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D E C I S I O N
of 28 September 1999

Case Number: T 0575/95 - 3.2.4

Application Number: 88203013.3

Publication Number: 0325816

IPC: A01G 7/00

Language of the proceedings: EN

Title of invention:
Method for forcing hydrangea plants into bloom all year round

Patentee:
Eveleens, Leo Anne

Opponent:
Koel- en Vrieshuizen, Wed. P. Eveleens & Zonen B.V., Sidaco Plant B.V., Tuinbouw Studiegroepen, Vereniging van Bloemenveilingen
HBH Holding B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 55(1)(a)

Keyword:
"Evident abuse - no"
"Main request -, independent claims - lack of novelty"
"Auxiliary requests - inadmissible"

Decisions cited:
-

Catchword:
-

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Case Number: T 0575/95 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 28 September 1999

Appellant: (Proprietor of the patent)
Eveleens, Leo Anne
Poelweg 36
1424 PB De Kwakel
PAYS-BAS

Representative:
Coppens, Johannes H.M.
Nederlandsch Octrooibureau
P.O. Box 29720
2502 LS Den Haag
PAYS-BAS

Respondent I: (Opponent I)
Koel- en Vrieshuizen, Wed. P. Eveleens & Zonen B.V., Sidaco Plant B.V., Tuinbouw Studiegroepen, Vereniging van Bloemenveilingen
P.O. Box 120, P.O. Box 35, Polderweg 22A,
P.O. Box 567, P.O. Box 9324
5260 AC Vught, 1430 AA Aalsmeer, 2641 NT Pijnacker, 2675 ZV Honselersdijk, 2300 PH Leiden
PAYS-BAS

Representative:
de Vries, Johannes Hendrik Fokke
Octrooibureau Los en Stigter B.V.
P.O. Box 20052
1000 HB Amsterdam
PAYS-BAS

Respondent II: (Opponent II)
HBH Holding B.V.
Haven 10
2161 HK Lisse
PAYS-BAS

Representative:
de Vries, Johannes Hendrik Fokke
De Vries & Metman B.V.
Gebouw Autumn
Overschiestraat 184 N
1062 XK Amsterdam
PAYS-BAS

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 15 May 1995 revoking European patent No. 0 325 816 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
J. P. B. Seitz

Summary of Facts and Submissions

I. European patent No. 0 325 816, filed on 23 December 1988 and claiming priority from the Dutch patent application 8800010 of 5 January 1988, was revoked by the opposition division's decision dispatched on 15 May 1995.

On 12 July 1995 the proprietor filed an appeal and paid the appeal fee, filing the statement of grounds on 25 September 1995.

II. The independent claims of the granted patent read:

"1. Method for forcing hydrangea plants (Hydrangea macrophylla (Thunb.)Ser.) into bloom after application of a dormant period for the hydrangea plants which are lignified and possess flower buds at reduced temperature, characterized in that hydrangea plants grown from tissue culture material are used which have undergone a dormant period at a temperature below 0°C after flower bud formation and lignification."

"6. Method for storing lignified hydrangea plants possessing flower buds at reduced temperature, characterized in that hydrangea plants grown from tissue culture material are stored at a temperature below 0°C after flower bud formation and lignification."

III. The following documents played a role in the appeal proceedings:

D1 Teelt van hortensia, Consulentschap in Algemene Dienst voor de Bloemisterij, No. 4, Teeltinformatie Pot- en Perkplanten, October 1987

D2 Declaration of Mr Nicolaas Jozef Kappelhof of 31 March 1992

D5 De teelt van hortensia, ir. Daan van der Spek, January 1987, an internal report of Wed. P. Eveleens en Zonen b.v. that is not for publication

D7 Declaration of Mr Johannes Jurjen Boonstra of 30 January 1996

D8 "Algemeen Rijksambtenarenreglement" (General Rules for Civil Servants), 1 January 1990, Articles 59 to 61 (filed as Annex I with the appellant's letter of 8 July 1998)

D9 Letter of 12 April 1989 from Prof. Dr Ir. R. L. M. Pierik of the Laboratorium voor Tuinbouwplantenteelt, Wageningen, Netherlands and annex (filed as Annex II with the appellant's letter of 8 July 1998)

D10 Communication from Mr Baaij to the board of Wed. P. Eveleens en Zonen b.v. and to Mr L. A. Eveleens of 20 July 1987, pages 1, 9 and 10 (filed as Annex III with the appellant's letter of 8 July 1998)

D11 Agreement for Termination of Employment between Wed. P. Eveleens en Zonen b.v. and L. A. Eveleens of 14 September 1987 (pages 1 and 5 filed as Annex IV with the appellant's letter of 8 July 1998 and pages 1, 3, 4 and 5 filed with respondent I's letter of 15 June 1999)

IV. In its decision revoking the patent, the opposition division found each of the appellant's main and auxiliary requests to be unallowable for lack of novelty or lack of inventive step of the claimed subject-matter, in view essentially of D1.

V. In section I of the statement of grounds of appeal the appellant maintained that Mr J. Boonstra, the person responsible for the paragraph "Weefselkweek" on page 16 of D1, was not authorized by the appellant to publish information received during one of his visits to the company of the appellant. Thus, in the appellant's view, there was an evident abuse in relation to the patentee and so document D1 should not be taken into consideration for application of Article 54 EPC, having regard to Article 55 EPC.

In section II of the statement of grounds of appeal, the appellant made the briefest of references to all the observations and amendments he had made before the opposition division. He added that he maintained all the requests he had made before the opposition division.

The board said in section 10 of its communication of 12 January 1998 that it would not deal with these blanket assertions.

After two extensions of the time limit for replying to the board's communication, the appellant promised in section 4 on page 7 of his letter of 8 July 1998 to substantiate the blanket assertions as soon as possible.

In the annex to the summons to oral proceedings the board stated that it intended "to decide on the basis of the requests on file three weeks before the oral proceedings".

VI. Oral proceedings took place on 28 September 1999 in the presence of the parties.

In these oral proceedings the appellant dropped a request for reimbursement of the appeal fee made in the notice of appeal, dropped all the auxiliary requests made before the opposition division, and presented two new auxiliary requests.

The first auxiliary request comprises independent claims 1 and 6 which correspond to the granted claims 1 and 6 except that the wording "with the proviso that a dormant period for 8-10.5 months at a temperature of -0.5°C is excluded" is added at the end of each of them.

The second auxiliary request comprises independent claims 1 and 6 which correspond to the granted claims 1 and 6 except that the wording "with the proviso that a dormant period for at least 8 months at a temperature of -0.5°C is excluded" is added at the end of each of them.

VII. In the appeal proceedings the respondents (opponents) argued that the appellant was incorrect in arguing that Article 55 EPC was applicable to D1 and, as this was the only ground for appeal, the appeal should be dismissed rather than re-opening the novelty and inventive step discussion.

In the oral proceedings the respondents objected to the filing of the two new auxiliary requests in the oral proceedings since this was after the time limit set by the board of three weeks before the oral proceedings.

VIII. The appellant requests that the decision under appeal be set aside and that the patent be maintained:

(1) as granted (main request),

(2) on the basis of his first auxiliary request filed during the present oral proceedings,

(3) on the basis of his second auxiliary request filed during the present oral proceedings.

The respondents request that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. *Document D1*

2.1 It is not in dispute that document D1 was published in November 1987 (see the last two lines of page 1 of the Dutch original of Mr P. W. M. Lentjes' letter of 7 January 1994). Thus D1 was published less than six months before the present patent's priority date (5 January 1988) but more than six months before the actual filing date (23 December 1988).

2.2 However the appellant maintains that Mr J. Boonstra, who was responsible for the paragraph "Weefselkweek" on page 16 of D1, received the information in this paragraph during one of his visits to Wed. P. Eveleens en Zonen b.v. but was not authorised to publish it. Thus the appellant considered that there was an evident abuse in relation to him and D1 should not be taken into consideration for application of Article 54 EPC, having regard to Article 55 EPC.

2.3 If the disclosure of D1 is to be excluded under Article 55(1)(a) EPC then the answer to each of the following four questions will need to be yes.

Has it been proved that Mr Boonstra got the information in the paragraph "Weefselkweek" on page 16 of D1 from Wed. P. Eveleens en Zonen b.v. and/or Mr L. A. Eveleens? If so, has it been proved that this information was confidential? If so, has it been proved that it was Mr L. A. Eveleens who was harmed? If so, does the period of grace of six months set out in Article 55(1) EPC apply to the date of priority?

It must be borne in mind throughout this examination of evident abuse that, since D1 was undoubtedly published before the priority date, in line with established case law the burden of proof for the allegations lies with the appellant who is making them.

2.4 Firstly, therefore, has it been proved that Mr Boonstra got the information in the paragraph "Weefselkweek" on page 16 of D1 from Wed. P. Eveleens en Zonen b.v. and/or Mr L. A. Eveleens?

2.4.1 According to section 6 of Mr Boonstra's declaration D7, the information in the paragraph "Weefselkweek" on page 16 of D1 "is based upon his own practical experience/observations" of which he gives examples.

The appellant argues however that these examples could not have involved Hydrangea tissue culture material. He maintained in his letter of 8 July 1998 that Wed. P. Eveleens en Zonen b.v. was the sole grower (apart from entrusted small research laboratories) of Hydrangea tissue culture material in 1985 - 1988. Page 2, line 8 (Hortensia) of D9 states that 100210 Hydrangea tissue culture plants were produced in vitro in 1988 in the Netherlands. Section D.1.3 on page 9 of

D10 lists "A draft budget 1987 for the laboratory on yearly basis (01.12.1986) wherein the left column was crossed out" while section D.1.3.1.c on page 10 specifies 100000 Hydrangeas. Thus in 1988 Wed. P. Eveleens en Zonen b.v. would produce all the Dutch tissue culture Hydrangeas. So Mr Boonstra's knowledge of freezing Hydrangea tissue culture material must have come from Wed. P. Eveleens en Zonen b.v..

Respondent I replied by letter of 15 June 1999 that the plants referred to in the draft budget in D10 and the plants referred to in the production list in D9 were not the same because the former concerned 1987 and the latter 1988. Moreover, according to section 2 of D2, freezing of Hydrangea obtained by tissue culture took place at Koelhuis Hillegom from 1985 for Wed. P. Eveleens en Zonen b.v. **and other customers**.

In the oral proceedings the appellant plausibly argued that the 1987 plants and the 1988 were in fact one and the same because the time needed to grow them would mean that plants budgeted for in 1987 would be ready in 1988.

The appellant concludes that Mr Boonstra gained his knowledge about freezing of Hydrangea tissue culture material from Wed. P. Eveleens en Zonen b.v..

If in fact there were other firms producing Hydrangea obtained by tissue culture at the relevant time (i.e. 1988), then the board is surprised that the respondents did not simply name one or more of these firms to refute the appellant's argument that Wed. P. Eveleens en Zonen b.v. was essentially the sole grower of Hydrangea tissue culture material, an argument raised as long ago as 8 July 1998. After all, the respondents (comprising five Dutch opponents) could be expected to know who these firms would be.

However this is still not proof that Mr Boonstra got the information in question from Wed. P. Eveleens en Zonen b.v. and/or Mr L. A. Eveleens.

The appellant considers that page 23 of D1, that under "Bewaring" (Overwintering) specifies frost-free overwintering but nothing about freezing tissue culture plants, points to Mr Boonstra's lack of experience of freezing tissue culture plants and means that the information on page 16 of D1 must have been based on what he heard at Wed. P. Eveleens en Zonen b.v.. The board cannot agree that this must be the case, presenting different information in different parts of a lengthy document concerning many aspects is quite common and can be merely a result of insufficient revision of the document.

2.4.2 It is not disputed that there was a meeting in Spring 1987 at the offices of Wed. P. Eveleens en Zonen b.v., attended by Mr Boonstra and Mr L. A. Eveleens to discuss forcing hydrangea plants into bloom propagated from tissue culture (see the last paragraph but one of the appellant's letter of 31 October 1995, and sections 2 and 3 of Mr Boonstra's declaration D7).

Mr Boonstra states in section 4 of his declaration D7 that "In the discussions with Wed. P. Eveleens the declarant has never spoken about the cooling/freezing of Hydrangea propagated from tissue culture for forcing". Mr K. P. Eveleens in his letter of 15 January 1996 agrees with this.

It seems from paragraph 2 of page 2 of the appellant's letter of 31 October 1995 that he considers that he discussed the present invention at the meeting.

However section 1 of his earlier letter of 21 June 1994 states that "On the basis of recently found notes of discussions between the patentee and Mr J. Boonstra in 1987, the patentee gets the impression that key details of the present invention were indeed not mentioned during these discussions." Section 3.1 of the opposition division's decision adds that the appellant "did not uphold his objection that document 1 was a document falling under the provisions of Article 55(1) EPC" (see also lines 1 and 2 of page 3 of the minutes of the oral proceedings before the opposition division).

In the appeal proceedings the appellant apparently changes his mind, arguing that Mr J. Boonstra received the relevant information during one of his visits to Wed. P. Eveleens en Zonen b.v.. In the oral proceedings before the board the representative for the appellant agreed that Mr Boonstra did not receive the relevant information at the meeting in Spring 1987 but received it before or afterwards. However the letter of 21 June 1994 states that "key details of the present invention were indeed not mentioned during these discussions" i.e. not just a single discussion but presumably all the discussions at Wed. P. Eveleens en Zonen b.v..

Thus the appellant changed his mind a first time after finding notes of discussions and then changed his mind again. The board has been given no reasons or evidence for this second about turn. It seems that the appellant has concluded that, as Mr Boonstra undoubtedly had the relevant information before the priority date of the present patent, then he must have received it from Wed. P. Eveleens en Zonen b.v. and/or the appellant. However there is a lack of evidence as to specifically when or from whom Mr Boonstra received the information, and plainly indications of confusion on behalf of the appellant.

2.4.3 Thus the board does not find the allegation that Mr Boonstra got the information in the paragraph "Weefselkweek" on page 16 of D1 from Wed. P. Eveleens en Zonen b.v. and/or Mr L. A. Eveleens to be proven. Accordingly the answer to the first question (see section 2.4 above) is no.

2.5 Secondly, has it been proved that, if Mr Boonstra did get the information in D1 from Wed. P. Eveleens en Zonen b.v. and/or Mr L. A. Eveleens, that the information was confidential?

2.5.1 The appellant has not said specifically when or from whom Mr Boonstra was supposed to have received the information but presumably this is supposed to have occurred during one of Mr Boonstra's visits in Spring 1987 to Wed. P. Eveleens en Zonen b.v.. However the board must be satisfied that whatever Mr Boonstra learnt during these visits was confidential.

2.5.2 The appellant says in paragraph 2 of page 2 of the letter of 31 October 1995 that he mentioned the confidential nature of the discussions and that a written confidentiality agreement was not necessary. On the other hand, section 3 of Mr Boonstra's declaration D7 says that several of the management of Wed. P. Eveleens en Zonen b.v. were present at the meeting in Spring 1987, that the meeting was held in an open atmosphere and based on an open knowledge system, and that neither implicitly nor explicitly was secrecy demanded from him. This seems not only to be supported by the letter of Mr K. P. Eveleens of Wed. P. Eveleens en Zonen b.v. dated 15 March 1994 which says that "The meetings were always held in a constructive atmosphere, whereby in no way whatsoever was Mr Boonstra bound to secrecy" but also by page 1, paragraph 2 of Mr P. W. M. Lentjes' letter of 7 January 1994 indicating that the role of a consultant existed inter

alia in an open exchange of information and knowledge. In the face of this, the fact that D5 is an internal report of Wed. P. Eveleens en Zonen b.v. and contains the invention is insufficient to prove that the patentee was trying to keep this invention secret.

2.5.3 The appellant stated in the letter of 8 July 1998 that Mr Boonstra - as a civil servant employed by the Ministry of Agriculture - was bound by the General Rules for Civil Servants (D8) of which the translation of Article 59(1) reads "The civil servant is obliged to secrecy about subject matter which has become known to him in the execution of his official duty, as far as this obligation follows from the nature of said subject-matter." Section 3 of Mr Boonstra's declaration D7 that the meeting was held in an open atmosphere and based on an open knowledge system, and that neither implicitly nor explicitly was secrecy demanded from him therefore had to be put into perspective. The problems concerning hydrangea culture could be discussed in an open atmosphere because the participants of Wed. P. Eveleens en Zonen b.v. knew that as far as firm's secrets were at stake Mr Boonstra was bound to secrecy.

2.5.4 However it has not been demonstrated that, see the last part of Article 59(1) of D8, the nature of the subject-matter that Mr Boonstra obtained from Wed. P. Eveleens en Zonen b.v. (and this might or might not have included the information on page 16 of D1) was such that he had an obligation to keep it confidential. Mr K. P. Eveleens of Wed. P. Eveleens en Zonen b.v. said in the letter dated 15 March 1994 that "in no way whatsoever was Mr Boonstra bound to secrecy". Mr Lentjes of the DLV (Agricultural Extension Service), the successor of the organisation responsible for publishing document D1, put it upon record in the letter of 7 January 1994 that the role of a consultant

existed inter alia in an open exchange of information and knowledge. The board considers that it is not its task to judge what Mr J. Boonstra is or is not allowed to do within the framework of the General Rules for Civil Servants, particularly since it seems that no legal action has been taken in the Netherlands against the DLV and/or Mr J. Boonstra.

2.5.5 The facts before the board thus do not prove that the relationship between Mr J. Boonstra and Wed. P. Eveleens en Zonen b.v. was one bound to confidentiality.

2.5.6 If the information received by Mr Boonstra did include the information on page 16 of D1, then it may be that Mr L. A. Eveleens realised later on that this information was of value for a patent application and should therefore have been kept secret. However the board considers that if information is given to someone without an explicit or implied obligation to secrecy then such an obligation cannot be subsequently imposed on that person, i.e. once public - always public.

2.5.7 Accordingly the answer also to the second question (see section 2.5 above) is no.

2.6 If Mr Boonstra's information came from Wed. P. Eveleens en Zonen b.v. and/or Mr L. A. Eveleens, and the information was confidential, has it been proved that it was Mr L. A. Eveleens who was harmed?

2.6.1 It is of course clear that Mr L. A. Eveleens is in a worse position than he would have been if D1 had not been published, therefore he was harmed by the publication. This does not mean however that he was harmed in the sense meant by Article 55(1)(a) EPC.

Page 5 of the appellant's letter of 26 October 1993 states that "Mr L.A. Eveleens was managing director of ... Wed. P. Eveleens & Zonen b.v. ... in his capacity as managing director of the above company, was developing the claimed method ...". Thus whatever information Mr Boonstra received during his visits to Wed. P. Eveleens & Zonen b.v. was at that time undoubtedly the property of the company not the personal property of Mr L. A. Eveleens. Thus if something was in fact impermissibly disclosed then at that time it would have been the company which would have been disadvantaged. This is also confirmed by the letter of Mr K. P. Eveleens in the name of Wed. P. Eveleens & Zonen b.v. of 15 January 1996, stating that the proprietary rights of report D5 belonged to the firm Wed. P. Eveleens & Zonen b.v. and that possible resulting rights were never assigned to Mr L. A. Eveleens (see also section 9 of respondent I's letter of 15 June 1999). Moreover, as set out in the above section 2.5.2, Wed. P. Eveleens en Zonen b.v. deny that anything confidential was disclosed in the discussions with Mr Boonstra.

It is clear from D11 that parts of the business of Wed. P. Eveleens en Zonen b.v. were to be transferred to Mr L. A. Eveleens to take effect on 1 November 1987. However respondent I argues in section 9 of the letter of 15 June 1999 that this transfer did not include any know-how or rights on hydrangea tissue culture. From the facts on file the board is unable to conclude that the rights to the present invention were transferred to Mr L. A. Eveleens. Even if the board were to assume that the rights on hydrangea tissue culture had been transferred then the point must be made that if the information in document D1 was not regarded as confidential in Spring 1987 then a transfer of rights cannot alter the situation, see also the above section 2.5.6.

2.7 As the answer to each of the first three questions set out in section 2.3 above is no, the board considers that the appellant has failed to prove the allegations of evident abuse that he needs to prove in order to proceed to the fourth question (at present being considered by the Enlarged Board of Appeal) of whether the period of grace of six months set out in Article 55(1) EPC applies to the date of priority.

2.8 As Article 55 EPC is therefore not applicable in the case of D1, the board finds that D1 is a state of the art document (Articles 52(1), 54(2) and 56 EPC) and so must be taken into account when examining novelty and inventive step.

3. *Main request - novelty*

3.1 The board agrees with the opposition division's finding in section 3 of the grounds for its decision that the subject-matter of the independent claims 1 and 6 as granted lacks novelty over D1. The appellant has not - at any time during the appeal proceedings - given any arguments whatsoever in support of the novelty over D1 of the subject-matter of either of these claims.

3.2 Therefore the subject-matter of independent claims 1 and 6 is not considered to be new within the meaning of Article 54 EPC.

3.3 Thus the main request is not allowable.

4. *First and second auxiliary requests*

4.1 The first auxiliary request comprises independent claims 1 and 6 which correspond to the granted claims 1 and 6 except that the wording "with the proviso that a dormant period for 8-10.5 months at a temperature of -0.5°C is excluded" is added at the end of each of them.

4.1.1 The appellant arrived at this disclaimer in the following manner.

Line 35 of page 4 of the patent specifies "forcing period 6-12 weeks". The paragraph "Weefselkweek" (Tissue culture) on page 16 of D1 says that "Dormant plants can be frozen at -0.5°C as from the end of December. The bloom period can then be postponed until November-December."

According to the appellant, the time from the start of freezing at "the end of December" until the start of the bloom period in "November-December" is thus 11 to 12 months and the forcing period is 1.5 to 3 months. He concludes that therefore D1 discloses a dormant period (i.e. freezing at -0.5°C) of between 11 months minus 3 months (i.e. 8 months) and 12 months minus 1.5 months (i.e. 10.5 months). 8 months and 10.5 months are therefore the end limits of the disclaimed range.

4.1.2 A disclaimer should adhere as closely as possible to the wording of the disclosure of the novelty-destroying document. The present disclaimer is however based on a calculation combining information from the patent and from D1 and immediately raises doubts as to whether it is allowable under Article 123(2) EPC.

4.1.3 Firstly the patent also specifies a forcing period of 40 days (page 4, line 20) i.e. less than 1.5 months. Secondly the bloom period in D1 is said to be "November-December" which means from the start of November to the end of December i.e. 10 to 12 months after the end of the previous December, not 11 to 12 months. This would lead to a lowering of the lower limit of the disclaimed dormant period.

Accordingly the end time limits in the disclaimer do not seem to be clearly based either on the patent or on D1 and so raise doubts under Article 123(2) EPC.

4.1.4 Moreover the statement in D1 that "The bloom period can then be postponed until November-December" cannot reasonably be taken to mean that the bloom period must be postponed to start **not earlier than** November. It plainly means that the bloom period can be postponed also to times earlier than November, e.g. August, as supported by preceding sentence in D1 that "tissue culture offers possibilities for **spreading** delivery and perhaps for **year-round cropping.**"

Thus D1 apparently implicitly discloses also dormant periods which are not excluded by the present disclaimer, so that the disclaimer apparently fails to make the subject-matter of the independent claims 1 and 6 of the first auxiliary request novel.

4.2 The second auxiliary request comprises independent claims 1 and 6 which correspond to the granted claims 1 and 6 except that the wording "with the proviso that a dormant period for at least 8 months at a temperature of -0.5°C is excluded" is added at the end of each of them.

4.2.1 Thus the claims of the second auxiliary request differ from those of the first auxiliary request only by having no upper limit on the dormant period. The arguments in the above sections 4.1.1 to 4.1.4 apply also to the second auxiliary request whose disclaimer apparently fails to make the subject-matter of the independent claims 1 and 6 of the second auxiliary request novel.

4.3 In spite of the board's statement in the annex to the summons to oral proceedings that it intended "to decide on the basis of the requests on file three weeks before the oral proceedings", the first and second auxiliary requests were not submitted until the oral proceedings. Since moreover the independent claims in these requests are on the face of it unallowable (indeed their subject-matter appears not even to be novel), the board decides not even to admit the requests into the proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

N. Maslin C. Andries