisable fat;
- (2) reducing the size of said particles so that said particles have a particle size distribution, as measured by a Malvern Mastersizer, such that (a) not more than 1 wt% of said particles exceed 60 μm , and (b) not more than 15 wt% of the particles are less than 2 μm and/or not more than 20 wt% of the

particles are less than 3 µm, without the addition of water to dissolve ultrafine particles; and

- (3) subjecting said mixture of solid chocolate-making ingredients and said at least one fat to a flavour development step to produce a flavour-developed chocolate composition having a total fat content of 18 to 24.9 wt%."

Claims 2 to 9 were dependent claims.

- II. A Notice of Opposition was filed against the patent by NESTEC S.A. on 12 March 2002. The Opponent requested the revocation of the patent in its entirety on the grounds of Article 100(a), i.e. lack of novelty and lack of inventive step, and on the grounds of Article 100(b) and (c) EPC.

The following documents were cited *inter alia* in the opposition procedure.

D1: US - 5 080 923;

D2: WO - A - 94/09649;

D3: Chocolate production made simple. CONFECTIONERY PRODUCTION. August 1989, pages 549 to 551;

D4: V. Eynck "Dry Grinding and Mixing of Compound Coatings". The Manufacturing Confectioner/May 1989, pages 100 - 103;

D5: "Industrial Chocolate Manufacture and Use" Edited By S.T. Beckett, 2nd Edition 1994, pages 97 - 98;

- D6: "Particle Size Distribution Effects in Chocolate Processing" by A.D. Darley, Thesis for the Degree of PhD, School of Studies in Chemical Engineering, University of Bradford, February 1987, Summary and pages 178 - 195;
- D7: Affidavit of Montagu Hyams dated 28 July 2003;
- D8: Declaration of Patrick John Couzens dated 23 August 2004;
- D15: S.T. Beckett "Control of Particle Size Reduction During Chocolate Grinding" Proceedings of the 48th Annual Production Conference, 25 - 27 April 1994, pages 136 - 143;
- D16: Declaration by Anthony James Brown dated 25 August 2004 (Brown 1);
- D17: Declaration by Anthony James Brown dated 25 August 2004 (Brown 2);
- D18: Declaration by Ian Humphrey Smith dated 25 August 2004; and
- D19: Affidavit by Michael Kenneth Payne dated 29 April 2003.
- III. By its decision announced orally on 28 September 2004 and issued in writing on 3 December 2004, the Opposition Division maintained the patent in amended form.

Claim 1 as maintained by the Opposition Division read as follows:

"1. A process for the manufacture of a milk, white or plain chocolate composition having a total fat content of 18 to 24.9 wt%, comprising the steps of:

- (1) intimately mixing (a) particles of solid chocolate-making ingredients comprising
 - (i) in the case of milk chocolate non-fat cocoa solids, milk solids, nutritive carbohydrate sweetener and emulsifier; or
 - (ii) in the case of plain chocolate non-fat cocoa solids, nutritive carbohydrate sweetener and emulsifier; or
 - (iii) in the case of white chocolate milk solids, nutritive carbohydrate sweetener and emulsifier, in each case, the nutritive carbohydrate sweetener may be partially or wholly substituted by sugar substitute(s), bulking agent(s) and/or intense sweetener(s) with (b) at least one fat selected from the group consisting of cocoa butter, cocoa butter equivalents and butterfat, wherein some of the cocoa butter may be replaced by partly or wholly non-metabolisable fat;

- (2) reducing the size of said particles so that said particles have a particle size distribution, as measured by a Malvern Mastersizer, such that (a) not more than 1 wt% of said particles exceed 60 μm , and (b) not more than 15 wt% of the particles are less than 2 μm and/or not more than 20 wt% of the particles are less than 3 μm , without the addition of water to dissolve ultrafine particles; and

- (3) subjecting said mixture of solid chocolate-making ingredients and said at least one fat to a flavour development step to produce a flavour-developed chocolate composition having a total fat content of 18 to 24.9 wt%."

The Opposition Division acknowledged the novelty of the claimed subject-matter considering that the process according to Claim 1 of the patent in suit differed from the process of D2 in at least two features: (i) the particle size distribution of D2 referred to the sweetener while in the patent it referred to the chocolate-making ingredient mixture and (ii) the processes disclosed in D2 always required the addition of water.

Concerning inventive step, the Opposition Division, starting from D2 as closest prior art, saw the problem to be solved by the patent in suit in the provision of an alternative method for manufacturing low-fat chocolate which did not increase the viscosity of the composition, did not decrease flavour development and provided a final product with no inferior mouth feel. In the opinion of the Opposition Division there was no hint in the available prior art which would prompt the skilled person to modify the method of D2, to determine the particle size distribution of the chocolate making ingredient mixture and not only the sweetener, to change the particle size distribution and to eliminate the step of water addition, thus arriving at the process of Claim 1 of the patent.

Concerning Article 83 EPC, the Opposition Division pointed out that the objection of the Appellant that the invention could not be carried out over the whole claimed breadth was not substantiated by any experimental evidence and that the results provided by the Patent Proprietor, D16, showed that the skilled person was able to reproduce example 1 of the patent.

The Opposition Division further decided not to admit document D6 into the proceedings, essentially because the Opponent had been unable to show that it was available to the public before the priority date of the opposed patent.

IV. On 26 January 2005, the Opponent (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day.

In the Statement of Grounds of Appeal filed on 13 April 2005, the Appellant requested the revocation of the patent in its entirety on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and insufficient disclosure (Article 100(b) EPC).

In support of its arguments the Appellant filed with the Statement of Grounds the following further documents:

D20: Statement by Peter Michael Ketley dated 4 November 2004;

D21: Statutory declaration of Angel Manez dated 11 April 2005; and

D22: Statutory declaration of Stephen Thomas Beckett dated 11 April 2005.

V. By letter dated 6 January 2006, the Respondent (Patent Proprietor) disputed all the arguments submitted by the Appellant and requested that the Opposition Division decision be upheld and the patent maintained as amended under that decision.

VI. In response to the Board's communication, issued on 20 November 2006 in preparation for the oral proceedings, the Respondent filed, with letter dated 29 December 2006, two sets of claims for auxiliary requests 1 and 2. Compared to the main request, the following amendments were made to these requests:

- Auxiliary request 1. Claim 1 of this request is based on Claim 1 of the main request with the additional step of:
"(4) moulding or extruding the chocolate composition to form a bar, or moulding or depositing the chocolate composition to form a solid or filled chocolate".
- Auxiliary request 2. Claim 1 of this request is also based on Claim 1 of the main request wherein the particle size requirement in step (2) is achieved "by milling in a hammer, pin or vane mill with classifier".

VII. The arguments presented by the Appellant in its written submissions and at the oral proceedings held on 30 January 2007 may be summarized as follows:

- The Appellant argued that D2 anticipated the subject-matter of Claim 1 of the patent. It relied on the passage at page 21, line 22 to page 22, line 4 which disclosed the use of a Micropul ACM mill in order to reduce the particle size of the sugar. The air classification step comprised by this technique already removed the ultrafine particles giving a sweetener of the required particle size, thus making the addition of water unnecessary.

- Concerning the issues of sufficiency and inventive step, the Appellant relied on the declarations of Mr Manez D21, and Mr Beckett D22, which showed that it was hardly possible to achieve a product which could be hand-tempered and that even the best products failed the sensory test for an eating chocolate. Moreover, the experiments of Mr Manez showed that the nature and amount of emulsifier was a critical aspect of the invention and that there was no disclosure of how to make chocolates with fat levels below 22% and of how to carry out the method on an industrial scale.

- Furthermore, the claimed method in any case lacked inventive step having regard to the combined teaching of D2 and D6 whose prior art status was established by D20.

VIII. The arguments presented by the Respondent in its written submissions and at the oral proceedings may be summarized as follows:

- The Respondent considered the evidence showing that D6 had been made available to the public before the

priority date of the patent insufficient and requested that D6 not be admitted into the proceedings.

- The Respondent argued that the specification gave the skilled person sufficient guidance on how to work the invention, and that the reproducibility of at least Example 1 had been confirmed by D16, which also established the possibility to produce a chocolate having a fat content of only 20,6 wt%. In all cases it was possible to hand temper the product and process it into bars.

- In its opinion the subject-matter of the claims was also novel over D2 because this document always involved, as an essential feature, the use of water to dissolve ultra fine particles.

- Concerning inventive step it stated that the problem underlying the patent in suit with regard to D2 was to provide a process for the manufacture of low fat chocolate which (i) did not require the addition of water to dissolve ultra fines, and (ii) did not require such a stringent particle size specification. The solution to this problem by the claimed less tight control of the particle size distribution which allowed for the presence of some ultra fine particles was established by the available evidence. The claimed solution was not rendered obvious by any of the citations, including D2 and D6, the latter document not relating to low fat chocolate and failing to unambiguously disclose the claimed particle size distribution.

IX. The Appellant requested that the decision under appeal be set aside and that the European patent No. 0 798 965 be revoked in its entirety.

The Respondent requested that the appeal be dismissed (main request) or that the European patent be maintained on the basis of one of the auxiliary requests 1 or 2, filed with letter dated 29 December 2006.

Reasons for the Decision

1. The appeal is admissible.
2. *Late filed evidence*
 - 2.1 During the appeal proceedings, the Appellant filed the declaration D20 in order to clarify the position with regard to the availability to the public of D6 and the further declarations D21 and D22 in order to support its arguments on inventive step.
 - 2.2 The Respondent did not object to the admission of declarations D21 and D22 into the proceedings, but maintained that D6 should not be admitted into the proceedings because D20 could not prove that D6 had been publicly available before the priority date of the patent in suit, namely 23 December 1994.

The Respondent considered that the expression "it may be **presumed** that, in accordance with the normal practice of the library, the thesis was placed in the open collection of the library at some point after June

1989" (emphasis by the Respondent) in paragraph 6 of D20 was too vague to prove that D6 had actually been made available to the public. It pointed out that a similar statement of the British Library (D7, paragraph 5) turned out to be wrong as it had been shown during the opposition proceedings (cf. paragraph 4 of D19).

2.3 The Board cannot share the doubts of the Respondent about the availability to the public of D6 for the following reasons:

2.3.1 D20 clearly states on paragraph 3 that D6 was submitted to the (Bradford) University in February 1987 and that a letter dated 27 May 1987 confirmed a restriction of two years on public access (paragraph 4). It is also not disputed that the thesis was listed in the Index to Theses in Volume 40 (1991), page 1575 (cf. D20, paragraph 8 and Annex to D7).

2.3.2 Any member of the public having the information in the Index to Theses that the thesis had been written at the Bradford University, would have known that a copy was to be found at the Bradford Library and would have obtained it upon request as it should have been in the open collection since June 1989 as 'presumed' by Mr Ketley in his declaration (point 6).

The argument of the Respondent that in view of the fact that a mistake happened in the British Library, the same mistake could have also taken place at the Bradford Library is merely an assumption without any basis. Even if a similar mistake had happened (which has not been shown to the Board), the thesis would

still have been available to the public at the Bradford Library upon request. At least since the publication in Volume 40 of the Index to Theses in 1991, any member of the public would have known of its presence at the Bradford Library and would have obtained it upon request because the two years restriction were already over as stated by Mr Ketley in D20.

2.3.3 For these reasons, the Board decided to admit D6 into the proceedings.

3. *Novelty (Article 54 EPC)*

3.1 Claim 1 is essentially directed to a process for the manufacture of a chocolate composition having a total fat content of 18 to 24.9 wt% by intimately mixing particles of solid chocolate-making ingredients with fat and subjecting said mixture to a flavour development step wherein the size of the particles of solid chocolate-making ingredients is reduced to have a given particle size distribution, without the addition of water to dissolve ultrafine particles.

3.2 The novelty of Claim 1 of the patent has been contested by the Appellant having regard to D2.

3.2.1 D2 relates to a low fat chocolate comprising 20.0 - 24.5 % by weight fat, nutritive carbohydrate sweetener and an edible emulsifier (see Claims 1 to 31) and to processes for the production of said low fat chocolate (Claims 32 to 45).

In the processes of D2 as summarized on page 12, lines 13 to 26, the sweetener is mixed with a fat and

the mixture is refined to reduce the particle size, then a surfactant is added to the mixture **in the presence of water** (emphasis by the Board) and the mixture is dried under agitation and heated until the desired consistency with the desired fat content is obtained. All the processes claimed in D2 wherein the sweetener is refined to a certain particle size include the further step of blending the mixture of refined sweetener and fat with water (cf. Claim 32, step (c); Claim 33, step (c); Claim 35, step (c) and Claim 37, step (c)) and in all the examples water is added to the refined sweetener (see examples 1 to 9; see also Figures 1/5 to 5/5).

3.2.2 The process according to Claim 1 of the patent in suit differs from the processes disclosed in D2 in that it is carried out without the addition of water to dissolve ultrafine particles (Claim 1, step (2)).

3.2.3 The Appellant does not dispute that the methods of preparing low fat chocolate claimed and exemplified in D2 include the use of water. However, the Appellant maintains that the disclosure of D2 is novelty destroying for the subject-matter of Claim 1 of the patent in suit because the description of D2 includes further processes for the preparation of low fat chocolate and these further processes do not require the addition of water.

In support of its novelty objection, the Appellant relies essentially on the passage at page 21, line 22 to page 22, line 4 of D2. In this passage, reference is made to an additional method for size reduction of sugar by milling techniques. The passage mentions the

use of a Micropul ACM mill to reduce the particle size of sugar within the desired range of ultrafines. The Appellant argues that account being taken that there was no mention of the addition of water/surfactant to remove ultrafine particles in said passage and that the required particle size had already been achieved by using the Micropul ACM mill, there was no reason for the person skilled in the art to assume that a water addition step would nevertheless be included.

- 3.2.4 The Board cannot agree with this interpretation of D2 by the Appellant for the following reasons:

The passage cited by the Appellant must be read in the correct context of the disclosure of D2. Thus, D2 describes several methods of reducing the surface area of the sweetener (page 21, line 11 - page 24, line 26) including the method of reducing the surface area by milling mentioned by the Appellant. The following paragraph bridging pages 24 and 25 makes it clear that these methods are applicable to fat contents as low as 25 wt% (24.9 wt% is the upper fat limit of the claimed invention). However, in order to lower the fat content to below 25% and as low as 20 % by weight, D2 requires that said methods "normally" be used in "some" combination. Furthermore the next sentence makes it clear that this statement specifically relates to the refining of saccharide crystals.

Thus the paragraph bridging pages 21 and 22 of D2 does not disclose a process for the preparation of low fat chocolate as specified by the claimed invention without addition of water but only a possible pre-treatment of the sweetener before carrying out the process of the

preparation of the low fat chocolate (see also footnote to Table 2A).

This interpretation of the teaching of D2 is confirmed not only by the process claims and examples as explained above but also by the whole teaching of D2. D2 actually develops the process of D1, which uses water to dissolve ultrafines, by further adding surfactants or emulsifiers. A process for preparing low fat chocolate without addition of water is not contemplated by D2.

Also the argument of the Appellant that this water addition in D2 would probably serve no purpose (see Dr. Couzens' declaration, D8, paragraph 6.7) cannot conceal the fact that this step, considered unnecessary or not, is indeed carried out in D2.

3.3 Consequently, there is no clear and unmistakable disclosure in D2 of a process for the preparation of a low fat chocolate as now claimed. The subject-matter of the claims is thus novel (Article 54 EPC).

4. *Inventive step (Article 56 EPC)*

4.1 Claim 1 of the patent in suit is directed to a process for the manufacture of a chocolate composition having a total fat content of 18 to 24.9 wt%.

4.2 Closest prior art

According to the parties, document D2, which also discloses processes for the preparation of low fat chocolate, represents the closest prior art. The Board

also considers D2 as the closest prior art document. Its disclosure has already been discussed above in relation to novelty (see point 3.2.1).

4.3 The problem to be solved and its solution

4.3.1 The patent specification already acknowledges on paragraph [0007] the disclosure of D2. There is neither in the specification, nor in the further evidence submitted by the Respondent, a comparison between the chocolate produced by the process of D2 and the chocolate obtained by the process of the patent in suit. Thus, in the absence of any advantage of the claimed chocolate, the objective problem to be solved by the patent in suit must be seen as the provision of an alternative process for the preparation of a low fat chocolate.

4.3.2 This problem is solved by the process of Claim 1 which is characterized by the use of particles of the solid chocolate-making ingredients having a defined particle size distribution, namely (a) not more than 1 wt% of said particles exceed 60 μm , and (b) not more than 15 wt% of the particles are less than 2 μm and/or not more than 20 wt% of the particles are less than 3 μm , said particle size distribution being achieved without the addition of water to dissolve ultrafine particles (Claim 1, step (2)).

4.3.3 The question whether this problem has been credibly solved by the claimed process was hotly disputed during the proceedings.

- 4.3.4 The patent in suit includes five working examples, according to which a low fat chocolate having a fat content between 22.38 and 22.51 wt% is said to be obtained.
- 4.3.5 However, the accuracy of the examples of the patent in suit was questioned by the Appellant and therefore it is necessary to discuss this point in detail.
- 4.3.6 The Appellant questioned the feasibility of the examples during the opposition proceedings (see section 3 of D8) essentially because the amount of the ingredients said to be used in example 1 of the patent actually do not fit into the 10 quart-bowl of the Hobart mixer used. Example 1 of the patent was then repeated by the Respondent during the opposition proceedings (see D16 and D18) and by the Appellant during the appeal proceedings (see D21 and D22).
- 4.3.7 By considering the experimental evidence on file, the Board has to conclude that example 1 of the patent as described in the specification must contain an error and it cannot be reproduced as written.

The experiments filed by the Patentee Respondent itself show that modifications were necessary to obtain the claimed low fat chocolate. The addition of the ingredients, in the amounts given in example 1 of the patent, resulted in some of the powder being thrown out of the Hobart mixer. The way in which the emulsifiers were added also slightly varied in order to achieve a fully liquefied chocolate (see D16, point 3).

The experiments submitted by the Appellant confirm the results of the Respondent in the sense that it was not possible to accommodate the ingredients in the Hobart mixer (see D21, trial 1). The Appellant then worked example 1 with smaller quantities of the ingredients (50%) using the same conditions and also found that an exact repetition of the example did not yield a workable paste (D21, trial 2: too thick for hand tempering). However, the Appellant also found that by slightly modifying the time of addition and the amount of the emulsifiers a chocolate mass fluid enough to be hand tempered and moulded could be obtained (D21, Trials 4 and 6).

- 4.3.8 However these experiments also show that the skilled chocolate maker knows how to modify the method in order to obtain a processable chocolate mass. In any case, the specification of the patent in suit already indicates the parameters which should be considered to improve the viscosity during processing (see [0012] and [0014]).

The chocolates obtained by both Parties following the process of Claim 1 are considered as having acceptable eating characteristics, similar to those of known low fat chocolates (see D18, points 2 and 3 and D22, points 2 and 5).

- 4.3.9 For these reasons the Board is satisfied that the problem as defined under 4.3.1 above has been credibly solved by the process of Claim 1.

4.4 Obviousness

- 4.4.1 It remains to be decided if the proposed solution was obvious in view of the available prior art.
- 4.4.2 Document D2 cannot give any hint to the claimed solution. As discussed under novelty, water is an essential requirement of the processes claimed in D2 either to dissolve ultrafines (Claims 32, 33, 35 and 37) or to control the crystallization of sugar to prevent its formation (Claims 34 and 36). There is no reason for the skilled person to modify the process therein disclosed by omitting its crucial feature.
- 4.4.3 There is also no hint to the claimed solution in the further documents cited by the Appellant, namely D3, D4, D5, D6 and/or D15.

All these documents relate to the preparation of chocolate having a normal fat content (over 25% by weight), higher than the low fat chocolate presently claimed. These documents essentially prove that it was possible, before the filing date of the patent in suit, to obtain a feed material having a particle size within the requirements of present Claim 1. There is however no suggestion that the use of such a feed material would render unnecessary the water treatment of the process of D2 and/or D1 when preparing low fat chocolates.

In particular D6, on which the Appellant mostly relied, relates to the preparation of a chocolate with a higher fat content (see page 186, Table 4.12 and page 192, Table 4.15). Also the last paragraph of page 195 of D6,

which suggests that the use of air classification gives comparable results to a water treatment, clearly relates to the preparation of such chocolates having a higher fat content and it is not relevant for the currently claimed process for the preparation of low fat chocolate of less than 25 wt% fat content.

4.4.4 In summary, none of the available prior art documents suggests the claimed process and therefore the subject-matter of Claim 1 involves an inventive step (Article 56 EPC).

5. *Sufficiency of disclosure (Article 83 EPC)*

5.1 In accordance with the case law of the Boards of Appeal the requirements of Article 83 EPC are met if at least one way is clearly indicated in the patent specification enabling the skilled person to carry out the invention, and if the disclosure allows the invention to be performed in the whole area claimed without undue burden, applying general common knowledge.

5.2 As already discussed above in relation to inventive step (see 4.3), although example 1 of the patent cannot be reproduced as such, the specification provides the skilled person with sufficient information on how to prepare a low fat chocolate following the process claimed. Consequently, the first requirement mentioned above is met by the patent in suit.

5.3 Concerning the second requirement, the Appellant considered that the patent in suit lacked sufficiency of disclosure because it did not teach the person skilled in the art how the problem can be solved over

the whole breadth of the claims. In particular the Appellant considered that the description was insufficient in (i) indicating the criticality of the nature and the amount of emulsifier to be used; (ii) the patent did not explain how to make chocolate with a fat level below 22% and (iii) the description did not provide any assistance to the person skilled in the art as to how the method could be carried out on an industrial scale.

- 5.4 The Board finds these arguments of the Appellant unconvincing. First of all, it is well known in the field that the viscosity during chocolate processing is influenced by the nature of the emulsifiers. The description of the patent already states that the viscosity during processing can be improved by using emulsifiers (see [0012]) and the skilled person knows which emulsifiers should be used to improve processing. The choice of an emulsifier for the process does not imply any undue burden for the skilled person.

Concerning the further arguments of the Appellant, it is noted that following the method of the patent in suit (see D16, point 5 and D18, point 2), the Respondent has successfully prepared an acceptable chocolate with a lower fat content (20,6 wt%). The Appellant, who has the burden of proof, has doubted that such chocolate could be prepared but has not provided any evidence showing that it could not be prepared. The same applies to the objection concerning the applicability to industrial scale of the claimed method. The doubts of the Appellant are not supported by any experimental evidence. Although modifications should be made when adapting the process to industrial

scale, the Appellant has failed to show that the claimed process could not be adapted to an industrial scale. The Appellant's argument in this respect that the claimed compositions could not be worked on existing standard equipment is beside the point.

5.5 In these circumstances and taking into account the considerations set out above as well as the fact that the burden of proof is on the Appellant, the Board has no reason to doubt that the disclosure allows the invention to be performed in the whole area claimed.

5.6 The requirement of Article 83 EPC, sufficiency of disclosure, is therefore met.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

C. Moser

P. Kitzmantel