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D E C I S I O N
of 6 September 2005

Case Number: T 0750/04 - 3.2.07

Application Number: 96109594.0

Publication Number: 737621

IPC: B65D 1/02

Language of the proceedings: EN

Title of invention:
-

Patentee:
CONTINENTAL PET TECHNOLOGIES INC.

Opponents:
01. PEPSICO INC.
02. REXAM AB

Headword:
-

Relevant legal provisions:
EPC Art. 76(1), 123(2)

Keyword:
"Divisional of a divisional"
"Subject-matter disclosed in grandparent - no"

Decisions cited:
T 0555/00, T 0720/02

Catchword:
-

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Case Number: T 0750/04 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 6 September 2005

Appellant: (Proprietor of the patent)	CONTINENTAL PET TECHNOLOGIES, INC. 7310 Turfway Road Suite 490 Florence, KY 41042 (US)
Representative:	Jenkins, Peter David PAGE WHITE & FARRER 54 Doughty Street London WC1N 2LS (GB)
Respondent: (Opponent 01)	PEPSICO, INC. 700 Anderson Hill Road Purchase, NY (US)
Representative:	Körber, Wolfhart Patent- und Rechtsanwälte Mitscherlich & Partner Sonnenstrasse 33 D-80331 München (DE)
Respondent: (Opponent 02)	Rexam AB Box 836 S-201 80 Malmö (SE)
Representative:	Rostovanyi, Peter AWAPATENT AB Box 5117 S-200 71 Malmö (SE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 5 April 2004 revoking European patent No. 737621 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: C. Holtz
Members: P. O'Reilly
H.-P. Felgenhauer

Summary of Facts and Submissions

I. Opposition was filed against European Patent No. 0 737 621 as a whole and based on Article 100(a) EPC (lack of novelty and lack of inventive step), Article 100(b) EPC (insufficiency) and Article 100(c) EPC (added subject-matter).

II. The Opposition Division decided to revoke the patent. The Opposition Division held that the subject-matter of claims 1 and 9 of each of the main and the auxiliary requests did not comply with Article 76(1) EPC in conjunction with Article 100(c) EPC.

III. The appellant (proprietor) filed an appeal against the decision of the Opposition Division.

IV. The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of either the main request (maintenance unamended), or one of the auxiliary requests 1, 3 to 7 filed on 5 August 2005, or on the basis of the second auxiliary request filed on 5 September 2005 and intended to replace the previous second auxiliary request.

Respondents I and II (opponents I and II) each requested that the appeal be dismissed.

V. Oral proceedings were held before the Board on 6 September 2005.

VI. Claim 1 of the main request read as follows:

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion."

Claim 1 of the first auxiliary request reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of **the base of** the bottle (30) whereby **the base of the bottle has resistance to stress cracking when** the bottle (30) is **used as a** returnable and refillable **bottle**, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion**, and the base (34) is a champagne-type base (34) having a peripheral contact radius and the central portion is unoriented and recessed**."

Claim 1 of the second auxiliary request filed with fax of 5 August 2005 reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, **the base having a thickness greater than the thickness of the sidewall.**"

Claim 1 of the second auxiliary request filed with fax of 5 September 2005 reads as follows (amendments when compared to claim 1 of the main request are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, **the base having a thickness greater than the thickness**

of the sidewall, the container having been stretch blow molded from a preform (10) comprising an injection molded member, said preform (10) having an elongated body (16) for forming the shoulder and the container sidewall and being closed at one end (20) and open at the opposite end, said preform open end having the neck finish (12) and said elongated body having a portion (14) adjacent said neck finish (12) tapering in wall thickness for forming the container shoulder, said closed one end being defined by a bottom having a generally hemispherical outer surface and said closed one end (20) of said preform body (16) comprising a cylindrical container base-forming flute portion (22) having a greater wall thickness relative to the wall thickness of said preform body, the base (34) being formed from the fluted portion (22)."

Claim 1 of the third auxiliary request reads as follows (amendments when compared to claim 1 of the second auxiliary request filed on 5 August 2005 are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, **and the base is a champagne-type base (34) having a peripheral contact radius and the central portion is**

unoriented and recessed, the base having a thickness greater than the thickness of the sidewall."

Claim 1 of the fourth auxiliary request reads as follows (amendments when compared to claim 1 of the third auxiliary request are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, and the base is a **low orientation** champagne-type base (34) having a peripheral contact radius and the central portion is unoriented and recessed, the base having a thickness greater than the thickness of the sidewall."

Claim 1 of the fifth auxiliary request reads as follows (amendments when compared to claim 1 of the fourth auxiliary request are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a **flexible** biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and

refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, and the base is a low orientation **rigid** champagne-type base (34) having a peripheral contact radius and the central portion is unoriented and recessed, the base having a thickness greater than the thickness of the sidewall."

Claim 1 of the sixth auxiliary request reads as follows (amendments when compared to claim 1 of the fifth auxiliary request are depicted in bold or struck through):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate having a neck finish (12), a shoulder (36), an elongated body having a ~~flexible~~ biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, and the base is a low orientation ~~rigid~~ champagne-type base (34) having a peripheral contact radius and the central portion is unoriented and recessed, the base having a thickness greater than the thickness of the sidewall**, the neck finish (12) is unoriented and the shoulder (36) is biaxially oriented, and the biaxial orientation in the shoulder (36) extending to within about 6.35 mm (0.250 inch) of the unoriented neck finish (12)**."

Claim 1 of the seventh auxiliary request reads as follows (amendments when compared to claim 1 of the sixth auxiliary request are depicted in bold):

"1. A transparent container (30) for carbonated liquid comprising a blow moulded bottle (30) of polyethylene terephthalate **having an intrinsic viscosity of from 0.72 to 0.84, the bottle** having a neck finish (12), a shoulder (36), an elongated body having a biaxially oriented side wall and an integral base (34) having a chime area (40) and a central portion characterised in that, for increasing the stress crack resistance of the bottle (30) whereby the bottle (30) is returnable and refillable, the base (34) is continuously reinforced by thickening the chime area (40) and the central portion, and the base is a low orientation champagne-type base (34) having a peripheral contact radius and the central portion is unoriented and recessed, the base having a thickness greater than the thickness of the sidewall, **the sidewall has a thickness around 7 to 9 times less than the thickness of a sidewall forming portion of a preform (10) from which the bottle (30) has been blow moulded,** the neck finish (12) is unoriented and the shoulder (36) is biaxially oriented, and the biaxial orientation in the shoulder (36) extending to within about 6.35 mm (0.250 inch) of the unoriented neck finish (12)."

VII. The application underlying the patent in suit was filed as a divisional of the European patent application with publication number 0 479 393 (hereinafter parent application) which in turn had been filed as divisional of the European patent application with publication number 0 247 566 (hereinafter grandparent application).

VIII. The appellant argued in written and oral submissions essentially as follows:

(i) The patent complies with Article 76(1) EPC. The Opposition Division in their decision grounds argued that a number of features were not included in claim 1 of the disputed patent and that the characterising feature of claim 1 of the main request was only originally disclosed in combination with these features. The respondents have also argued in this manner. However, this is not the case.

Claim 1 of the grandparent application did not contain any limitations regarding the features of the container. In the description of the grandparent a number of criteria are described which are necessary for commercial viability. These criteria are not, however, essential for the container to be refillable. On page 2, lines 14 to 16 it is explained that viability is achieved if the fill level volume has a variation of one and one half percent or less. This, however, is a commercial criterion.

In the description of the embodiments in the grandparent application up to page 4, line 28 tests carried out on known bottles are described. The description of the invention starts on page 4, line 29. It is there described how the problem of stress cracks was reduced. The cracks arise from the stress of heating and cooling during the caustic washing which is part of the refilling

procedure. At the priority date of the grandparent application it was considered that strength was increased by providing a biaxial orientation. On page 4, lines 29 to 30 it is explained that the crack problem can be reduced by providing a continuously reinforced base. Already at this point in the description at least a partial solution to a problem has been described.

It is explained on page 4, lines 39 to 42 of the grandparent application that a further change was made to the contact diameter radius of the bases. However that change was described as an independent feature and not solely in combination with the continuous reinforcement of the base. It is clear that the value of the contact radius is not essential to the solution of the problem since this feature only appears in dependent claim 10. On page 4, lines 51 to 54 of the grandparent application it is explained that already with the above features there was a success and that a commercially viable refillable PET container would be feasible. There is here a clear indication that this success means that the skilled person recognises that already a contribution to solving the crack problem has been achieved which is independent of any subsequent changes. The fact that the passage indicates that the feasibility is dependent upon the container minimizing stress build-up during pressurisation and upon shrinkage being reduced below ±1.5% is not relevant when the skilled person already recognises the solution to a problem. The subsequent description starting on page 4, line 55 is a description of a container

which achieves commercial viability. Commercial viability is not however a technical requirement.

Also the reference to 140°F (60°C) temperature for the caustic washing which is mentioned on page 4, lines 51 to 54 of the grandparent application is not essential. This is simply the temperature which happens to have been used in the embodiment of the invention. In another embodiment this temperature could have been different.

The value of the crystallinity of the sidewalls is nowhere stated in the grandparent application to be an essential feature. This feature is mentioned on page 5, lines 15 to 18 of the grandparent application, i.e. after the reference on page 4, line 51 to the success. It is here disclosed that there is improved thermal stability. But it is not disclosed that refillable containers must have a crystallinity within the stated range. The feature is only mentioned in dependent claim 5 which shows that it is inessential to the invention. On page 6, lines 34 to 35 reference is made to the 24-30% crystallinity being an optimum. However, this disclosure is made in connection with the explanation in the preceding lines 29 to 33 that with more than 30% crystallinity failure occurs in less than 20 washing cycles. Claim 1 of the grandparent however only requires at least 5 washing cycles.

IX. Respondent I argued in written and oral submissions essentially as follows:

(i) The characterising feature of claim 1 of the main request whereby the container becomes returnable and refillable was not disclosed separately in the grandparent application but only in combination with a number of other features.

The technical requirements for refillability are given on page 2, lines 10 to 16 of the grandparent application, wherein the technical requirement of achieving a maximum fill level volume variation of one and one half percent is mentioned. This requirement for maximum variation is reiterated on page 4, lines 27 to 28. On page 4, lines 22 to 26 it is clearly indicated that an additional requirement for refillability is that stress crack failures are to be avoided.

From the passage on page 4, lines 27 to 54, in particular lines 51 to 54, of the grandparent application it clearly emerges that that it is not sufficient to provide a continuously reinforced base to make a PET container returnable and refillable.

In order to make the PET container returnable and refillable it is necessary to specify the following: the intrinsic viscosity; the increased contact radius diameter; the increased sidewall crystallinity; the increased orientation in the shoulder area; and the reduced unoriented wall thickness in the base chime area.

On page 4, lines 55 to 57 and page 5 lines 12 to 13 and 15 to 18 of the grandparent application it

is explained how new technology has increased the thermal stability of PET by increasing the crystallinity. With regard to this increased sidewall crystallinity of 24 to 30% this is the only solution in the whole of the grandparent specification of how to obtain the thermal stability which is an essential requirement of viability and thus of a returnable and refillable PET container.

X. Respondent II argued in written and oral submissions essentially as follows:

(i) The term refillable as used in claim 1 of the main request is not supported in general by the disclosure of the grandparent application. It is also necessary to specify the following: that there are at least five loops; that caustic washing is included in the loops; the maximum volume deviation is ±1.5%; no crack failures of any type; resistance to breakage due to impact; retention of aesthetic appearance; sidewall crystallinity of 24-30%; intrinsic viscosity of 0.72-0.84; ratio of wall thickness of preform and container of 7-9 times; temperature of caustic wash of 60°C; pressure of product filling and capping of about 4 atm; and the biaxially oriented shoulder portion.

With respect to crystallinity the importance of this is set out on page 5, lines 15 to 18 of the grandparent application.

(ii) The claims of the parent application do not contain the invention to which the claims of the patent in suit are directed. In Board of Appeal Decision T 720/02 it was decided that it was not permissible to direct the claims of a divisional of a divisional to an invention which was not contained the claims of the parent application. The present case corresponds to that situation. Therefore that decision should also apply in the present case.

Reasons for the Decision

1. *Preliminary remarks on Article 76(1) EPC*

The question of the requirements to be met by a divisional application which is derived from an application which is itself a divisional application has been thoroughly discussed in decision T 555/00, see points 1.1 to 1.6 of the reasons for that decision. The present Board agrees with the conclusions reached in that decision, which essentially are that the matter disclosed in the patent in suit must already have been disclosed in both the parent and the grandparent applications. As a matter of convenience the present Board has first investigated whether the subject-matter of the patent in suit was disclosed in the grandparent application. The following discussion therefore refers to the grandparent application and in particular to the description and claims of the grandparent application as published in the A2 document. The Board notes in this respect that the description and drawings of the grandparent are essentially identical with those of the

patent in suit and its parent, though the claims of the grandparent and parent differ from those of the patent in suit.

Main request

2. *Article 123(2) EPC*

Since claim 1 of the main request is identical in wording to claim 10 of the application as filed it is considered that no contravention of Article 123(2) EPC has occurred with respect to this claim.

3. *Article 76(1) EPC*

3.1 The meaning of claim 1

The discussion with regard to Article 76 EPC has centred on the characterising portion of claim 1. This requires that the base is continuously reinforced by thickening the chime area and the central portion for increasing the crack resistance of the bottle whereby the bottle is returnable and refillable.

The Board understands the word "whereby" in this respect as meaning that the bottle becomes returnable and refillable as a result of the chime and central portion of the base having a thickness that is greater than the rest of the bottle and being continuously so thickened.

The expression "returnable and refillable" has been much discussed in the proceedings and indeed its meaning is central to the present discussion. Whilst

the term "returnable" may not have any particular technical meaning the term "refillable" is considered to have a technical meaning. On page 2, lines 10 to 14 a technical indication of the requirements for refillability is given. The requirement is stated to include remaining "aesthetically and functionally viable" over a minimum of five loops which each include amongst other things caustic washing. On page 2, lines 15 to 16 of the patent in suit the term viable is further defined as maintaining a fill level volume variation of 1½% or less and resisting breakage due to stress crack failure. On page 2, lines 32 to 34 it is further indicated that it is an object of the invention to provide a container which retains its aesthetic and functional performance over five to ten complete refill loops. The other object of the invention (page 2, line 34) is to provide a preform for forming containers. The skilled person reading page 2 of the description would therefore receive information regarding the disclosed invention and interpret the claim accordingly.

In the view of the Board the skilled person would therefore interpret the expression "returnable and refillable" as meaning that the container may be returned and caustic washed whilst remaining aesthetically and functionally viable, whereby functionally viable includes maintaining a fill level volume variation of 1½% or less and resisting breakage due to stress crack failure.

3.2 Disclosure of the grandparent application

3.2.1 The description of the grandparent reads rather like a scientific report in which experiments and their results are described. Page 3, line 1 to page 4, line 26 describes experiments with caustic washing and the results of tests carried out on known non-refillable PET bottles which have been caustic washed in order to identify the problems associated with this. At the end of this section it is concluded (page 4, lines 24 to 26) that the principle problems are shrinkage at 60°C (140°F) and stress crack failures. In a separate paragraph (page 4, lines 27 to 28) it is emphasised that a maximum volume deviation of more than 1½% and any crack failures are unacceptable. Up to this point therefore the description of the invention consistently indicates that a refillable bottle must have a particular maximum volume deviation and no crack failures upon caustic washing.

The next part of the description on page 4, lines 29 to 50 discloses the effects of making the reinforcement of the base continuous and how this provision has solved the crack failure part of the problems. There is further a mention of a change to the contact diameter radius for the base without however any mention of the effect of this change. This section of the description then ends with a statement that the volume shrinkage was 7% and that visible distortion and whitening was present.

The description then continues on page 5, lines 51 to 54 by stating inter alia that a commercially viable,

refillable PET container would be possible if the shrinkage problem at 60°C (140°F) could be solved.

At this point the Board notes that as stated above the description on page 2 already states technically what is meant to be refillable and that the creation of a refillable container is the object of the invention.

The next part of the description from page 4, line 55 to page 5, line 53 is concerned with describing the crystallinity, i.e. 24-30%, of the sidewalls of the container and how control of this within the range of 24 to 30% solves the problem of shrinkage. This section however is then followed by a referral to the crack problem and a statement that finally the wall thickness of the base of the preform is increased to reduce axial crack initiation (page 5, line 55 to page 6, line 4).

The last part of the description (page 6, lines 5 to 42) describes the results of the foregoing measures and includes some general remarks. One particular remark is that "it is believed that 24-30% crystallinity is an optimum level for a refillable PET container".

3.2.2 From the above mentioned parts of the description the Board first of all concludes that the term "refillable" has in the context of the grandparent application a technical meaning which is at least complementary to any possible commercial meaning. This may be deduced from page 2, line 10 since here the technical problem is introduced by the word "Technically". Furthermore on page 2, lines 32 to 34 it is indicated that the object of the invention is to provide a thermoplastic PET

container which retains its aesthetic and functional performance over five to ten complete refill loops. The Board notes that inventions are intended to be technical and that the object of the invention is therefore also normally to be considered to be technical. The requirement for refillability therefore has a technical meaning and it is this technical meaning which is referred to in the grandparent application. The requirement is that the aesthetic, i.e. clear and transparent, and functional performances should remain for at least five complete refill loops.

The appellant stressed the reference on page 4, lines 51 to 54 to commercial viability. However, this must be seen as a complement to the technical definition. In that passage reference is made to "over 5 to 10 loops and as high as 20 loops". Thus, here a commercial point is made that after the basic technical problem of refillability is overcome there may remain a commercial desire or need to go beyond this and have a technical solution which leads to improved economics. This passage also refers to the shrinkage distortion problem and the shrinkage problem. However, as already stated on page 2, lines 10 to 16 the solving of the shrinkage problem is part of the solving of the technical problem of refillability. On page 5, lines 12 to 18, it is explained that the shrinkage problem is solved by increasing the crystallinity. Furthermore, the value of 24-30% crystallinity is mentioned. On page 5, lines 19 to 42 tests are described which show that the shrinkage problem is solved. On page 6, lines 1 to 4 it is explained that "Finally" the thickness of the base area is increased to reduce axial crack initiation. The Board understands this passage to

mean that the refillability problem is solved by at least the combination of the increased base thickness and the specific crystallinity values. The importance of the crystallinity is emphasised on page 6, lines 29 to 34, where the result of going outside of the crystallinity values is shown to result in a container which fails the caustic washing process.

3.2.3 In conclusion there is no disclosure in the grandparent application of a refillable container which does not have a sidewall crystallinity of 24-30%. Claim 1 of the patent in suit, however, claims a refillable container which does not need to have a sidewall crystallinity of 24-30% and thus adds to the content of the patent over the disclosure of the grandparent application in that the information is imparted that a container may be refillable without having the specified crystallinity in its sidewalls.

3.2.4 The appellant has argued that the fact that the feature of the crystallinity of the sidewalls was a feature of a dependent claim of the grandparent indicates that this was not an essential feature of the invention. However, the independent claim of the grandparent was a claim which did not define any structural features of the container but rather simply stated that the container was such that it should withstand at least 5 caustic washing cycles. Thus the skilled person considering this claim was forced to consider the rest of the grandparent application in order to find out the structure required to achieve this result.

The appellant has further argued that the crystallinity value of 24-30% is only a preferred value that is

required to achieve twenty washing cycles, referring to page 6, lines 29 to 35 of the grandparent. In fact that part of the description indicates that with a crystallinity value of more than 30% the containers fail in less than 20 cycles without giving the actual values. The value of 24-30% is in fact the only value disclosed in the patent and the skilled person is clearly told that the refillability is dependent upon the crystallinity value in order to obtain thermal stability. The skilled person would therefore conclude that the value of 24-30% is the one to be used.

3.2.5 Therefore at least on the basis of the omission of the crystallinity value from claim 1 the patent in suit does not comply with Article 76(1) EPC when applied to the grandparent application, following T 555/00 (see point 1. above).

3.3 It is not necessary to decide whether the omission from claim 1 of any of the features referred to by the respondents contravenes Article 76(1) EPC since the absence of the value for the crystallinity is alone sufficient to conclude that the patent does not comply with this article. Moreover, the Board considers it appropriate to concentrate on this feature since this feature is absent from all the requests, including the late filed request.

4. *Relationship of the patent in suit with the parent application*

In the foregoing the Board has considered the relationship of the patent in suit with the grandparent application. Respondent II also considered the

relationship of the patent in suit with the parent application, as did the Board in its communication accompanying the summons to oral proceedings. The Board made reference to the claims of the parent since the claims of the patent in suit may be considered as amendments to the claims of the parent (just as they may be considered as amendments to the claims of the grandparent). The Board did not express any opinion as to the consequence of this consideration and it is not necessary to consider this matter further since the patent is to be revoked for another reason.

Respondent II made reference to decision T 720/02 and considered that applying this decision to the present case would lead to the claims of the patent in suit not being allowable since they do not relate to the same invention or group of inventions defined in the parent application. The present Board does not have to consider whether or not it would follow T 720/02 since the patent has to be revoked already on the basis of its relationship to the grandparent application.

Auxiliary requests

5. The independent claim 1 of each of the auxiliary requests, including the late filed request, lacks the feature of the value of the crystallinity of the sidewalls. The Board therefore considers that none of these requests can be allowed for the same reason as for the main request.

6. *Late filed request*

At midday on the day before the oral proceedings before the Board the appellant filed by fax a new second auxiliary request. As explained above the main request is not allowable in view of Article 76 EPC, due to the omission of the feature of the value of the crystallinity of the sidewalls. Neither the new second auxiliary request nor the request that this new request was intended to replace contain the disputed feature. It was not therefore necessary for the Board to discuss with the parties or decide upon the admittance of the new request since the decision would be the same whether or not the request were to be admitted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Nachtigall C. Holtz