

[Abstract prepared by the PCT Legal Division (PCT-2015-0003)]

Case Name:

OXONICA ENERGY V. NEUFTEC

Decision Date:

9 July 2009

Jurisdiction:

ENGLAND AND WALES COURT OF APPEAL (UK)

Abstract:

Neuftec was in possession of an international patent application concerning fuel additives. Neuftec entered into an exclusive license agreement with Oxonica, based on the claims in the PCT application. During the application process, the scope of the claims was narrowed over the claims as filed in the original PCT application. The PCT application matured into the grant of several national patents, with the narrowed claims, in a number of countries. Oxonica developed and sold a product which was covered by the claims in the PCT application, but not by the (narrowed) claims in the patents granted in several countries. Oxonica stopped paying royalties in respect of sales in these countries arguing that the product did not fall within the licensed claims, and the product was not actually covered by any patent in these countries. The Court of Appeal upheld the interpretation of the license agreement adopted by the judge at first instance whereby royalties have to be paid for any product covered by the claims of the PCT application.

PCT Legal References:

- Article 6
- Article 28

Source: <http://www.bailii.org/ew/cases/EWCA/Civ/2009/668.html>

Neutral Citation Number: [2009] EWCA Civ 668

Case No: A3/2008/2531

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (PATENTS COURT)
Peter Prescott QC (sitting as a Deputy Judge of the High Court)
HC 07 C 00437**

Royal Courts of Justice
Strand, London, WC2A 2LL
09/07/2009

B e f o r e :

**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE RT HON LADY JUSTICE ARDEN
and
THE RT HON LORD JUSTICE JACOB**

Between:

Oxonica Energy Limited

**Claimant/
Appellant**

- and -

Neuftec Limited

Defendant/Respondent

**(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)**

**Iain Purvis QC and Piers Acland (instructed by Hammonds LLP)
for the Claimant/Appellant
Richard Hacon (instructed by Watson Farley & Williams LLP)
for the Defendant/Respondent
Hearing date: 23 June 2009**

HTML VERSION OF JUDGMENT

Lord Justice Jacob:

1. This appeal is from a decision of Peter Prescott QC sitting as a Deputy Judge of the Patents Court. It is about the construction of a patent and know-how licence deed and is with permission granted by the Judge.
2. The events leading up to the deed were not controversial. Celox, the predecessor in title to Neuftec, the respondent, had the idea of using lanthanides and particularly cerium oxide as a fuel additive. It had done some research work on this. The Judge states the position:

".... It is not disputed that Celox was possessed of a body of knowhow about lanthanide oxide fuel additives – including test results on motor vehicles – whose significance cannot be dismissed".

Celox also had the idea that delivery of the additive in the form of nanoparticles might be beneficial. It sought a partner with expertise in this field and found an Oxford University spin-off company called Oxonica Materials Ltd. Although this company had nanoparticle expertise it had none in fuel additives or their market or indeed any general commercial experience or experience of the chemicals industry.

3. It was initially decided to proceed with a 50/50 joint venture company. But, probably for tax reasons, it was decided to proceed in a different way. Oxonica Materials Ltd. formed a wholly-owned subsidiary (which hereafter I will call "Oxonica"). Celox (by now Neuftec), Oxonica and its parent and certain individuals then entered into two agreements on the same day, 7th December 2001. They were respectively called "the main agreement" and the "licence deed" in argument. It is common ground that they must be construed together. For convenience I annex to this judgment copies of the provisions of the two agreements relevant to this appeal.
4. For present purposes the parties to the agreements other than Oxonica and Neuftec do not matter. One can proceed simply on the basis that Neuftec were licensors and Oxonica licensees.
5. Prior to the agreements Neuftec (technically its predecessors in title, but no matter) had filed an application for a patent under the Patent Co-operation Treaty. Such applications are often called "International Applications" but there is no such thing as an international patent. The PCT provides a procedure whereby upon filing the application, applications for individual patents in the various countries (or regions) you designate will be made within a year. The system also provides for a central, at least initial, prior art search. If the application is proceeded with each national, or as the case may be regional office (e.g. the European Patent Office) will examine the application applying its own national (or regional) standards.
6. Annexed to the Licence Deed was a copy of the specification of Neuftec's PCT patent application – called in the Deed "the application appended hereto" In addition to a description of the invention it contained claims both to a method and to a product. It is sufficient for present purposes to consider the widest method claim:

1. A method of improving the efficiency with which fuel is burnt in a fuel burning apparatus and/or a method of reducing the emissions produced by a fuel which is burnt in a fuel burning apparatus, said method comprising dispersing an amount of at least one particulate lanthanide oxide in the fuel.

Of course in practice (and as contemplated in the application) the apparatus is an internal combustion engine. And in practice the idea was to make (or have made) and sell a fuel additive for use in the method.

7. After the agreements, the patent application matured first into national and regional applications and ultimately into granted patents in a number of countries. In yet others the applications are still pending. In at least some important countries, as a result of prior art, the claims of the granted patents are narrower than those of the PCT application. The bundle of granted European patents is illustrative. The main process claim reads:

1. A method of improving the efficiency with which fuel is burnt in a fuel burning apparatus and/or a method of reducing the emissions produced by a fuel which is burnt in a fuel burning apparatus, said method comprising dispersing an amount of at least one particulate lanthanide oxide in the fuel, wherein the lanthanide oxide is coated with an alkyl carboxylic anhydride.

So the method actually patented in Europe is narrower than that of the PCT application – it is confined to the use of particulate lanthanide coated with an alkyl carboxylic anhydride rather than the use of particulate lanthanide oxide generally.

8. Following the agreements, Oxonica took over research and its scientists developed a commercial product which went by the trade name Envirox. It consisted of particulate cerium oxide coated with an alkyl carboxylic acid. Thus it fell within the narrower claim as granted in Europe. It was made for Oxonica by a third party company. Sales were made and royalties were paid to Neuftec. So far there was no problem.
9. But then Oxonica found another source of supply. The product, called Envirox 2, was different. It consists of particulate cerium oxide coated with a lipophilic material but one which is not an alkyl carboxylic anhydride. So it falls outside the claims of the granted patents in Europe (and maybe elsewhere). It is that fact which gives rise to the present dispute. Neuftec contends, and Oxonica denies, that according to the correct construction of the Deed royalties are payable on Envirox 2.
10. Before going further I should mention briefly the well-known principles for the construction of contracts and other commercial documents identified in *Mannai Investment Co Ltd v. Eagle Star Assurance* [\[1997\] UKHL 19](#), [\[1997\] AC 749](#) and *Investors Compensation Scheme v. West Bromwich Building Society* [\[1997\] UKHL 2](#); [\[1998\] 1 WLR 896](#), at 912-913 *per* Lord Hoffmann. There is no need to go to these in detail for there was no dispute as to the correct approach. The exercise requires "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."
11. The exercise is of course made all the more difficult if it is apparent to the reader that the draftsman of the document was inept or did not fully understand the legal background – as was the case here. Lord Bridge gave guidance as to the approach in such a case. Poor drafting itself provides:

no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis (*Mitsui Construction Co Ltd v. A-G of Hong Kong* (1986) 33 BLR 14).

It also follows that, faced with such a document fine arguments based upon supposed consistency of language or even thought throughout the document, will carry less or no weight than with an obviously carefully and well-drafted document – one obviously drafted by someone who knew what he was about.

12. Also of relevance to this case is the well-known principle that:

"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear" *per* Lord Reid in *Wickman Machine Tool v L Schuler* [1974] AC 235 at 251.

13. I can now turn to identify the dispute in more detail. Under Clause 4.2 royalties are payable on the Net Sale Price. This is calculated on the price paid for Licensed Products (see the definition). Licensed Products means any product etc "falling within the scope of claims in the Licensed Application or Licensed Patent". Licensed Application means the PCT "and any continuation, continuation-in-part or divisional applications thereof as well as foreign counterparts and re-issues thereof". Licensed Patent means "any patent issuing from the Licensed Application thereof as well as foreign counterparts and reissues thereof."

14. Envirox 2 falls within the scope of the claims of the PCT application but does not fall within the scope of the claims of granted patents (e.g. those in Europe). So royalties are payable only if it is a product "falling within the scope of claims in the Licensed Application or Licensed Patent." All turns on the meaning of that phrase as understood when interpreting it for the purpose of clause 4.2. I add that qualification because the Definition section of the Deed opens with the words "unless the context otherwise requires" so the draftsman made it clear that it is possible that different contexts may give rise to different meanings. Curiously the definition section of the Main Agreement contains no equivalent reservation. Whether that was intentional or just sloppiness one cannot say.

15. Three possible interpretations of a product falling within the scope of "claims in the Licensed Application or Licensed Patent" were canvassed:

- (1) That it meant any product covered by the claims (in practice the widest claims) of the PCT Application. This was the Judge's interpretation. The consequence is a once and for all single question, applicable worldwide: is the product within the claims of that Application
- (2) "Or" in the phrase "Licensed Application or Licensed Patent" signified alternatives. So royalties were due on any product within the meaning of either

"Licensed Application" or "Licensed Patent." The consequence would be that royalties would be payable if a later patent claim was wider than the claim of the PCT application. This was Neuftec's alternative interpretation, supported in its Respondent's Notice.

(3) The phrase should be read as if the words *as the case may be* were added. So when and if the PCT application was superseded by a national application one looked to the claims of that. And if that in turn was superseded by a granted patent, one then went by the claims of that. So whether royalties were payable on a particular product depended on the patent position in the country of the transaction at the time of the transaction. This was Oxonica's interpretation.

16. Each side supported its position with what I can call "big" arguments supported by various subsidiary arguments based on inference from other clauses. The latter have minor significance here given the poor drafting and the *Mitsui* principle of construction. So it is not necessary to deal with these in detail. What matters are the big arguments.
17. Not surprisingly, each side said that the other's position amounted re-writing the document rather than construing it. I do not agree with either view. Given that neither side suggests the agreements are void for ambiguity (a position of last resort in relation to the construction of any contract) the search is on to ascertain what the reasonable reader would make of the disputed phrase in the context of the two documents and the background.
18. Oxonica's big points were first that if meaning (1) were correct it would have to pay royalties on products which had no patent protection in their place of sale. It would or might be exposed to competition from third parties who did not have to pay royalties. That, it said, made no business sense. Secondly, if meaning (1) were correct, then no meaning was being given to "or Licensed Patent". It is not permissible for the Court to re-write the contract so as to give no meaning to words at all – a meaning must have been intended and the only rational meaning was (3).
19. Neuftec's big points were first that because the agreements had to be read together, one should look at the total package on either side. Oxonica were not only getting a licence under whatever patent rights might emerge from the application; they were also getting a worldwide licence to use the Neuftec knowhow and the benefit of a worldwide non-competition clause (cl.10.1.1 of the Main agreement). There is no reason in logic or business sense why what was agreed should be paid for should be confined to the scope of patents or patent applications at any one place or time. This was not a bare patent licence where there would be more logic to the notion that the licensee only would pay for the licensed patent rights. Here it was Neuftec which was providing knowhow to get Oxonica into the fuel additive business and the royalties should reflect that rather than leave Oxonica free of all royalty if it could find a way round a narrowed patent claim. Secondly there were real potential practical difficulties if meaning (3) were adopted: for every sale one would have to consider the patent situation in the country concerned – a potentially enormous exercise which would involve not only accountants, but also an examination of the state of the patent or patent application(s) locally.
20. The Judge reasoned that Oxonica's meaning (i.e. (3)) should be rejected. His main reason was that it completely disregarded the fact that the Deed was a patent and

know-how licence. On any basis the licence was world-wide for the use of the know-how. So there was no rational business reason why Oxonica should get free use of the know-how for a product made using or originating from the use of that know-how in any particular country just because no patent or patent application, or no patent or patent application with a scope wide enough to cover that product was extant at the time of the transaction.

21. The Judge was reinforced in his view about the significance of know how by the problems which would occur in relation to clause 4.6 of the Deed if Oxonica were right. Besides a royalty Neuftec is entitled to payment of a £1m if the turnover "attributable to the Business" in a calendar year exceeds "£10m" (clause 4.5) and, if there is a positive Cumulative Profit, a payment under clause 4.6. Both criteria depend on the amount of the "Business." That is a defined term and relates "solely to the exploitation of the IP Rights." These are the "intellectual property rights licensed under the Deed." Although "intellectual property rights" is not defined one must certainly read it in context as covering both patents and know-how. So how is one to deal with products not covered at a particular time and place by the patent claims but produced using the know-how directly or indirectly? It is an impossible task and cannot have been intended.
22. The Judge also derived support for rejecting the Oxonica construction by reason of the recitals to the two agreements. He thought they indicated their broad purpose: - to licence Neuftec's technology generally (see recital B of the main agreement of the agreement). Recital B of the Deed again is not patent specific – merely saying that the licence is to be "under the patent application".
23. The Judge was also much impressed with the practical problems which would arise from Oxonica's construction and applied the *Wickman* principle to say that the parties cannot be supposed to have intended that.
24. Looking just at the big picture, which I think is the only way to approach these poorly drafted documents, I think the Judge was right to reject Oxonica's construction. It offends one's business sense to say that Oxonica were to get free use of the know-how in every country where there was to be no patent or a restricted patent. True it is that in any such country third parties would be free to compete either generally (if there were no patent) or by circumventing the patent claim (if it were restricted) but in either case they would have to develop their own knowhow.
25. Mr Iain Purvis QC for Oxonica sought to downgrade the know-how element of the licence so that it could in effect be disregarded. He said it was not open to the Judge to proceed on the assumption that the knowhow was of any real significance. There was no real evidence as to the point. And besides once the PCT application had been published the knowhow was practically in the public domain. I do not agree. The reasonable reader of the Main Agreement and Deed could only assume that what the parties at the time regarded as a significant body of know-how was being licensed – see for instance recital B to the Main Agreement. The parties even thought it would continue to be valuable until ultimate termination – see clause 2.4 of the Deed (the clause has lots of difficulties vis-à-vis competition law on any view, but the point made here is valid).
26. Mr Purvis also sought to downplay the practical problems of his territorial-patent-claim-at-the-time-of transaction construction. But I was not convinced. On his

construction one would have to decide for each sale and country of sale what the current state of the patent or application was in that country. The position would be in a constant state of flux. And there are other difficulties. Even without the temporal problems there are problems as to what law would apply – some laws, e.g. UK law regards (or used to regard – I am not deciding the point) a completed sale abroad of a product whose ultimate destination is here as not covered by patent law, German law would take a different view.

27. Mr Purvis pointed out there was a potential similar but much lesser problem in relation to the Annual Accounts which on any view would have to separate out the licensed business from any other business of Oxonica's. But to my mind the practical difficulties there are of a lesser order. The *Wickman* principle causes one to lean heavily against the Oxonica construction – confirming the view reached by consideration of the position as to know-how.
28. Consideration of what the position might be in non-PCT countries (there are a few, mainly in South America) provides added confirmation. If, as I think, any product covered by the language of the claims of the PCT application is royalty-bearing wherever it is sold there is no difficulty. But if one has to consider the claims in patents (or applications therefore) of non-PCT countries as well as those of PCT countries on a country by country basis, you have the further problem of deciding whether the patents in non-PCT countries are "foreign counterparts", which could be difficult.
29. What then of Oxonica's two big points? The first (that it would or might be open to competition in non-patent countries and, having to pay the 5%, would be at a disadvantage) is offset by two things. First the notional competitor would have to develop its own know-how from scratch, including perhaps finding his own way round the local patent claims, whereas Oxonica were given a flying start and had the use of the know-how. And second even on Oxonica's construction it would be subject to such a disadvantage unless and until the patent claims were narrowed – so the parties cannot have regarded the potentiality of competition as all that significant.
30. The second point – that the words "or Licensed Patents" would be deprived of all meaning – is at first sight very powerful. The Judge reasoned that it all depended on context. In [101] he started, mistakenly as it happened, by reasoning that the words *as the context may require* should be read into the definitions in the Deed. That was an unnecessary step because, as I have pointed out, the words are actually already there. The Judge then reasoned that the purpose of the Deed was two-fold – to license all and any patents and know how and to provide for payment of royalties. The contexts of licensing and payment were different. As regards licensing, it was essential that Oxonica should get everything. Hence the context required that both the application and any ensuing patents should be licensed. But as regards payments it was not necessary to tie the payments to exactly what was being licensed. After all the payments were for know-how and a non-competition clause too. So, in the context of payable royalties the alternative of "or Licensed Patent" should not be read as applicable – they made no sense or at least an unreasonable sense in that context.
31. In the end I am convinced by this. Initially I felt uncomfortable with ignoring the closing words "or Licensed Patent" in the definition of Licensed Products for the purposes of deciding what was royalty bearing. But in the end, I think that has to be done to make rational sense of this appallingly drafted document. At least the

draftsman recognised that his definitions might not apply if the context otherwise required, and in this instance context requires just that.

32. Accordingly I would uphold the judgment below essentially for the same reasons as the Judge (and not for the reasons advanced by way of a Respondent's notice) and dismiss this appeal.

The Main Agreement

WHEREAS

(A) the Company [now called Oxonica Energy] is a wholly owned subsidiary of Oxonica working with nano particle technologies.

(B) Neuftec wishes to licence exclusively its technology and know how that involves any product, development or invention containing lanthanide oxides, particularly cerium oxide (Ce_xO_y), in whole or in part for use in connection with the combustion of fuels to the Company for a royalty income.

AGREEMENT:

1. INTERPRETATION

In this Agreement

1.1 the following words have the following meanings that is to say:

1.1.3 "the Business" means the business of the Company as carried on from time to time relating solely to the exploitation of the IP Rights."

1.1.9 "IP Rights" means the intellectual property rights licensed under the Neuftec Licence Deed."

1.1.11 "Licensed Application" has the meaning given in the Neuftec Licence Deed;

1.1.12 "Licensed Patent" has the meaning given in the Neuftec Licence Deed."

1.1.14 "Neuftec Licence Deed" means a deed in the Agreed Terms proposed to be made between the Company, Neuftec and the shareholders of Neuftec whereby Neuftec will license certain technology to the Company;

1.1.15 "Neuftec Royalty Fees" mean those royalty fees subject to those payment provisions as set out in the Neuftec Licence Deed;

1.1.16 "Notional Oxonica Royalty Fees" means notional royalty fees equal to the amount of the Neuftec Royalty Fees."

1.1.18 "the Territory" means the world.

4. PROMOTION OF THE BUSINESS

The Company and Oxonica undertake to Neuftec generally to use all reasonable endeavours to promote the Business and the interests of the Company.

6. ACCOUNTING PROVISIONS

For the purposes of this Agreement and the Neuftec Licence Deed, the following accounting provisions shall apply:

6.1 The Company shall procure that annual accounts are prepared ("Annual Accounts") on a basis consistent with the audited accounts of the Company and to be made up to the Company's financial year end. The Annual Accounts shall include:

6.1.1 a breakdown showing turnover, profit and liabilities of the Business separately from other businesses undertaken by the Company;

- 6.1.2 a statement of cashflow of the Business (the "Cashflow"). This shall be cash available to the Business after satisfaction of all liabilities due and payable which are attributable to the Business;
- 6.1.3 a statement of the annual profit of the Business ("Annual Profit") as defined in, and calculated in accordance with Clause 6.3;
- 6.1.4 a statement of the cumulative profit of the Business ("Cumulative Profit") as defined in, and calculated in accordance with, Clause 6.4;
- 6.1.5 a statement of the Neuftec Royalty Fees.

10. NON-COMPETITION RESTRICTIONS

10.1 Neuftec shall not during the currency of this Agreement or for a period of one year from the date of termination of this Agreement either solely or jointly with or on behalf of any third party directly or indirectly do or permit any of the following without the prior written consent of the Company:

- 10.1.1 Carry on or be engaged or interested (except as the holder for investment of securities dealt in on a recognised stock exchange) in any business competing with the Business within the Territory;
- 10.1.2 solicit the custom of any third party who is or has been at any time during the term of this Agreement a customer, or client, or prospective customer of the Business for the purpose of offering to such customer, client, or prospective client goods or services similar to or competing with those of the Business."

14. DURATION AND TERMINATION

14.2 Any party shall be entitled to terminate this Agreement forthwith by written notice to the others in the following circumstances.

14.2.5 if the last of the Licensed Patents has expired or the last of the Licensed Applications has been revoked without right of further appeal.

LICENCE DEED

WHEREAS

(A) Neuftec has developed a fuel additive invention for which an international patent application (number PCT/GB01/02911) was filed at the UK Patent Office on 29 June 2001, a copy of which is attached in the Schedule hereto.

(B) Neuftec, the Licensee and Oxonica Limited have entered into an agreement dated 7th December 2001 (the "**Main Agreement**") under which Neuftec agrees to grant and the Licensee agrees to accept an exclusive licence under the patent application to manufacture, use and sell certain products, as defined below, on the terms set out in this Deed.

1. DEFINITIONS

In this Deed the following words and expressions shall, except where the context otherwise requires, have the following respective meanings.

"Business" shall have the meaning as set out in the Main Agreement.

"Licensed Application" means the application appended in the Schedule hereto and any continuation, continuation-in-part or divisional applications thereof as well as foreign counterparts and re-issues thereof;

"Licensed Know How" means all technical information owned or possessed by Neuftec at the date of this Deed and thereafter, whether patentable or

otherwise, relating to the combustion of fuels using cerium oxide, which information is necessary or useful for the development, manufacture, use and/or sale of the Licensed Products hereunder;

"Licensed Patent" means any patent issuing from the Licensed Application thereof as well as foreign counterparts and reissues thereof;

"Licensed Products" means any product, process or use falling within the scope of claims in the Licensed Application or Licensed Patent;

"Main Agreement" means an agreement entered into between the Licensee, Oxonica Limited and Neuftec of even date;

"Net Sale Price" means the price paid by a purchaser of the Licensed Products excluding all discounts and costs attributable to freight, distribution and import duty;

"Neuftec Royalty Fees" are as defined in Clause 4.2.

2. GRANT OF LICENCE

2.1 In consideration of the Licensee agreeing to pay to Neuftec the payments set out in Clause 4, Neuftec hereby grants the Licensee an irrevocable (save as provided in Clauses 2.2 and 2.3) exclusive licence under the Licensed Know How, the Licensed Application and/or Licensed Patent in all fields to make, manufacture, use, sell and/or otherwise exploit the Licensed Products throughout the Territory including but not limited to the right to sub-licence the manufacture of the Licensed Products to a third party.

2.2 This Deed shall come into effect on the Commencement Date and shall continue in force until either the date on which (a) the last of the Licensed Patents has expired or (b) the last of the Licensed Applications has been revoked without right of further appeal or (c) the Licensee goes into liquidation (except for the purposes of amalgamation or reconstruction) or (d) the Main Agreement is terminated in accordance with the provisions in Clause 14 of the Main Agreement (the **"Term"**).

2.4 Upon the termination of this Deed, the Licensee shall return all Licensed Know How, and all records and documentation relating thereto, and shall cease to make manufacture, use, sell and/or otherwise exploit the Licensed Products or sub-licence their manufacture to a third party.

3. EXPLOITATION

The Licensee shall use its commercially reasonable endeavours to exploit the Licensed Application and/or the Licensed Patent by the manufacture and sale of the Licensed Products throughout the Territory during the term.

4. ROYALTY FEES

4. 2 During the Term the Licensee shall pay to Neuftec a royalty based on five percent (5%) of the Net Sale Price received by the Licensee (the **"Neuftec Royalty Fees"**). Where the Licensed Product is marketed in a combination package containing other products or materials, the Net Sale Price for the purpose of determining the Neuftec Royalty Fees shall be calculated on the weight per kilogram of Licensed Products used in the combination package multiplied by the Net Sale Price per kilogram of the Licensed Product marketed separately.
4. 5 If, during the currency of this Deed, the Annual Accounts show that the turnover attributable to the Business is £10 million or more in any given calendar year, the Company shall, subject to the provisions of Clause 4.7, pay to Neuftec the sum of £1

million (the "**Revenue Milestone Royalty**") at the earliest opportunity following the preparation, approval and signature of the Annual Accounts (not to be unreasonably delayed).

4. 6 If the Annual Accounts show that there is a positive Cumulative Profit, the Company shall, subject to the provisions of Clause 4.7, pay to Neuftec 25% of the amount of the Annual Profit shown in the Annual Accounts.

5. PATENT PROSECUTION AND RENEWAL

5. 2 Neuftec shall perform all such acts as either Neuftec and/or the Licensee may consider necessary or desirable to obtain the grant of the Licensed Patent provided that the costs and fees shall be met by the Licensee provided that such costs and fees have been agreed in advance between the Parties.
5. 3 Neuftec shall not amend the specification of any of the claims in respect of the Licensed Application or Licensed Patent without first notifying the Licensee of its intention so to do.
5. 4 The Licensee shall during the Term of this Deed pay all renewal fees and perform all such acts necessary to maintain the Licensed Patent once granted in the jurisdictions in which the Licensee is exploiting the Licensed Patent and Neuftec shall produce to the Licensee invoices for such renewal fees at least sixty (60) days before the last day for renewing the grant of the Licensed Patent.
5. 5 Save with the express prior written consent of the Licensee, Neuftec shall not during the Term of this Deed agree to abandon the Licensed Application or allow the Licensed Patent to lapse.

8. INFRINGEMENT OF LICENSED PATENTS

8. 1 In the event that any Party becomes aware of any infringement or suspected infringement of the Licensed Application and/or Licensed Patent or misappropriation of the Licensed Know How, the Parties shall as soon as practicable thereafter consult to decide what steps should be taken to prevent or terminate such infringement.

Lady Justice Arden:

33. I agree.

The President of the Queen's Bench Division:

34. I also agree that this appeal should be dismissed for the reasons given by Jacob LJ.