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D E C I S I O N
of 18 March 2003

Case Number: T 0098/00 - 3.3.1

Application Number: 92901898.4

Publication Number: 0522167

IPC: C10M 105/38

Language of the proceedings: EN

Title of invention:

Method for manufacturing a refrigerating system

Patentee:

MATSUSHITA REFRIGERATION COMPANY

Opponent:

Cognis Deutschland GmbH

Headword:

Refrigerating system/MATSUSHITA

Relevant legal provisions:

EPC Art. 56, 69, 111(1), 112(1)(a), 114(1), 123(2)(3)
EPC R. 57a

Keyword:

"Main request: inventive step (no) - obvious solution in view of the closest state of the art and common general knowledge"
"First auxiliary request: extension of the protection conferred (yes) - Article 69 EPC not relevant for interpreting the claims within Article 123(3) EPC"
"Second auxiliary request: introduction by the Board at the oral proceedings of a fresh document reflecting the common general knowledge - inventive step (no) - obvious solution"
"Third auxiliary request: remittal to the first instance for further prosecution (no)"
"Fourth auxiliary request: referral of a question to the Enlarged Board of Appeal (no)"

Decisions cited:

G 0009/91, G 0001/98, T 0406/86, T 0295/87, T 0111/98,
T 0190/99

Catchword:

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Case Number: T 0098/00 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 18 March 2003

Appellant: MATSUSHITA REFRIGERATION COMPANY
(Proprietor of the patent) 22, Takaidahondori 3-chome
Higashiosaka-shi,
Osaka-fu 577 (JP)

Representative: Patentanwälte
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Respondent: Cognis Deutschland GmbH
(Opponent) Cognis IP
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Representative: -

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 30 November 1999
revoking European patent No. 0 522 167 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: A. J. Nuss
Members: P. F. Ranguis
R. T. Menapace

Summary of Facts and Submissions

I. The Appellant (Proprietor of the patent) lodged an appeal against the decision of the Opposition Division to revoke the European patent No. 0 522 167 (European patent application No. 92 901 898.4) on the ground that its subject-matter did not involve an inventive step (Article 56 EPC).

II. The sole claim (Claim 1 as granted) read as follows:

"1. A method for manufacturing a refrigerating system for use in refrigerators comprising a compressor, an evaporator and a condenser disposed in a refrigerant circulating loop using as refrigerant 1,1,1,2-tetrafluoroethane, and a lubricant having a viscosity of 2 to 8 cst (at 100°C) and comprising a major component of an ester produced by reacting one or more of di- or higher polyhydric alcohols having 8 or less carbon atoms with one or more of monovalent normal chain (linear) or branched fatty acids having 5 to 8 carbon atoms is used for lubricating said compressor and wherein the water content inside the refrigerating system is forced to be de-aired under vacuum to a level of 560 ppm or less and the lubricant is dry-deaired to have a dissolved water content of 80 ppm or less to thereby reduce the water content to a level not higher than the saturation concentration of water of the lubricant".

III. The Opposition sought revocation of the patent in suit on the grounds that the claimed subject-matter lacked novelty or did not involve an inventive step (Article 100(a) EPC). The opposition was supported by several document including:

- (4) US-A-4 177 145

- (6) Y. Ohta "Recent Trends in Refrigerator Oil"
Lubrication, Vol. 24, No. 8, 1979, pages 535
to 539; English translation of parts of pages 535
to 537

- (7) G.K. Filonenko, P.D. Lebedew "Einführung in die
Trockentechnik", VEB Fachbuchverlag Leipzig 1960,
Seiten 110 to 111,

- (8) WO-A-90 12849

IV. The Opposition Division held that starting from document (8) as the closest state of the art, which disclosed a refrigeration composition within the scope of Claim 1 of the patent in suit, it would have been obvious to accomplish the double de-airing step in view of the common technical knowledge of the person skilled in the art which could be derived from documents (4), (6) and (7).

V. In a written communication, the Board informed the parties that document:

- (9) Ullmanns Encyclopädie der technischen Chemie,
Band 20, Verlag Chemie, 1981, pages 602 to 605, in
particular, page 602, left-hand column

might reflect a relevant technical background as
common general knowledge.

VI. At the Oral proceedings which took place on 18 March 2003, the matter relating to Claim 1 as granted was discussed. After this discussion, the Appellant filed amended claims in form of two auxiliary requests:

Claim 1 of the first auxiliary request differed from Claim 1 as granted in that the expression "to a level of 560 ppm or less" was replaced by "to a level of about 560 ppm".

Claim 1 of the second auxiliary request differed from Claim 1 as granted in that the expression "to a level of 560 ppm or less" was replaced by "to a level of 560 ppm".

VII. The Board, of its own motion, introduced into the proceedings document

(10) Refrigeration and Air Conditioning,
Bill C. Langley, 1986, Prentice-Hall, Englewood
Cliffs, N.J. 07632, pages 16 to 21

and, after the handing over of that document, the oral proceedings were adjourned from 11.20 a.m until 1.00 p.m as recorded in the minutes.

VIII. The Appellant's submissions in the written proceedings and during the oral proceedings regarding Claim 1 as granted (main request) may be summarised as follows:

The use of the compositions of document (8) in refrigeration systems generally resulted in an inferior freezing efficiency, i.e. enhanced power consumption of the system. Further, insufficient durability of the composition was generally observed. Relying upon the

comparative experiments set out in the patent in suit on page 5, lines 24 to 32, the Appellant set forth that the problem to be solved was to provide a refrigerating system which was reliable, i.e. provided a satisfying durability of the system, ecological and economically acceptable. In order to obtain satisfying durability of the system, the person skilled in the art would have considered the use of a drier packed with an appropriate agent such as disclosed in documents (4) and (6). Although these drying agents were capable of effecting a reduction of the water content within the system to an amount of 50 ppm or less, they might react with the lubricant during storage of the system, such that side-reactions might occur which affected performance of the refrigerating systems as a whole.

On the other hand, the skilled person was perfectly aware of the fact that the drying of a closed system, like a refrigerant circulating loop of the type specified in the opposed patent **could** be effected by de-airing the system under vacuum, as for example proposed in document (7). However, the skilled person was perfectly aware of the fact that drying a sealed system to a water content level of 50 ppm or less which could be obtained by the previously used drying agents or dryers would need a considerable drying time as well as application of an extremely low pressure to the system which both made this drying process inappropriate for mass production purposes in the production of refrigeration systems.

Accordingly, it could not have been expected that a reduction of the water content inside the refrigerating system to a level of 560 ppm only would be sufficient to obtain reliable performance of the system. This

rather moderate reduction of the water content was sufficient to significantly reduce the metal corrosion, degradation of the motor insulator, decrease of electrical characteristics and degradation of the lubricant.

Regarding Claim 1 of the first auxiliary request, the Appellant argued at the oral proceedings that the amendment did not offend the requirements of Article 123(3) EPC since Article 69 EPC stated that the description should be used to interpret the claims. In that context, it could be derived from the description that the value 560 was not a discrete value but encompassed a range as reflected by the term "about".

Regarding Claim 1 of the second auxiliary request, the Appellant argued at the oral proceedings that it could not have been expected in view of document (10) that a reduction of the water content inside the refrigeration system to a level of 560 ppm would be sufficient to obtain reliable performance of the system.

IX. The Respondent (Opponent) disputed in the written proceedings and at the oral proceedings that the subject-matter of the patent involved an inventive step and argued as follows:

In view of document (8) as the closest state of the art, the sole distinguishing feature was the two-step de-airing process of the refrigerating system. However, de-airing or evaporation, as means for reduction of water in refrigerant systems and lubricants, was common general knowledge from documents (6) and (7), rendering, therefore, the claimed subject-matter obvious.

X. The Appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or on the basis of Claim 1 of the first auxiliary request or of Claim 1 of the second auxiliary request, both submitted at the oral proceedings, or that the case be remitted to the first instance for further prosecution (third auxiliary request) or, as the fourth auxiliary request, that the following question be referred to the Enlarged Board of Appeal:

"Under which conditions may a technical board of appeal confirm revocation of a European Patent on the basis of a document which was introduced into the proceedings by the board itself during oral proceedings before the board?".

The Respondent requested that the appeal be dismissed.

XI. At the end of the oral proceedings the decision of the Board was announced orally.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is admissible.

Main Request

2. *Article 56 EPC - Inventive step*

2.1 The patent in suit relates to a method for manufacturing a refrigerating system for use in refrigerators having a compressor, an evaporator and a condenser disposed in a refrigerant circulating loop which employs 1,1,1,2-tetrafluoroethane (HFC-134a) as a refrigerant and a lubricant having a viscosity of 2 to 8 cst (at 100°C) comprising a major component of an ester, which is the feature group 3 according to the statement of grounds of appeal.

However, the Board, like the Opposition Division is confronted with the situation where a proper interpretation of the wording of the claim turns out to be necessary (cf. point II above). Indeed, the expression "the water content inside the refrigerating system is forced to be de-aired under vacuum to a level of 560 ppm or less" is unclear since de-airing under vacuum would leave the system essentially empty of gas or vapour. The Appellant submitted that the method basically proceeded as follows:

"In a first step the individual components of the system (compressor, evaporator, condenser) are connected, welded and sealed.

In a second step the assembled system is vacuum-dried to thereby effect a reduction of the water content of the system as assembled.

In a third step the lubricant according to the feature group 3 after having reduced the water content thereof to a level of 80 ppm or less and the refrigerant are sealed into the system.

After having completed this third step the water content inside the system is at a level of 560 ppm or less." (cf. page 6 of the statement of grounds of appeal).

Although, this interpretation is not stated in the description, the Board holds that this explanation is the most likely one for the skilled person reading the patent document since any other interpretation does not make technical sense (cf. T 190/99, point 2.4 of the reasons).

- 2.2 Document (8) discloses liquid compositions useful as refrigeration liquids comprising a major amount of at least one fluorine-containing hydrocarbons such as HFC-134a (cf. page 9, Table I) and a minor amount of at least one soluble organic lubricant comprising at least one carboxylic ester of a polyhydroxy compound containing at least 2 hydroxy groups and characterized by the general formula



(cf. page 5, lines 1 to 12 from the bottom). The liquid compositions are particularly useful as refrigerants in various refrigeration systems which are compression-type systems such as refrigerators, freezers, and air-conditioners (cf. page 27, lines 14 to 17).

- 2.3 The Board considers, as held by the Opposition Division and in agreement with both parties, that document (8) represents the closest state of the art and, thus, the starting point in the assessment of inventive step for the subject matter of Claim 1 according to the patent. Indeed, this document aims at the same objective as the

claimed invention, namely to provide refrigeration systems which are compression-type systems using the same combination of refrigerant and lubricant as the patent in suit.

- 2.4 The Appellant submitted that the use of the compositions of document (8) in refrigeration systems generally resulted in an inferior freezing efficiency, i.e. enhanced power consumption of the system. Furthermore, insufficient durability of the composition was generally observed. Relying upon the comparative experiments set out in the patent in suit on page 5, lines 24 to 32, the Appellant set forth that the problem to be solved was to provide a refrigerating system which was reliable, i.e. provided a satisfying durability of the system, ecological and economically acceptable.
- 2.5 However, if the Patentee chooses to give evidence of a technical effect by comparative tests, these must be carried out in respect of the relevant closest state of the art (cf. Case Law of the Board of Appeal of the European Patent Office, 4th edition 2001, I.D.7.7.2). In that respect, the advantages relied upon by the Appellant to sustain an inventive step are not based on a fair comparison between the teaching of document (8) and the claimed invention. Indeed, as a comparison test, the patent discloses an experiment wherein the lubricant (B-3), before introduction in the system, is placed in a beaker at a temperature of 25°C and in an atmosphere of relative humidity of 70%, and then placed in open air for 72 hours, the lubricant reaching thereby the saturation concentration of water of 1460 ppm (cf. page 5, lines 7 to 9 and 24). However, such a method of use is in complete contradiction with

the common general knowledge of the person skilled in the art such as reflected by document (9) which states that: "Water highly deteriorates the refrigerating properties of the oil and can trigger reaction with the refrigerant. Refrigerating oils must, therefore, be carefully dried before use or investigation" (cf. page 602, left-hand column). The person skilled in the art would not have used, therefore, within the disclosure of document (8), a lubricant whose water content reached the saturation concentration. What is described in the comparison test is just the contrary. This was admitted by the Appellant in the oral proceedings.

- 2.6 In the absence of a fair comparison between the claimed invention and the closest state of the art, the technical problem can only be seen in view of document (8) in the provision of a further method for manufacturing a refrigerating system having similar performances.
- 2.7 It is not contested that this technical problem is solved by the claimed invention.
- 2.8 It remains to be decided whether or not the claimed solution is obvious over the cited prior art.
 - 2.8.1 The relevant question is whether the person skilled in the art aware of document (8) and having in mind the technical problem as defined in point 2.6 above would have been directed to achieve a method for manufacturing a refrigerating system within the claimed invention.

2.8.2 Document (9) reflecting common general knowledge in the field of refrigeration, as part of the Ullmann's Encyclopedia of Technical Chemistry, discloses that "Water highly deteriorates the refrigerating properties of the oil and can trigger reaction with the refrigerant. Refrigerating oils must, therefore, be carefully dried before use or investigation" (cf. page 602, left-hand column). This was admitted by the Appellant at the oral proceedings.

2.8.3 The Appellant, however, argued that in order to obtain satisfying durability of the system, the person skilled in the art would have considered the use of drier packed with an appropriate agent such as disclosed in documents (4) and (6). Although these drying agents were capable of effecting a reduction of the water content within the system to an amount of 50 ppm or less, they might react with the lubricant during storage of the system, such as side-reactions might occur which affected performance of the refrigerating systems as a whole.

On the other hand, the skilled person was perfectly aware of the fact that the drying of a closed system, like a refrigerant circulating loop of the type specified in the patent in suit could be effected by de-airing the system under vacuum, as for example proposed in document (7). However, the skilled person was equally aware of the fact that drying a sealed system to a water content level of 50 ppm or less, which could be obtained by the previously used drying agents or dryers, would need considerable drying time as well as application of extremely low pressure to the

system, both of which made this drying process inappropriate for mass production purposes, which were required for the production of refrigeration systems.

Accordingly, it could not have been expected that a reduction of the water content inside the refrigerating system of a level of 560 ppm or less would be sufficient to obtain reliable performance of the system. This rather moderate reduction of the water content was sufficient to significantly reduce the metal corrosion, degradation of the motor insulator, decrease of electrical characteristics and degradation of the lubricant.

2.8.4 However, this argumentation misses the point in three aspects.

First, the claimed subject-matter does not refer to mass production and, furthermore, there is no hint at all of such a notion in the patent in suit. Therefore, this argument to set aside the relevancy of document (7) cannot be accepted.

Secondly, opposing the moderate reduction of the content of water which would be one of merit of the claimed invention to the drastic reduction of the content of water achieved possibly by the drying process of document (7) is not in line with the wording of Claim 1 which merely provides for a range of 560 ppm or less, encompassing, therefore, also a very minor content of water.

Thirdly, the term "comprising" used in Claim 1 renders that claim open-ended and, therefore, in addition to the compressor, the evaporator and the condenser, it

cannot be excluded that a dryer such as disclosed in document (4) be present (cf. Claim 1; col. 2, line 61 ff and figure 2).

2.8.5 In the Board's judgment, in view of document (8) which teaches the production of refrigerating systems involving refrigerants and ester oils within the definition of the claimed subject-matter, it would have been *prima facie* obvious to the person skilled in the art, faced with the technical problem defined in point 2.6 above, to use an oil which has been beforehand dried as taught by document (9) (cf. point 2.5 above) and, to de-air the system under vacuum since such a practical step forms part of the common general knowledge as admitted by the Appellant (cf. point 2.8.3 above). The upper limit of 560 ppm is certainly not mentioned in the prior art. But since a commonly used de-airing under vacuum can reduce the content of water under 50 ppm, this feature cannot help in rebutting the Board's finding.

2.8.6 The Appellant further argued at the oral proceedings that the teaching of documents (4) and (6) established a prejudice against the claimed method since the person skilled in the art would have used water removing agents and not a de-airing under vacuum step. However, as set out above (cf. point 2.8.4), the term "comprising" used in Claim 1 renders that claim open-ended and, therefore, in addition to the compressor, the evaporator and the condenser, it cannot be excluded that a dryer such as disclosed in document (4) be present. Therefore, any argument related to the absence of a dryer is irrelevant in the present case. Furthermore, according to the case law of the Boards of Appeal, the existence of a prejudice, i.e. a widely

held but incorrect opinion of a technical fact, is normally to be demonstrated by reference to the literature or to encyclopaedias (cf. Case Law of the Board of Appeal of the European Patent Office, 4th edition 2001, I.D.7.2). No evidence was submitted in that respect. For this reason, the Appellant, upon which the onus of proof rested, has not demonstrated that a prejudice existed in the art. The Board concludes, in agreement with the Opposition Division's decision, that the subject-matter of claim 1 is obvious in view of document (8) and the common general knowledge of the person skilled in the art.

2.9 Since the subject-matter of Claim 1 does not involve an inventive step, the main request must be rejected.

3. *Late filed requests - Rule 57a EPC - admissibility*

3.1 As is apparent from point VI above, the two sets of claim forming the present first and second auxiliary request were brought to the Board's and the Respondent's attention as well for the first time only at the oral proceedings before the Board. They were thus filed at the last possible moment. The Respondent did not object to these late-filed submissions.

3.2 The fresh amendment made by the Appellant to Claim 1 as granted concerns, in the first auxiliary request, the replacement of the expression "to a level of 560 ppm or less" by "to a level of about 560 ppm" and, in the second auxiliary request, the replacement of the expression "to a level of 560 ppm or less" by "to a level of 560 ppm".

Those amendments are designed to overcome objections raised by the Respondent/Opponent in the course of the appeal proceedings.

- 3.3 Therefore, those amendments are considered appropriate and necessary and the Board, in exercising due discretion, admits the claims according to the first auxiliary request and second auxiliary request into the appeal proceedings (cf. decisions T 295/87, OJ EPO 1990, 470, point 3 of the reasons; T 406/86, OJ EPO 1989, 302, point 3.1 of the reasons).

First auxiliary request

4. *Article 114 EPC - Extent of scrutiny*

The Appellant has amended the claim as granted in the course of the proceedings before the Board (cf. point VI above). In case of such amendments, they must be fully examined by the Board as to their compatibility with the requirements of the EPC, in particular with the provisions of Article 123 EPC (cf. G 9/91, OJ EPO 1993, 408, point 19 of the reasons).

5. *Article 123(3) EPC - Amendments*

- 5.1 The fresh amendment made by the Appellant to Claim 1 as granted concerns the replacement of the expression "to a level of 560 ppm or less" by "to a level of about 560 ppm".

- 5.2 The Appellant argued that this amendment did not offend the requirements of Article 123(3) EPC since Article 69(1) EPC stated that the description should be

used to interpret the claims. In that context, it could be derived from the description that the value of 560 ppm was not a discrete value but encompassed a range as reflected by the term "about".

5.3 However, Article 123(3) EPC precludes amending the claims during opposition proceedings in such a way as to extend the protection conferred. Claim 1 in its granted form excludes the values higher than 560 ppm. In contrast thereto, the term "about" now used associates a range of values close to the value of 560 ppm which encompasses not only values lower than 560 ppm but also values **higher** than 560 ppm. Therefore, such an amendment extends the protection conferred to a water content **above** the upper limit of 560 ppm set out in Claim 1 as granted contrary to the requirements of Article 123(3) EPC.

5.4 As to the reference to Article 69(1) EPC, the Board observes that this article does not deal with the issue related to amendments which is controlled by the provisions of Article 123 EPC. The provisions of Article 69(1) EPC are primarily intended to be applied by the Courts responsible for deciding on infringement cases (cf. G 1/98, OJ EPO 2000, 111, point 4 of the reasons or Singer, the European Patent Convention, English Version, 1995, page 253). These provisions are, therefore, not designed to be a substitute for the requirements of Article 123(3) EPC.

5.5 In conclusion, the subject-matter of Claim 1 of the first auxiliary request offends against the provisions of Article 123(3) EPC and this request must be rejected.

Second auxiliary request

6. *Article 123 (2)(3) EPC - Amendments*

6.1 The fresh amendment made by the Appellant to Claim 1 as granted concerns the replacement of the expression "to a level of 560 ppm or less" by "to a level of 560 ppm".

6.2 The Board, like the Respondent, sees no objection with respect to Article 123(2) EPC in the restriction to a single value which is actually supported by the application as filed on page 9, line 5 of the application as filed. Furthermore, that amendment also restricts the scope of the protection conferred and thus satisfies the requirements of Article 123(3) EPC.

7. *Article 56 EPC - Inventive step*

7.1 The situation differs from that of the main request only in that the solution to the technical problem set out in point 2.6 above requires that "the water content inside the refrigeration system is forced to be de-aired under vacuum to a level of 560 ppm".

7.2 The Appellant argued that the invoked common general knowledge directed the person skilled in the art to reduce the water content inside the refrigeration system under 50 ppm. It was, therefore, unexpected that a reduction of the water content inside the refrigerating system to a level of 560 ppm only would be sufficient to obtain reliable performance of the system.

- 7.3 However, none of the cited documents mentions any quantitative value reflecting the necessity for such a drastic reduction of the water content (under 50 ppm). The Appellant who carries the burden of proof has provided no evidence in that respect. Furthermore, document (10), confirming in that respect the previous declarations of the Appellant (cf. point 2.8.3 above) indicates at the Chapter "Dehydration" that "with the use of a high-vacuum pump and a proper vacuum gauge, a service technician can be certain that the refrigeration system has been properly evacuated to prevent the possible early breakdown of the lubricating oil and the refrigerant (cf. page 18, right-hand column). It is concluded that the person skilled in the art seeking to implement in view of document (8) a further method for manufacturing a refrigeration system would have been particularly concerned to reduce the water content in the system to an acceptable practical level. Under these circumstances, the choice of a suitable water content, i.e. 560 ppm, represents a routine task of the notional skilled person which does not involve an inventive step.
- 7.4 This request must, therefore, be rejected for lack of inventive step.

Procedural matters

8. *Article 114(1) EPC*

- 8.1 The conclusion of the Board regarding the main request (cf. point 2 above) was essentially based on the uncontested fact that de-airing the system under vacuum was part of the common general knowledge. The content of water which could be obtained in this way (under

50 ppm according to the Appellant) was not critical since the content of water defined in Claim 1 as granted was 560 ppm **or less**.

8.2 By contrast, the fresh auxiliary requests raised new issues since the Appellant submitted that while it was common technical knowledge in the field of refrigeration to de-air the system such as to obtain a water content of 50 ppm or less, it had been surprisingly found that a value of 560 ppm or so was sufficient. Under those circumstances it became critical to establish in this respect the common general knowledge in that particular field.

8.3 The Board, therefore, in the exercise of its discretion under Article 114(1) EPC found it appropriate to refer to document (10) as literature reflecting the common general knowledge in the refrigeration field.

8.4 The Appellant neither objected to the submission of this document nor to the time given for considering it.

9. *Remittal - Article 111(1) EPC*

9.1 As a consequence of the submission of document (10), the Appellant however requested that the case be remitted to the first instance for further examination.

9.2 Under Article 111(1) EPC a Board of Appeal has a discretion during appeal proceedings before it, either to "exercise any power within the competence of the department which was responsible for the decision appealed" (here: the Opposition Division) or to "remit the case to that department for further prosecution". The provision of a discretionary power would make no

sense if the Boards were ipso facto obliged to remit the case whenever new matter was raised in appeal proceedings, irrespective of the nature of such matter (cf. T 111/98 of 10 July 2001, point 1.2 of the reasons). Thus, Article 111 EPC also confers the power upon a Board of Appeal to act *inter alia* as the first and only instance in deciding upon a case taking into account a fresh request which was only filed at oral proceedings, without the possibility of further appellate review. Furthermore, remittal of a case results in a substantial delay of the procedure which keeps the public in uncertainty about the fate of the patent for several more years. It also involves additional costs for all the parties and the EPO. In the Board's view, when a Patentee waits until oral proceedings to file a new request, after the patent was revoked by the Opposition Division, he must expect the fresh case to be discussed during oral proceedings and the possibility of being confronted to general literature directly related to his own declarations. The decision can therefore be announced by the Board at the conclusion of the oral proceedings.

9.3 Therefore, the Board considers it appropriate to exercise its discretion not to remit the case to the Opposition Division.

10. *Request for referral of a question to the Enlarged Board of Appeal*

10.1 Article 112(1)(a) EPC provides that the Board of Appeal during proceedings on a case, either of its own motion or following a request from a party to the appeal, shall refer any question to the Enlarged Board of Appeal, if it considers that a decision is required for

ensuring uniform application of the law or if an important point of law arises.

10.2 In view of what has been said under point 9.2 above and the fact that the main request (patent as granted) was rejected on the basis of the same documents as considered by the Opposition Division (cf. point 2 above), in the Board's judgment, the response to the legal question raised by the Appellant is not necessary for deciding on the present issue. There is, therefore, no need for referral of the said question to the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

N. Maslin

A. Nuss