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Datasheet for the decision of 20 October 2015

Case Number: T 0318/11 - 3.4.02

Application Number: 01920042.7

Publication Number: 1279026

IPC: G01N21/35, G01N21/25, G01N33/34

Language of the proceedings: EN

Title of invention:
METHOD IN CONNECTION WITH THE PRODUCTION OF PULP, PAPER OR PAPERBOARD

Patent Proprietor:
Stora Enso AB

Opponent:
METSO AUTOMATION INC.

Relevant legal provisions:
EPC 1973 Art. 56

Keyword:
Inventive step (yes)

Decisions cited:
R 0009/14, T 2044/09

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Case Number: T 0318/11 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 20 October 2015

Appellant: (Opponent)	METSO AUTOMATION INC. Tulpatie 1b 00880 Helsinki (FI)
Representative:	TBK Bavariaring 4-6 80336 München (DE)
Respondent: (Patent Proprietor)	Stora Enso AB Asgatan 22 791 80 Falun (SE)
Representative:	Johansson, Lars-Erik Hynell Patenttjänst AB Patron Carls väg 2 683 40 Uddeholm (SE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 7 December 2010 rejecting the opposition filed against European patent No. 1279026 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	B. Müller
Members:	F. J. Narganes-Quijano
	H. von Gronau
	F. Maaswinkel
	T. Karamanli

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division rejecting the opposition against European patent No. 1279026 (based on European patent application No. 01920042.7).

The opposition filed by the appellant against the patent as a whole was based on the grounds for opposition of insufficiency of disclosure (Article 100(b) EPC) and of lack of inventive step (Article 100(a), together with Article 56 EPC).

II. In its decision the opposition division held that none of the two grounds for opposition invoked by the appellant under Article 100(b) and Articles 100(a) and 56 EPC prejudiced the maintenance of the patent as granted. In particular, the opposition division held that the claimed invention was disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. In addition, as regards the issue of inventive step, the opposition division referred, *inter alia*, to the following documents:

D3: "Multivariate Characterization of Mill Beaten Pulps - Using NIR, PQM 1000 and STFI FiberMaster", M. Bergström; diploma thesis, Umeå University, Sweden, 1999; pages 1 to 78, and

D4: copy of the brochure "PulpExpert"; PulpExpert Oy, Leppävirta, Finland; pages 1 to 4,

and found that

- in view of the evidence on file, and in particular of the results of the hearing of the witness M.

Sjöström, document D3 constituted state of the art within the meaning of Article 54(2) EPC,

- the evidence on file, including the results of the hearing of the witness P. Lehtikoski, was insufficient to conclude that the brochure shown in document D4, allegedly distributed since 1992, was made available to the public before the relevant date of the patent, and

- the method of claim 1 of the patent was not rendered obvious by the disclosure of document D3 and the common general knowledge of the person skilled in the art.

III. With the statement setting out the grounds of appeal the appellant submitted the original brochure (document D4') of the copy shown in document D4 in support of the public availability of the brochure, and contested the opposition division's view that the claimed invention involved an inventive step.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

IV. In reply to the statement of grounds of appeal the respondent (patent proprietor) requested that the appeal be dismissed.

V. The board - in a five-member composition pursuant to Article 21(4)(b) EPC - summoned the parties to oral proceedings and, in a communication under Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA, OJ EPO 2007, 536) annexed to the summons, identified the main issues to be discussed during the oral proceedings.

VI. In reply to the communication of the board annexed to the summons to oral proceedings, the respondent confirmed its request to the effect that the patent be

upheld as granted, and the appellant filed further submissions in writing and referred to the following document already considered during the first-instance proceedings:

D5: Manual "PulpExpert Mittausmenetelmät", versio 4.0, 08/95, PulpExpert Oy, 1995; pages 1 to 3, 7, 8, 17 to 20 and 23 to 25, and English translation thereof (document D5T).

Subsequently, the respondent informed the board in its electronic submission dated 22 September 2015 that he would not be attending the oral proceedings.

VII. Oral proceedings before the board were held on 20 October 2015 in the absence of the respondent.

The appellant confirmed its request that the decision under appeal be set aside and the patent be revoked.

At the end of the oral proceedings the chairman announced the decision of the board.

VIII. Claim 1 of the patent as granted reads as follows:

"Method for predicting properties of a product that consists of cellulose-fibre-based pulp, paper or paperboard, wherein a sample quantity of a suspension of cellulose fibre is analysed during manufacture of the product by means of spectroscopic measurements (13) in a selected spectral range in the wavelength range 200-25000 nm **characterized in that** each sample quantity, prior to said analysis, is diluted (3, 4), and thereafter one partial flow (6) of the diluted sample quantity is dewatered and dried (8) and used for said spectroscopic measurements (13), and in a second partial

flow (5) of the diluted sample quantity is used for analysis (7, 14) of physical fibre data by means of image analysis, wherein each sample quantity analysed generates at least 100 data points from the spectroscopic measurement distributed in the selected spectral range, and at least 50 data points with regard to said physical fibre data in the form of one or more physical fibre property distributions with regard to at least one physical property in the group that consists of fibre length, fibre width and fibre shape, and said data points are combined in multivariate data processing (16), for said prediction, on the basis of calibrations previously executed that were carried out on samples with known product attributes."

The set of claims of the patent as granted also includes dependent claims 2 to 10 defining particular embodiments of the method defined in claim 1.

Reasons for the Decision

1. The appeal is admissible.

2. The duly summoned respondent did not attend the oral proceedings. According to Rule 71(2) EPC 1973, the proceedings could however continue without him. In accordance with Article 15(3) RPBA the board relied for its decision only on the respondent's written submissions. The board was in a position to decide at the conclusion of the oral proceedings, since the case was ready for decision (Article 15(5) and (6) RPBA), and the voluntary absence of the respondent was not a reason for delaying a decision (Article 15(3) RPBA).

3. *Inventive step*

3.1 *Documents D3, D4 and D5*

3.1.1 Document D3 is a copy of a diploma thesis and in its decision the opposition division found that, in view of the evidence on file, the document constituted state of the art within the meaning of Article 54(2) EPC 1973. During the appeal proceedings the respondent has contested the opposition division's finding in this respect and has submitted that the content of the document was not rendered available to the public before the relevant date of the patent in suit.

Document D4 is a copy of a brochure, allegedly distributed since 1992, disclosing the apparatus "PulpExpert", and in its decision the opposition division held that the evidence on file was insufficient to conclude that the content of the document was made available to the public before the relevant date of the patent. During the appeal proceedings the appellant has contested this finding of the opposition division and has filed the original brochure (document D4') of the copy shown in document D4 in support of the public availability of the brochure.

During the appeal proceedings the appellant has also referred to document D5, showing parts of a document entitled "PulpExpert", and to the English translation of the same (document D5T) in support of the public availability of the brochure shown in document D4 before the relevant date of the patent, and also as prior art on its own. Document D5 and the English translation thereof (document D5T) were already considered in the first-instance proceedings and the opposition division

expressed doubts as to whether the publication of the document before the relevant date of the patent had been sufficiently substantiated (decision under appeal, point 3.4 of the Reasons). In view of the fact that document D5 refers to the same apparatus as the one shown in document D4 and that the submissions of the appellant in relation to document D5 only raised issues similar to those raised with respect to document D4, the board, exercising its discretion under Article 13(1) RPBA, decided during the oral proceedings to admit into the proceedings the submissions of the appellant in respect of document D5.

3.1.2 During the oral proceedings, however, the board concluded - as will be shown below - that, even assuming that documents D3, D4 and D5 represented state of the art within the meaning of Article 54(2) EPC 1973, the claimed invention involved an inventive step. In these circumstances, there is no need to address the disputed question of whether the evidence on file is sufficient to conclude that each of documents D3, D4 and D5 was rendered available to the public before the relevant date of the patent in suit.

Accordingly, the following assessment of inventive step is based on the assumption that documents D3, D4 and D5 constitute state of the art.

3.2 *Closest state of the art - Document D3*

3.2.1 It has been undisputed during the proceedings that document D3 represents the closest state of the art. This document is directed to the prediction of the properties of a product manufactured on the basis of beaten pulp (title, and first paragraph on page 2), and the document discloses the use of multivariate methods

for predicting the mentioned properties on the basis of data obtained by carrying out different measurements in samples of the pulp (page 2, first and third paragraphs, and page 5, third paragraph). In particular, the document discloses the extraction of samples from the pulp (page 5, fourth paragraph), and the analysis of each of the pulp samples, this analysis involving for each of the samples, on the one hand, carrying out near-infrared spectrometric measurements by means of the apparatus NIR Systems 6500 (page 5, fourth and fifth paragraph, together with page 6, first paragraph) and, on the other hand, carrying out image analysis of the fibres of the pulp samples by means of the apparatus STFI FiberMaster (page 5, fourth and fifth paragraphs, together with the first paragraph of each of pages 8 and 9). The multivariate method is then based on the measurement data obtained from both the spectrometric measurements and the fibre analysis (page 67).

It has been undisputed during the appeal proceedings that, as found by the opposition division in its decision, the method of claim 1 differs from the disclosure of document D3 in that, while in document D3 the portion of the sample subjected to fibre analysis is diluted before analysis (Figure 3 on page 8), in the claimed method each sample quantity, prior to analysis, is diluted, and thereafter one partial flow of the diluted sample quantity is dewatered and dried and used for the spectroscopic measurement, and a second partial flow of the diluted sample quantity is used for fibre analysis.

During the appeal proceedings the respondent has contested the opposition division's finding that the claimed feature mentioned above constituted the sole distinguishing feature over the disclosure of document

D3 and has pointed to other features of claim 1 which, in its view, would not be anticipated by the disclosure of document D3. However, since - as will be shown below - the claimed method involves an inventive step at least by virtue of the distinguishing feature mentioned in the preceding paragraph, there is no need for the purposes of the present decision to address the question of whether or not the further claimed features mentioned by the respondent are disclosed in document D3.

3.2.2 During the appeal proceedings the appellant has disputed the opposition division's finding that claim 1 involved an inventive step over the disclosure of document D3 and the common general knowledge of the person skilled in the art.

In addition, the appellant has also referred to the disclosure of documents D4 and D5 and has submitted that the claimed method was also rendered obvious by the application of the teaching of any of these two documents to the method disclosed in document D3.

Each of these three lines of argument will be considered in the following.

3.3 *Document D3 in combination with document D4*

Document D4 is a copy of a technical brochure disclosing the characteristics of the apparatus PulpExpert used in the measurement of the characteristics of pulps for the purposes of controlling the quality of the pulps (pages 1 and 2). The apparatus is arranged to carry out the steps of sampling and then testing the pulp samples, and distributing the measurement results (page 2). According to the logical flow chart represented on page 2, the sample is first subjected to dilution, and then a

portion of the sample is formed into a sheet, dried and subjected to brightness measurement, and another portion of the sample is subjected to fibre analysis.

According to the appellant's submissions, it would be obvious for the skilled person to apply the teaching of document D4 relating to the preparation of the sample before measurement and analysis to the method disclosed in document D3, thereby arriving at the claimed method.

However, document D4 merely involves brightness measurement, and not the measurement of the more complex spectroscopic data required for the multivariate data processing disclosed in document D3 and also required by the claimed method, so that the method of document D4 does not appear to be appropriate for use with multivariate data processing. In addition, even assuming that the skilled person would have a reason or a motivation for considering - as submitted by the appellant - the application of the teaching of document D4 relating to the way the sample is handled to the method of document D3, the skilled person would not arrive at the claimed method for the following reasons:

3.3.1 As already noted above, the logical flow chart represented on page 2 of document D4 shows, after the dilution step of the sample, two parallel logical lines, a first line involving the sequential steps of "Sample sheet", "Drying and weighing" and "Brightness measurement", and a second line involving the steps of "Fiber analysis". There is no indication in the logical flow chart relating to the timing of these two parallel logical lines, and according to the explanation of the flow chart on page 3 of document D4 in the first of the two logical lines a sheet is first formed and dried and then subjected to brightness measurement (page 3, first

column) and this process is repeated several times (see page 3, second column, second paragraph reading: "out of the same sample several repetitive sheets are made and tested through the same procedure"), and then - as underlined by the respondent in its written submissions - "after sheets have been tested, the sample is diluted further and subjected to the fiber analysis" (page 3, second column, third paragraph). Contrary to the appellant's submissions, these passages do not merely define a "logical correlation" between the two logical lines represented in the flow chart, but the correlation in time between them. It follows that in document D4 the step of subjecting a portion of the sample to fibre analysis starts only once the step of forming sheets with another portion of the sample and subjecting the sheets to brightness measurement has been carried out at least for a predetermined number of sheets, so that the two parallel logical lines represented in the flow chart of document D4 do not actually start simultaneously or run in parallel - or, as submitted by the respondent, they are not performed "in phase"-, but the second line is started after the first line has been run with several sheets.

This is at variance with the claimed method, and more particularly with the distinguishing feature identified in the second paragraph of point 3.2.1 above. Indeed, according to this feature defined in the characterizing portion of claim 1 "each sample quantity, prior to said analysis, is diluted, and thereafter one partial flow of the diluted sample quantity is dewatered and dried and used for said spectroscopic measurements, and in a second partial flow of the diluted sample quantity is used for analysis of physical fibre data by means of image analysis" (*emphasis added*). The skilled reader would understand that this feature not only defines the

technical features of each of the steps, but - contrary to the appellant's submissions during the oral proceedings - also the temporal relationship between the steps: first, the dilution step is carried out and, thereafter, the two partial flows respectively involving the spectrometric measurement and the image fibre analysis are simultaneously started so that they run in parallel (or, as explained in paragraph [0019] of the patent specification, "in phase" or, as found by the opposition division in its decision, "in synchrony" with each other), irrespective of whether they end simultaneously or not.

During the oral proceedings the appellant submitted that the statements in document D4, page 3, second column, third paragraph referred to above could only be seen as constituting a mistake because it was not realistic to wait until several sheets have been dried and measured to start with the step of further diluting a portion of the sample and carrying out fibre analysis. However, in the absence of any indication - in particular, in the absence of any inconsistency or ambiguity in the formulation or in the technical content of the document - that would support the appellant's view that the disclosure in the mentioned paragraph constituted a mistake, the board sees no reason that would justify disregarding as a mistake the otherwise explicit and clear technical teaching of the mentioned passages of document D4.

3.3.2 In addition, the application of the teaching of document D4 to the method of document D3 would not result in the dilution conditions defined in claim 1 for the following reasons:

It is first noted that while the spectrometric measurements (see claim 1) and the brightness measurements (see document D4, page 3, first column, fourth to sixth paragraphs) under consideration generally require that the sample is in a dried state, the fibre analysis requires a predetermined high degree of dilution of the sample (see document D3, Figure 3 on page 8, document D4, page 3, first column, second paragraph, and second column, third paragraph; see also patent specification, paragraph [0032] and claims 1 and 9). This is essentially the reason why both the claimed invention and document D4 involve dilution but also require dewatering and then drying the sample portion to be subjected to spectrometric or brightness measurement.

However, while claim 1 requires one single dilution step, namely the dilution of the sample before it is split in two portions for the respective operations of spectrometric measurement and fibre analysis, document D4 requires a first dilution step of the sample before it is split (page 3, first column, second paragraph), and a subsequent, second dilution step for further dilution of the sample portion to be subjected to fibre analysis (page 3, second column, third paragraph). This second dilution step of the method of document D4 implies that the first dilution step is generally insufficient for diluting the sample to a degree enabling the fibre analysis of the sample, whereas in the claimed method the single dilution step of the sample before it is split guarantees that the sample is already diluted before being split to a degree sufficient for enabling fibre analysis in the split sample portion. This interpretation of the claimed method was contested by the appellant during the oral proceedings on the grounds that the claimed method did not exclude a further dilution of the portion of the

sample subjected to fibre analysis. However, the aforementioned construction of the claimed method is not only reflected by the proper formulation of the claim which requires dilution of the sample before being split without requiring a further dilution of the portion of the sample to be subjected to fibre analysis, but is, in addition, supported by the patent specification which refers to the dilution of the sample "to a concentration of less than 0.5 %, preferably less than 0.1 %" (paragraph [0019]) and, in one particular example, to the fibre measurements being carried out "on a 0.05 % pulp suspension" (paragraph [0032]), without however specifying a further dilution of the sample.

During the oral proceedings the appellant also referred to point 5.3 on page 6 of document D5T disclosing the dilution of the sample in the first of the two dilution steps of the apparatus PulpExpert shown in document D4 to "a target consistency (e.g. 0.2 %)", and submitted that since in document D4 a further dilution of the sample was required for carrying out fibre analysis, the degrees of dilution specified in the patent specification implied that the claimed method, construed as excluding a further dilution of the sample for fibre analysis, included embodiments leading to bad results. However, the appellant did not dispute that the value ranges of the degree of dilution disclosed in the patent specification are sufficient to carry out fibre analysis. In addition, the mere fact that some of the values in the ranges "less than 0.5 %, preferably less than 0.1 %", and in particular the upper values, might possibly lead to results that are not optimal - and even "bad" according to the appellant - when compared with the results that can be obtained with higher degrees of dilution within the specified ranges - and in particular with the value 0.05 % specified in paragraph [0032] of

the patent specification - does not call into question construing the claimed method as mentioned above.

3.3.3 The board concludes that, assuming that the skilled person would have found a motivation to apply the teaching of document D4 to the method of document D3, he would then have arrived at a method in which

- the step of dewatering, drying and subjecting to spectrometric measurement a portion of the sample and the step of carrying out image fibre analysis with another portion of the sample would, contrary to the claimed method, not start running in parallel as required by the claimed method, and
- the sample would be first diluted before being split into the two sample portions but, contrary to the claimed method, this first dilution step would be followed by a second dilution step of the sample portion to be subjected to fibre analysis.

At least for these two reasons the board cannot follow the appellant's contention that the claimed method is rendered obvious by the disclosure of documents D3 and D4.

3.4 *Document D3 in combination with document D5*

Document D5 is a copy of partial parts of a manual of operation of the apparatus PulpExpert described in the brochure shown in document D4. Document D5 discloses, among others, a flow chart (see page 8 of document D5, and page 5 of the English translation D5T) similar to the flow chart shown on page 2 of document D4, and during the oral proceedings the appellant did not dispute that, as far as the relevant issues under consideration are concerned - and with the sole exception of the passage of document D5 already

considered in point 3.3.2 above, last paragraph -, the technical content of document D5 (see English translation D5T) does not go beyond the disclosure of document D4.

Therefore, in view of the conclusions already drawn in point 3.3 above with regard to the combination of documents D3 and D4, the combination of documents D3 and D5 does not render obvious the claimed method either.

3.5 *Document D3 in combination with the common general knowledge*

3.5.1 According to the line of argument of the appellant regarding document D3 and the common general knowledge in this field, the distinguishing feature of claim 1 identified in point 3.2.1 above would - contrary to the opposition division's finding - not result in any technical benefit, even after consideration of the different technical aspects addressed in paragraph [0019] of the patent specification. The appellant submitted that the claimed method therefore constituted an arbitrary modification of the method of document D3 and only one out of equally obvious alternative procedures that the person skilled in the art would readily consider in advance; the appellant also referred to decision R 9/14 (point 2.4.3 of the Reasons) and decision T 2044/09 (Catchword and points 4.6 and 4.8 of the Reasons) in support of its view that, in these circumstances, the claimed method did not involve an inventive step.

Notwithstanding the submission of the appellant that the distinguishing feature under consideration would not result in any technical benefit and did even amount to an arbitrary modification, during the oral proceedings

the appellant agreed with the board that, assuming that the claimed invention would not result in any technical effect over the disclosure of document D3, the objective problem solved by the claimed method over the disclosure of document D3 could at least be formulated in terms of finding an alternative to the sample handling stage of the method of document D3, and the remaining discussion was based on this formulation of the objective problem. In view of this formulation of the technical problem, there is no need to address the passages of decision R 9/14 referred to by the appellant as they relate to the submission of comparative tests to prove an effect or improvement of an invention. As regards the appellant's reference to decision T 2044/09, the board notes that this decision relates to the issue of inventive step of arbitrary non-functional modifications, and in particular of distinguishing features of a claim that are not linked to a particular functionality, and concludes that this decision is not pertinent to the present case as the distinguishing feature of the claimed method identified in point 3.2.1 above does not constitute an arbitrary non-functional modification within the meaning of the mentioned decision, but - as will be apparent from the following discussion - involves technical functional considerations linking the distinguishing feature to a specific functionality, namely the diluted and/or dried state of the sample to be analysed before and after being split for the purposes of carrying out the two different analyses.

3.5.2 The appellant has submitted that, as regards the way the sample was handled and prepared for the purposes of subjecting the sample to measurement and fibre analysis, the skilled person would consider the three following alternatives, and that these three alternatives were equivalent in terms of their technical effects:

i) splitting the sample in two portions, drying one portion for spectroscopy measurement, and diluting the other portion for fibre analysis;

ii) drying the sample, splitting the dried sample in two portions, taking one dried sample portion for spectroscopy measurement, and diluting the other dried sample portion for fibre analysis; and

iii) diluting the sample, splitting the diluted sample in two portions, drying one of the diluted sample portions for spectroscopy measurement, and taking the other diluted sample portion for fibre analysis.

According to the appellant, option i) was disclosed in document D3, and since the three options were fully equivalent in terms of their technical effects, the skilled person would also consider selecting option iii) so as to arrive at the claimed method, the probability in the selection of this option being of about 33 %. In addition, according to the appellant, option iii) was the only one which the skilled person would select if it was desired to finish both measurements roughly at the same time because, as it was already discussed during the first-instance proceedings, while the spectroscopic analysis was relatively quick, the fibre analysis took longer.

3.5.3 The board, however, is not convinced by this line of argument. The appellant's submissions rely on carrying out spectroscopic measurements with a sample portion in a dried state and carrying out fibre analysis with another sample portion in a high degree of dilution, and in this context it would be counter-intuitive for the skilled person to reverse the splitting and dilution steps, i.e. to consider diluting a sample when a portion of the sample is required to be subsequently analysed in a dried state.

During the oral proceedings the appellant disputed that the skilled person would not consider diluting the sample before splitting it in the two portions and submitted that, on the contrary, in practice the pulp sample presented inhomogeneities - for instance, caused by partial sedimentation of the pulp during handling of the same - that were detrimental to the spectroscopic measurement, and that it was straightforward for the skilled person working in this field to first dilute the sample in order to improve the homogeneity of the sample before splitting it. In the opinion of the board, however, the potential effect of sample inhomogeneities is already compensated, at least in part, in the method of document D3 since according to the disclosure of this document the method is carried out not with one single sample, but with a plurality of them (document D3, page 2, third paragraph and page 5, penultimate paragraph), thus statistically averaging the possible effects of inhomogeneities present in each of the samples. In addition, according to document D3 the spectroscopic measurement procedure can be applied to both solid and liquid samples (page 6, first paragraph), and the skilled person would understand that possible inhomogeneities in the liquid-fibre phases of the sample would not be detrimental for the spectroscopic measurement.

In any case, even assuming that the skilled person would follow the approach indicated by the appellant, he would then consider the dilution of the sample to a degree sufficient to homogenize the sample, but not to a higher degree, and in any case not to the high degree of dilution required by the claimed method, i.e. to a degree of dilution that would enable carrying out fibre analysis with a portion of the diluted sample (see point

3.3.2 above). Thus, the skilled person would, at the most, arrive at a method involving a dilution regime analogous to that of document D4, i.e. at a method in which the sample is first diluted but in which the portion of the diluted sample used for fibre analysis requires further dilution, and - as already concluded in point 3.3.2 above with regard to document D4 - this dilution regime would not be sufficient to render obvious the dilution regime defined in claim 1 and requiring one single dilution step.

Similar considerations apply to a subsidiary approach submitted by the appellant during the oral proceedings and according to which the skilled person would consider endowing the method of document D3 with an automatic handling of the sample, this procedure requiring, according to the appellant, as a routine measure the dilution of the sample in order to allow an easy flow of the same along the different operation lines. Even assuming that the skilled person, relying on his common general knowledge, would follow the approach indicated by the appellant, he would then dilute the initial sample to a degree sufficient to enable the sample to flow along the operation lines, but not to a higher degree, let alone to the degree of dilution required for fibre analysis, for reasons analogous to those given in the former paragraph.

3.5.4 The board concludes that the common general knowledge invoked by the appellant would not lead the skilled person to modify the method disclosed in document D3 so as to arrive at the claimed method.

3.6 Having regard to the above considerations, the board concludes that the method of claim 1 involves an inventive step (Article 56 EPC 1973) over the content of

documents D3, D4, D5 and the common general knowledge mentioned by the appellant. The same conclusion applies to dependent claims 2 to 10.

4. In view of the conclusion in point 3.6 above, and as already noted in point 3.1.2 above, there is no need in the circumstances of the case to address the question of whether documents D3, D4 and D5 were rendered available to the public before the relevant date of the patent.

5. Since the opposition division already concluded that the ground for opposition under Article 100(b) EPC 1973 did not prejudice the maintenance of the patent as granted (cf. point II. above) and this finding has not been contested in the present appeal proceedings, and since - as already concluded above - the claimed invention involves an inventive step and thus the ground for opposition under Article 100(a) together with Article 56 EPC 1973 does also not prejudice the maintenance of the granted patent, the appellant's opposition has no prospect of success and, therefore, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Kiehl B. Müller

Decision electronically authenticated