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**Datasheet for the decision
of 13 August 2024**

Case Number: T 0779/21 - 3.4.01

Application Number: 11772919.4

Publication Number: 2628210

IPC: H01Q1/52, H01Q1/24, H01Q9/04,
H01Q7/00, H01Q1/27, H01Q21/28

Language of the proceedings: EN

Title of invention:
A HEARING AID COMPRISING AN ANTENNA DEVICE

Patent Proprietor:
GN Hearing A/S

Opponent:
Oticon A/S

Headword:
Hearing aid with antenna / GN Hearing

Relevant legal provisions:
EPC Art. 100(c), 123(2)
RPBA 2020 Art. 12(2), 12(4), 12(6), 13(1), 13(2)

Keyword:

Grounds for opposition: added subject-matter (yes)

Amendments (main request, auxiliary requests II-IV): non-allowable intermediate generalisation (yes)

New claim requests (auxiliary requests IA, XI): exceptional circumstances (no)

New claim requests (auxiliary requests V-X): should have been filed earlier (yes)



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: T 0779/21 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 13 August 2024

Appellant: GN Hearing A/S
(Patent Proprietor) Lautrupbjerg 7
2750 Ballerup (DK)

Representative: Zacco Denmark A/S
Arne Jacobsens Allé 15
2300 Copenhagen S (DK)

Appellant: Oticon A/S
(Opponent) Kongebakken 9
2765 Smørum (DK)

Representative: Cohausz & Florack
Patent- & Rechtsanwälte
Partnerschaftsgesellschaft mbB
Postfach 10 18 30
40009 Düsseldorf (DE)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 March 2021 concerning maintenance of the
European Patent No. 2628210 in amended form.**

Composition of the Board:

Chairman P. Scriven
Members: P. Fontenay
C. Almberg

Summary of Facts and Submissions

- I. The appeals, by the proprietor and by the opponent, are of the Opposition Division's interlocutory decision, finding the European patent allowable in an amended form.
- II. The opposition was filed to the patent in its entirety. It relied on grounds under Article 100(a) EPC (lack of novelty (Article 54 EPC) or lack of an inventive step (Article 56 EPC)), Article 100(b) EPC (insufficiency of disclosure), and Article 100(c) EPC (added subject-matter).
- III. In the course of opposition proceedings, the proprietor filed five amended sets of claims. The main request differed from the patent only in that dependent claim 3 had been deleted.
- IV. In their decision, the Opposition Division held, *inter alia*, that the subject-matter of claim 1 of the main request was disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 83 EPC), did not contain subject-matter extending beyond the content of the application as filed (Article 123(2) EPC), but was not inventive over document E9: EP-A-2 200 120 (Articles 52(1) and 56 EPC).

- V. Concerning the objection of added subject-matter, the Opposition Division observed that the passage on page 5, lines 3 - 22, of the original disclosure, which, in their view, contained the only basis for the added feature concerning the length of the first conducting element being between one sixteenth and one eighth of a wavelength of an emitted electromagnetic field, allowed the selection of this feature without mention of the associated effect. Concretely, they found that, in this passage, the effect of a major part of the power of the electromagnetic field emitted by the antenna and propagating from it to another electronic device was no more than an effect that might, but need not, occur. This resulted from the wording in this paragraph, reciting that *a major part of the power of the electromagnetic field [...] may be contributed by the conducting element*. Moreover, the passage associated the effect to broader ranges of lengths for the first conducting member.
- VI. The Opposition Division was not persuaded by the other objections of added subject-matter and insufficiency of disclosure. They considered that a modified version of claim 1, according to the first auxiliary request, was allowable and, therefore, did not decide on the merits of the three remaining auxiliary requests.
- VII. In the initial phase of appeal proceedings, the proprietor requested maintenance of the patent in amended form according to one of five sets of claims, filed during the opposition proceedings; or six sets, filed in response to the appeal.

- VIII. The opponent requested revocation of the patent, or dismissal of the proprietor's appeal.
- IX. In a communication under Article 15(1) RPBA 2020, the parties were informed of the Board's preliminary opinion.
- X. The Board expressed the views, *inter alia*, that
- the first two sets of claims offered by the proprietor lacked an inventive step over E9;
 - the three further requests filed before the Opposition Division should be admitted into the appeal proceedings;
 - the six new requests filed only in response to the opponent's appeal should be disregarded.
- XI. Both parties responded, in writing, to the Board's preliminary opinion, the proprietor's response including another set of claims.
- XII. At oral proceedings before the Board, at which both parties were represented, the proprietor filed yet another set of claims.
- XIII. The parties' final requests are as follows:
- The proprietor's main request is that the appealed decision be set aside and the patent maintained on the basis of the claims of the main request underlying the appealed decision.

In the alternative, the proprietor requests maintenance of the patent on the basis of the claims of one of

- auxiliary request I underlying the appealed decision;
- auxiliary request IA, filed during oral proceedings before the Board (labelled as auxiliary request "XII" when filed, later called "IA");
- auxiliary requests II to IV, first filed during opposition proceedings, and refiled with the reply to the opponent's appeal;
- auxiliary requests V to X, filed with the reply to the opponent's appeal;
- auxiliary request XI, filed with the reply to the Board's communication under Article 15(1) RPBA.

The opponent requests that the appealed decision be set aside and that the patent be revoked.

XIV. Claim 1 of the main request reads:

A hearing aid (10, 11) comprising an antenna device (1), wherein the hearing aid (10, 11) and the antenna device (1) is [sic] accommodated within a housing (2), the hearing aid (10, 11) being configured to be used at or in proximity to a user body (9), the antenna device (1) comprising an antenna structure having a first conducting element (5) forming a first section of an actively fed antenna structure, wherein the actively fed antenna structure further comprises a second section, wherein the antenna structure is configured so that a current is induced in at least the first conducting element (5) during operation, and wherein the first

conducting element (5) is extending over a length of between 1/16 of a wavelength and 1/8 of a wavelength of an emitted electromagnetic field at a desired radio frequency for the antenna structure in a direction substantially parallel to an ear-to-ear axis of a user, when the hearing aid (10, 11) is worn in an intended operational position.

XV. The claims of the main request differ from the claims of the patent only in that claim 3 has been deleted.

XVI. Claim 1 of auxiliary request I differs from claim 1 of the main request in that it incorporates the features of claim 2 of the patent. Concretely, the claim incorporates the additional limitation:

*....,
wherein the electromagnetic field emitted by the antenna structure during operation has an electric field polarized substantially orthogonal to the surface of the user body (9) and the electromagnetic field propagates primarily in a direction along a surface of the user.*

XVII. Claim 1 of auxiliary request IA differs from claim 1 of auxiliary request I in that it includes the further limitation, at the end of the claim:

*....,
wherein a major part of the power of the*

electromagnetic field emitted by the antenna structure and propagating from the antenna structure to another electronic device is contributed by the first conducting element (5).

XVIII. Claim 1 of auxiliary request II differs from claim 1 of the main request in that it includes the additional feature of claim 4 of the patent. Concretely, the claim includes the additional limitation at the end of the claim:

*... ,
wherein the length of the antenna structure is a quarter of the wavelength.*

XIX. Auxiliary request III combines the amendments of auxiliary requests I and II.

XX. Claim 1 of auxiliary request IV differs from claim 1 of the main request in that it includes, at the end of the claim, the limitation:

... and wherein the antenna structure forms a monopole antenna.

XXI. Claim 1 of auxiliary request V differs from claim 1 of the main request in that it includes the additional limitation:

[... during operation,] wherein the antenna structure is a resonant antenna structure,

[and wherein the first conducting element ...].

- XXII. Claim 1 of auxiliary request VI differs from claim 1 of the main request in that it includes the penultimate feature:

[... ear-to-ear axis of a user] and wherein the second section is positioned so that current flows in the second section in a direction parallel to the surface of the user body, [when the hearing aid ...].

- XXIII. Claim 1 of auxiliary request VII differs from claim 1 of the main request in that it includes the limitation:

[... a second section,] wherein the second section is orthogonal to the first section and/or the second section comprises a meandering antenna element, [wherein the antenna structure ...].

- XXIV. Claim 1 of auxiliary request VIII differs from claim 1 of the main request in that it includes the feature:

[... during operation,] wherein the second section comprises an antenna shortening component, [and wherein the first conducting element ...].

XXV. Claim 1 of auxiliary request IX differs from claim 1 of the main request in that it includes, at the end of the claim, the limitation:

*[...],
wherein the length of the antenna structure is a quarter of the wavelength or any integer multiple thereof.*

XXVI. Claim 1 of auxiliary request X differs from claim 1 of the main request in that it includes, at the end of the claim, the limitation:

[...], wherein the length of the antenna structure is a quarter of a wavelength or any integer multiple thereof, and wherein the electromagnetic field emitted by the antenna structure during operation has an electric field polarized substantially orthogonal to the surface of the user body (9) and the electromagnetic field propagates primarily in a direction along a surface of the user.

This reflects, essentially, a combination of the amendments introduced in claim 1 of auxiliary requests I and IX.

XXVII. Claim 1 of auxiliary request XI differs from claim 1 of auxiliary request 1 in that it includes, at the end of the claim, the further limitation:

*[...],
wherein the antenna device is configured to*

provide interconnection with one or more electronic devices provided at or in close proximity to the user body.

Reasons for the Decision

Main request - Added subject-matter (Article 123(2) EPC)

1. Compared with claim 1 as originally filed, which defined an antenna device, claim 1 of the patent was restricted to a hearing aid incorporating such an antenna device and was further amended to specify that

the first conducting element is extending over a length of between 1/16 of a wavelength and 1/8 of a wavelength of an emitted electromagnetic field at a desired radio frequency for the antenna structure in a direction substantially parallel to an ear to ear axis, when the hearing aid is worn in an intended operational position.

2. This differed from the length in original claim 1 which specified:

the first conducting element extending over a length of between 1/16 of a wavelength and a full wavelength in a direction substantially orthogonal to a surface of the user body, when the antenna device is provided in an intended operational position.

3. Neither the original claims, nor the various embodiments in the description disclosed the combination of features in claim 1 of the patent. In particular, the explicit references to a length of between one sixteenth of a wavelength and one eighth of a wavelength for the first conducting element were made in the context of specific embodiments which did not allow the generalisation that is comprised in claim 1 of the patent.
4. Original claims 25-27 were directed to a hearing aid and referred to original claim 1 as to the antenna device, thus confirming that the the hearing aid and the antenna device were disclosed in combination in the original application, as further confirmed e.g. by the passage on page 16, lines 16-29 in the published PCT application.
5. Original claim 25 contained, however, the explicit limitation that the conducting element had a length between one sixteenth and a quarter of a wavelength. Claims 26 and 27 (the only claims dependent on claim 25) did not address this aspect of the invention.
6. When the amendment was introduced during examination, the applicant referred to page 12, lines 28 and 29 in the original application, as basis for the recited length. This passage makes no reference to the length of the conducting element, and the Board assumes that page 12, lines 5 and 6 was intended. This refers explicitly to a *specifically preferred embodiment*, in which the length of the conducting element is between one sixteenth wavelength and one eighth wavelength.
7. In the Board's opinion, this passage is not a valid basis for the amendment, since it relates to a family

of embodiments of the invention in which the antenna structure comprises a parasitic element, as discussed in the section of the published application extending from page 9, line 13, to page 16, line 15. There is no indication, in this extensive section, that the features regarding the length of the first conducting element can be separated from the parasitic antenna element. This is particularly true considering that the passage confers a very specific meaning to "conducting element", it is one directly linked to the configuration of the antenna structure with its parasitic antenna element (cf. page 11, lines 1-3; page 13, lines 6-8).

8. The Opposition Division held that it was the passage on page 5, lines 19 and 20 of the original disclosure that provided the sole valid basis for the amendment in question. This sentence refers to another specifically preferred embodiment, in which the length of the conducting element is between one sixteenth and one eighth of a wavelength. In the Opposition Division's view, it provided a clear and unambiguous disclosure for the selected feature.
9. This was contested by the Opponent. In their view, the feature had been selected while omitting the associated intended effect that a major part of the power of the electromagnetic field was contributed by the conducting element.
10. The sentence on page 5 is part of a longer passage, extending from line 3 to line 22, which underlines that a key aspect regarding the recited length of the conducting member is that it emits a major part of the electromagnetic field that propagated from the antenna to another electronic device. This effect has been

omitted, while the feature regarding the preferred length of the conducting element has been selected, and introduced into claim 1.

11. In the Board's judgment, this amounts to a non-allowable intermediate generalisation of the claimed subject-matter, contrary to Article 123(2) EPC.
12. The proprietor's argument that the passage on page 5, lines 6-9 presented the omitted effect as preferred (decision, point 3.1.2, page 7, second paragraph) is not persuasive. This interpretation relies on the wording in said sentence: *... a major part of the power of the electromagnetic field emitted by the antenna and propagating from the antenna to another electronic device **may be contributed** by the conducting element* (with emphasis added by the Board).
13. The word *may* is often ambiguous. Its basic meaning is about permission (as in "Please, may I have some more?"), but it is frequently used to convey a possibility (as in "It may be raining, so I will take an umbrella."). Sometimes, though far from always, the context will resolve ambiguities. That is the case here. The immediate context is this (emphasis by the Board):

*The conducting element of the antenna structure **may** be connected to a transceiver and configured so that the conducting element conducts current of large amplitude at the desired transmission frequency of the electromagnetic field. **Hereby**, a major part of the power of the electromagnetic field emitted by the antenna and propagating from the antenna to another*

*electronic device **may** be contributed by the conducting element.*

14. Here, the first use of *may* either introduces an option or means that a particular connection is permitted. It is difficult to see much difference between the two. However, the second *may* is affected by *Hereby* at the start of the sentence, so that the natural reading is that, if the option in the first sentence is taken up (or the permission is used) then it is possible to have a major part of the power come from the conducting element.
15. There is still some ambiguity, because the language does not make clear whether connecting and configuring the antenna structure as in the first sentence is sufficient to bring about the effect, or is only a condition that allows it to be brought about (by configuring it in some special way). That, however, is resolved by the subsequent text and the skilled person's understanding of antennas. The following two sentences read:

The length of the conducting element may be determined as the length of the current path in the conducting element. The length of the conducting element may be between one sixteenth wavelength and a full wavelength, such as between one sixteenth and three quarters wavelength, such as between one sixteenth and five eighths wavelength, such as between one sixteenth and a quarter wavelength, such as between one sixteenth and a half wavelength, such as between one sixteenth and three eighths wavelength, such as between one sixteenth

and one eighths wavelength.

16. The skilled person is familiar with antenna elements with a length equal to some integral fraction of the wavelength at which the antenna is intended to operate. Half and quarter wavelength antennas would have been particularly familiar. This sort of matching between antenna length and wavelength produces good results in terms of transmitted power at the desired wavelength. There are subtelties that mean this is only an approximation, but the connection between length and transmitted power is nevertheless in the skilled person's mind.
17. In the light of this, the Board's view is that the skilled person understands page 5, lines 3 - 18 such that the conducting element can be connected to a transceiver and configured such that a major part of the emitted power comes from the conducting element. Part of the configuration is to match the length of the element to the wavelength, and there are several possible ranges that can be used. One of those ranges is from one sixteenth to one eighth of the wavelength.
18. The Opposition Division further noted, in support of its interpretation, that the omitted effect was not *inextricably linked to the specific presently claimed range*, noting, in this respect, that the passage associated the same effect to broader ranges.
19. It is true that the passage on page 5, lines 10-17, refers to various ranges that permit current of large amplitudes to flow in the conducting element and, accordingly, to have a major part of the power of the electromagnetic field emitted by the antenna and

propagating from the antenna to another electronic device contributed by the conducting element.

20. Nevertheless, the finding according to which the effect is not limited to lengths of the conducting element being in the range of one sixteenth and one eighth of a wavelength do not justify the effect's omission altogether. On the contrary, the list of ranges for the length of the conducting element suggests that a multiplicity of preferred embodiments was initially envisaged in the context of the invention as long as said ranges generated the intended current amplitude and resulting electromagnetic field. They confirm, *de facto*, the relevance in the context of the original disclosure of these effects and the fact that it was the specific length that was secondary.
21. Consequently, the feature that a major part of the electromagnetic field emitted by the antenna and propagating from the antenna to another electronic device is contributed by the conducting element cannot be isolated from the preferred length of the conducting element extending between one sixteenth and one eighth of a wavelength. The present wording extends to possible configurations in which only minor part of the emitted power is contributed by the conducting element, contrary to the teaching conveyed by the application as filed.
22. Claim 1 thus extends beyond the content of the application as filed contrary to Article 123(2) EPC.

Auxiliary request I - Added subject-matter (Article 123(2) EPC)

23. The further limitation in claim 1 according to which the electromagnetic field emitted by the antenna structure during operation has an electric field polarized substantially orthogonally to the surface of the user's body and the electromagnetic field propagates primarily in a direction along a surface of the user, does not affect the analysis made above.

24. Although the emitted pattern reflects the electromagnetic field that the first conducting element of an antenna positioned close to a user and oriented in a direction substantially parallel to their ear-to-ear axis would emit, thus suggesting that the contributions to the electromagnetic field pattern originating from other antenna portions are negligible, it is not conclusive.

25. The reason is that the added feature does not imply the presence of the missing effect regarding a major part of the power of the electromagnetic field being provided by the first conducting member. The claim language does not imply that the electromagnetic field, as defined in claim 1, is generated by the first conducting element only or even predominantly. The electromagnetic field could include additional contributions provided by parts of the antenna other than the first conducting element. The claim wording simply implies that the contributions to the electromagnetic field that are not polarised orthogonally to the surface body cancel out.

26. Thus, the subject-matter of claim 1 according to auxiliary request 1 contains added subject-matter

(Article 123(2) EPC) for the same reasons as the main request.

Auxiliary request IA - Admission

27. Auxiliary request IA was filed during oral proceedings before the Board. It is an amendment to the proprietor's case, the consideration of which is at the Board's discretion, under all relevant parts of Articles 12 and 13 RPBA, in particular Article 13(2).
28. Under Article 13(2) RPBA, any amendment, made at this late stage of the appeal proceedings, *shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.*
29. Auxiliary request IA was filed as a reaction to the Board's finding that claim 1 of the main request and of auxiliary request I contain added subject-matter.
30. In the proprietor's view, the conclusion that the Board reached for those claims regarding added subject-matter resulted from a very specific approach that the proprietor could neither have foreseen nor addressed at an earlier stage of proceedings. In effect, the intermediate generalisation that the Board identified in the missing reference to a major part of the power resulting from the first conducting portion had never been discussed in so much detail before. It was a new attack. In any case, because the Opposition Division had agreed with them on added subject-matter, they were fairly sure, even convinced, that there was no need to file a request like auxiliary request IA earlier. These circumstances were exceptional. Moreover, adding the

missing feature to claim 1, to address the Board's concern, served procedural economy. The added feature was also clear for a regular user of the English language and, therefore, did not give rise to new issues under Article 84 EPC.

31. The opponent argued that the objection of the non-allowable intermediate generalisation was raised before the Opposition Division, and then again on appeal. There were no exceptional circumstances or cogent reasons. Moreover, auxiliary request IA gave rise to new clarity issues.
32. The proprietor's arguments are not persuasive.
33. The objection relied upon by the Board, in concluding that the subject-matter of claim 1 of the main request and of auxiliary request I contain added subject-matter, because of the omitted effect, was raised by the opponent during opposition proceedings (letter dated 1 December 2020, point I.1 bridging pages 1 and 2), but was rejected by the Opposition Division (decision, page 7, in particular, the second paragraph). The opponent reiterated it on appeal (statement of grounds, detailed point IV.1, in particular page 18 and the first three lines of page 19). In both cases, the omitted feature allegedly causing the non-allowable intermediate generalisation was explicitly spelled out and explained.
34. While the discussion of the omitted feature was more detailed at oral proceedings before the Board than it had been earlier, it was the same objection and certainly not a new attack.

35. As to the proprietor's expectations, it follows from the primary object of the appeal proceedings, which is to review the appealed decision (cf. Article 12(2) RPBA), that parties must take account of the possibility that a Board might deviate from the decision's findings and conclusions.
36. Hence there was no objective element of surprise.
37. There are thus no exceptional circumstances that would justify the filing of auxiliary request IA only at the very last stage of the proceedings, when the proprietor had learnt about the Board's negative assessment of the higher-ranking requests (Article 13(2) RPBA). For this reason alone, the new request should not be considered.
38. In fact, auxiliary request IA should have been filed during the opposition proceedings, to address the pending objection based on the omitted feature. The normal circumstances of the appeal case justify no exemption (cf. Article 12(6), second sentence, RPBA).
39. As a result, auxiliary request IA is not taken into account.

Auxiliary requests II to IV - Added subject-matter (Article 123(2) EPC)

40. The limitations that the length of the antenna structure is a quarter of the wavelength (auxiliary request II) and that the antenna structure forms a monopole antenna (auxiliary request IV) are without any bearing on the omitted effect regarding the first conducting element. They do not affect the above finding regarding claim 1 of the main request.

41. Similarly, the indication in claim 1 of auxiliary request III that the length of the antenna structure is a quarter of a wavelength does not alter the above finding concerning claim 1 of auxiliary request I, that the claimed emission pattern, with its polarisation of the electric field orthogonal to the surface of the user's body, does not imply the omitted feature regarding a major portion being contributed by the first conducting portion.

Auxiliary request V to X - Admission (Article 12 RPBA)

42. Auxiliary requests V to X were filed with the reply to the opponent's appeal.
43. They are thus amendments of the proprietor's case, in the sense of Article 12(4) RPBA, which can be admitted only at the discretion of the Board under all relevant parts of Article 12 RPBA.
44. Claim 1 of these auxiliary requests contains additional limitations regarding the antenna structure within the hearing aid or elements thereof, better to distinguish the claimed subject-matter from known hearing aids. This applies, in particular, to the hearing aid known from E9 (cf. reply to the Opponent's grounds of appeal, pages 8 to 11).
45. The Board acknowledges that the added features are straightforward from a technical point of view. However, the amendments do not resolve the issues regarding added subject-matter that led to the main request and auxiliary requests I to IV being considered non-allowable. None of the added features affects the

finding that the information regarding a major part of the power of the emitted electromagnetic signal originating from the first conducting element is missing in the definition of the invention, contrary to Article 123(2) EPC. This was acknowledged by the proprietor.

46. The Board further underlines that these requests were filed as reactions to the opponent's objections to the patentability of the claimed subject-matter. Since these had already been raised before the Opposition Division, and since there are no justifying circumstances, auxiliary requests V to X should have been filed during opposition proceedings (Article 12(6), second sentence, RPBA).
47. Consequently, auxiliary requests V to X are not admitted into the appeal proceedings.

Auxiliary request XI - Admission (Article 13 RPBA)

48. Auxiliary request XI was filed in reaction to the Board's communication under Article 15(1) RPBA. It is an amendment to the proprietor's appeal case, the admission of which is at the Board's discretion under all relevant parts of Articles 12 and 13 RPBA, in particular Article 13(2).
49. Under Article 13(2) RPBA, any amendment, made at this late stage of the appeal proceedings, *shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.*

50. The added feature specifies that the antenna device is configured to provide interconnection with one or more electronic devices provided at or in close proximity to the user's body. It aims at specifying the antenna effect in that it ensures wireless communication between devices located at different positions at or close to the body. It was intended further to differentiate the subject-matter of claim 1 from the hearing aid known from the disclosure of E9 (cf. letter dated 14 June 2024, paragraph bridging pages 7 and 8).
51. The filing of auxiliary request XI was prompted by the preliminary opinion of the Board. This does not constitute exceptional circumstances within the meaning of Article 13(2) RPBA. The analysis of document E9 developed by the Board in its preliminary opinion merely elaborated on the opponent's arguments. It did not raise new issues to be addressed by the proprietor. For this reason alone auxiliary request XI should not be admitted.
52. In addition, the amendment does not, *prima facie*, overcome the objection of added subject-matter (Article 13(1), fourth sentence, RPBA).
53. Consequently, auxiliary request XI is not taken into account.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



D. Meyfarth

P. Scriven

Decision electronically authenticated