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**D E C I S I O N**  
of 29 May 1996

**Case Number:** T 0125/94 - 3.3.2

**Application Number:** 87303382.3

**Publication Number:** 0243104

**IPC:** B01F 5/04

**Language of the proceedings:** EN

**Title of invention:**  
Fluid injection system

**Applicant:**  
Fluid Technology Limited

**Opponent:**  
-

**Headword:**  
Fluid injection/FLUID TECHNOLOGY

**Relevant legal provisions:**  
EPC Art. 111(1), 123(2)

**Keyword:**  
"Amendments - substantial change of factual framework -  
remittal"

**Decisions cited:**  
-

**Catchword:**  
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Case Number: T 0125/94 - 3.3.2

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.2  
of 29 May 1996

**Appellant:** Fluid Technology Limited  
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**Representative:** Pacitti, Pierpaolo A.M.E.  
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**Decision under appeal:** Decision of the Examining Division of the European Patent Office posted 28 September 1993 refusing European patent application No. 87 303 382.3 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** P. A. M. Lançon  
**Members:** G. J. Wassenaar  
J. Van Moer

**Summary of Facts and Submissions**

I. European patent application No. 87 303 382.3 was refused by a decision of the Examining Division.

The decision was taken on the basis of claims 1 to 10 filed on 7 January 1993 as main request and two alternative claims 1 filed as first and second auxiliary request filed during oral proceedings on 7 September 1993.

II. The Examining Division held that the subject matter of the independent claims 1 (main and auxiliary requests) did not meet the requirements of Article 56 EPC, because of lack of inventive step over US-A-2 058 508 (2).

In their decision, the Examining Division mentioned the following features as technical differences between the apparatus as claimed in claim 1 and the one disclosed by (2):

- (a) the specification of the venturi and
- (b) the use of a flexible bladder, piston or movable member to separate the first and second volumes.

They took the view that these differences did not solve any technical problem in a surprising or advantageous way.

The patentability of the dependent claims was not considered in the contested decision (paragraphs 8 and 9 of the reasoning).

III. The Appellant lodged an appeal against this decision.

With the Statement of the Grounds of Appeal, the Appellant submitted a new set of claims 1 to 12 as main request together with a further claim 1 as a subsidiary request.

IV. In a communication of the Board pursuant to Article 110(2) EPC it was indicated that claim 1 of the main request had been amended substantially as compared with original claim 1 and the independent claims considered in the contested decision and that now the prior art document DE-B-1197065 (6), mentioned in the search report but not mentioned in the contested decision, had become relevant.

In reply the Appellant filed a new set of claims 1 to 11 with an amended description and figures.

In a second communication the Board indicated that claims 4 to 9 extended beyond the content of the application as filed (Article 123(2) EPC).

V. With telefax of 12 April 1996 the Appellant deleted the claims on file and substituted for that new claims 1 to 5.

No reference was made to any auxiliary request.

The new main claim reads as follows:

"1. A fluid delivery and metering apparatus for delivering a metered flow of a second fluid into a first fluid, said apparatus comprising a tubular member (12) arranged to form part of a fluid flow line through which the first fluid flows under pressure; a venturi (14) contained within the tubular member (12) defining high

and low pressure sides (18,20) thereof; a first volume arranged to contain the first fluid; a second volume arranged to contain the second fluid; conduit (22) providing communication between the high pressure side (18) of said venturi (14) and said first volume; a metering line (40) providing communication between said second volume and the low pressure side (20) of said venturi (14) whereby, on a pressure differential being created across said venturi (14) as a result of a flow of said first fluid through said tubular member (12), said first fluid is caused to flow into said first volume thereby reducing said second volume and consequently displacing the second fluid into the metering line (40); and a bypass conduit (50) provided between the high pressure side (18) of the venturi (14) and the metering line (40) to allow the delivery of the first fluid into the metering line (40) intermediate of the second volume and the tubular member (12);

said apparatus being characterised in that:

said first volume comprises a first chamber (24) and said second volume comprises a second chamber (30), one of said first and second chambers (24,30) being disposed substantially within the other of said first and second chambers (24,30);

said first and second volumes are separated one from the other by pressure responsive means (30) comprising a movable element received within the outer one of said first and second chambers (24,30) and defining at least a portion of the walls of the inner one of said first and second chambers (24,30); whereby said flow of said first fluid into said first volume displaces the pressure responsive means (30) thereby reducing said second volume and consequently displacing the second fluid into the metering line (40); and in that:

said apparatus is configured as a disposable, sealed apparatus."

VI. The Appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 5 filed with telefax dated 12 April 1996.

### Reasons for the Decision

1. The appeal is admissible.
2. *Allowability of amendments*

Present Claim 1 differs from original claim 1 by the following features:

- (a) the chambers for the first and second volume are disposed substantially within each other;
- (b) the pressure responsive means comprise a movable element within the outer chamber and defines at least a portion of the walls of the inner chamber;
- (c) the bypass conduit is arranged between the high pressure side of the venturi and the metering line and
- (d) the apparatus is configured as a disposable sealed apparatus.

Feature (a) follows from original claim 2 in combination with page 6, lines 14 to 19 of the original description and original Figures 1, 2 and 8.

Feature (b) is based on page 4, line 19 to page 5, line 5 and page 6, lines 19 to 22 in combination with Figures 1, 2 and 8 of the application as originally filed.

Feature (c) is based on original claim 3 and original Figures 1, 2, 9 and 10.

Feature (d) is based on original claim 10 and original Figure 8.

Claim 2 corresponds to original claim 4.

Claim 3 is based on original Figures 1, 2 and 10.

Claim 4 is based on original claim 11 in combination with original Figures 9 to 14.

Claim 5 corresponds to original claim 12.

Thus, the present set of claims does not contain subject matter which extends beyond the content of the application as filed and therefore satisfies the requirements of Article 123(2) EPC.

### 3. *Novelty and inventive step*

- 3.1 An essential feature of present claim 1 is the requirement that the apparatus is configured as a disposable, sealed apparatus. This requirement, based on original dependent claim 10, has not played any role in the contested decision. This new feature in the main claim is related to the use of the apparatus as a portable apparatus for spraying herbicides or pesticides and prevents the operator from coming into contact with the concentrated active ingredient to be sprayed (page 9, line 20 to page 10, line 6 of the original description).

Document (2) taken as closest prior art in the contested decision relates to a device for introducing an odourizing liquid in a gas distribution network. The

known device is a large fixed apparatus which is neither portable nor configured to be disposable and not related to the technical field of crop spraying.

- 3.2 The closest prior art with respect to present claim 1 should be sought for amongst existing crop spraying devices.

According to the search report, the technical field searched was B 01 F (IPC 4), which relates to mixing devices in general. Crop spraying devices are, however, more likely to be found in other technical fields of the IPC such as B 05 B.

Thus, the amendments made at the appeal stage have not only substantially changed the factual framework of the contested decision, they also could require an additional search to determine the closest prior art.

- 3.3 For these reasons and to guarantee the Appellant's right to appeal against a decision based on new facts, the Board exercises its power under Article 111(1) EPC, to remit the case to the first instance for further prosecution.

4. Since the examination of Appellant's main request has not been terminated, it is for this decision immaterial if the subsidiary request is still in force or has been implicitly deleted with Appellant's telefax of 12 April 1996.



**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 5 filed on 12 April 1996.

The Registrar:

The Chairman:

P. Martorana

P. A. M. Lançon

