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Datasheet for the decision of 18 September 2025

Case Number: T 2008/23 - 3.4.02

Application Number: 10857121.7

Publication Number: 2616876

IPC: G02C7/04, A61F9/00, G02C7/06, A61F2/14

Language of the proceedings: EN

Title of invention:
SYSTEM FOR RETARDING PROGRESSION OF MYOPIA

Patent Proprietor:
The Hong Kong Polytechnic University

Opponent:
De Clercq & Partners

Relevant legal provisions:
EPC Art. 54(1), 123(2)
RPBA 2020 Art. 12(4), 13(2)

Keyword:

Amendments - added subject-matter (yes) - main request, aux. req. 1 to 26, 28 to 30
Admittance - aux. req. 27 (yes)
Novelty (no) - aux. req. 27
Amendment after summons - taken into account (no) - aux. req. 31

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Case Number: T 2008/23 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 18 September 2025

Appellant: (Patent Proprietor)	The Hong Kong Polytechnic University Hung Hom Kowloon Hong Kong (CN)
Representative:	Vogel, Andreas Bals & Vogel Patentanwälte PartGmbB Konrad-Zuse-Straße 4 44801 Bochum (DE)
Appellant: (Opponent)	De Clercq & Partners Edgard Gevaertdreef 10a 9830 Sint-Martens-Latem (BE)
Representative:	De Clercq & Partners Edgard Gevaertdreef 10a 9830 Sint-Martens-Latem (BE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 16 October 2023 concerning maintenance of the European Patent No. 2616876 in amended form.**

Composition of the Board:

Chairman	R. Bekkering
Members:	A. Hornung
	G. Decker

Summary of Facts and Submissions

I. The opponent appealed against the interlocutory decision of the opposition division maintaining European patent No. 2616876 in amended form.

Opposition had been filed against the patent as a whole and based on the grounds for opposition of Article 100(a) EPC, together with Articles 54(1) and 56 EPC, and Article 100(c) EPC.

The opposition division had found that the patent as amended according to a new main request then on file and the invention to which it related met the requirements of the EPC.

II. Oral proceedings before the board were held on 18 September 2025.

III. The opponent-appellant requested that the decision under appeal be set aside and that the patent be revoked.

IV. The patentee-respondent requested as a main request that the appeal be dismissed, i.e. that the patent be maintained in amended form on the basis of the claims found allowable by the opposition division. Alternatively, it requested that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution, or that the patent be maintained in amended form on the basis of the claims according to one of auxiliary requests I to XXX filed with the letter of 21 June 2024 or to auxiliary request XXXI filed with the letter of 30 April 2025. For improved readability, the auxiliary requests will hereinafter be numbered using Arabic numerals instead of Roman numerals.

V. The following document, which was relied on in the first-instance opposition proceedings, is referred to in the present decision:

D1: US 2005/0068494 A1.

The opponent's written submissions are designated O1 and O2 as follows:
O1: statement of grounds of appeal, dated 16 February 2024,
O2: letter dated 18 August 2025.

The patentee's written submissions are designated P1 and P2 as follows:
P1: reply to the statement of grounds of appeal, dated 21 June 2024,
P2: letter dated 30 April 2025.

VI. Claim 1 of the main request reads as follows (the numbering of the features **A** to **J** are added by the board):

A "A refractive lens (9) for retarding the progression of myopia in a human eye, the refractive lens (9) comprising:

B a concentric annular multi-zone refractive lens including:

C correcting zones (12, 22, 24) of optical power for correcting refractive error, and

D defocusing zones (23) having a progressive power profile (10) for projecting multiple non-homogenous defocused images in front of at least a part of retina [sic] to inhibit myopic eye growth,

E the defocusing zones (23) having a range of less negative powers than the optical power for correcting refractive power of the correcting zones (12, 22, 24);

F wherein the correcting zones (12, 22, 24) and the defocusing zones (23) are alternated in the lens,

G wherein the lens has at least a total number of more than three correcting zones (12, 22, 24) and defocusing zones (23) alternating in a concentric manner,

H wherein the central first correcting/defocusing zone (12, 22, 23, 24) is smaller than the pupil is measured under photopic lighting conditions,

I wherein the same single homogeneous power is maintained over the correcting zones (12, 22, 24),

J characterized in that the defocusing zones have a sinusoidal power profile".

VII. Claim 1 of auxiliary request 27 reads as follows:

"A contact lens (9) for retarding the progression of myopia in a human eye, the contact lens (9) comprising:

a concentric annular multi-zone contact lens including:

at least one correcting zone (12, 22, 24) of optical power for correcting refractive error, and

at least one defocusing zone (23) having a progressive power profile (10) for projecting multiple non-homogenous defocused images in front of at least a part of retina [sic] to inhibit myopic eye growth, the at least one defocusing zone (23) having a range of less negative

powers than the optical power for correcting refractive power of the correcting zone (12, 22, 24);

wherein the at least one correcting zone (12, 22, 24) and the at least one defocusing zone (23) are alternated in the lens,

wherein the lens has at least a total number of more than three correcting zones (12, 22, 24) and defocusing zones (23) alternating in a concentric manner,

wherein the central first correcting/defocusing zone (12, 22, 23, 24) is smaller than the pupil is measured under photopic lighting conditions,

wherein the same single homogeneous power is maintained over the correcting zones (12, 22, 24),

characterized in that the defocusing zones have a sinusoidal power profile, wherein the correcting and defocusing zones (12, 22, 23, 24) are connected to each other through integrated progressive transition curves".

VIII. Claim 1 of auxiliary request 31 reads as follows:

"A contact lens (9) for retarding the progression of myopia in a human eye, the contact lens (9) comprising:

a concentric annular multi-zone contact lens including:

correcting zones (12, 22, 24) of optical power for correcting refractive error, and

defocusing zones (23) having a progressive power profile (10) for projecting multiple non-homogenous defocused images in front of at least a part of retina [sic] to

inhibit myopic eye growth, the defocusing zones (23) having a range of less negative powers than the optical power for correcting refractive power of the correcting zones (12, 22, 24);

wherein the correcting zones (12, 22, 24) and the defocusing zones (23) are alternated in the lens,

wherein the lens has a central zone that is a circular first correcting zone (12, 22, 24) having a diameter smaller than the pupil of the eye under photopic lighting,

wherein the first correcting zone is immediately surrounded by a first defocusing zone having an annular shape,

wherein the first defocusing zone is immediately surrounded by a second correcting zone having an annular shape,

wherein the second correcting zone is surrounded by additional defocusing zones and correcting zones in an alternating manner,

wherein the central first correcting zone (12, 22, 24) is smaller than the pupil is measured under photopic lighting conditions,

wherein the same single homogeneous power is maintained over the correcting zones (12, 22, 24),

characterized in that the defocusing zones have a sinusoidal power profile, wherein the correcting and defocusing zones (12, 22, 23, 24) are connected to each other through integrated progressive transition curves".

Reasons for the Decision

1. Main request - amendments

Claim 1 contains subject-matter extending beyond the content of the patent application as originally filed (Article 123(2) EPC).

1.1 Feature **J***

The omission of feature **J*** (see definition below) from present claim 1 represents an amendment that introduces subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).

1.1.1 According to independent claims 1, 22 and 24 of the patent application as originally filed, "the correcting and defocusing zones [...] are connected to each other through integrated progressive transition curves" (hereinafter referred to as feature **J***). Feature **J*** has been omitted from present claim 1. However, there is no direct and unambiguous basis in the originally filed application for a claim lacking feature **J***.

On the contrary, as stated by the opponent, "[t]he repeated reference to the fact that the zones are connected to each other through progressive transition curves in the description and the claims for all aspects of the invention [...] makes it clear that this is an essential aspect of the invention" (O2, page 5, fifth paragraph).

For example, the originally filed application discloses, on page 2, line 35, to page 3, line 35, a general description of the invention that explicitly refers to

feature **J*** on page 3, lines 6 to 8. As argued by the opponent (O1, page 17, point 41), the section on page 3, lines 12 to 35, cannot be considered "as providing a general description of the features of the lens, which would be independent from the other features described for the lens at the start of that section", namely from the section on page 3, lines 6 to 8, reading that "the correcting and defocusing zones [...] are connected to each other through integrated progressive transition curves".

Therefore, a skilled person would objectively have derived from the description of all the embodiments and from the independent claims of the patent application as filed that the correcting zones and the defocusing zones are connected to each other through integrated progressive transition curves. Omitting this connection corresponds to an information having no direct and unambiguous basis in the application as filed.

1.1.2 The patentee submitted the following counter-arguments:

(a) At the oral proceedings before the board, the patentee reiterated its argument that page 6, lines 26 to 33, of the application as filed represented a basis for omitting feature **J***. In writing, the patentee had contended that feature **J*** was "not simply removed, but exchanged by the feature that 'the defocusing zones have a sinusoidal power profile'" (P1, page 9, third paragraph). "[T]he skilled person learns from p. 6, lines 24 ff. that the sinusoidal power profile of the defocusing zones is another way to eliminate undesired visual disturbances, thereby being on the same level with the transition curve. Thus, the techniques can be exchanged as done in the claim" (P1, page 10, first paragraph). Moreover, the patentee argued (P2,

point I.3) that the skilled person learned from page 6, lines 24 to 33, of the application as filed that several techniques (i) to (v) were possible - but not essential - to eliminate the undesired visual disturbance. Technique (ii) corresponded to feature **J** that was present in claim 1 and technique (iii) corresponded to feature **J***. "Therefore, features **J** and **J*** are exchangeable and feature **J*** is not considered to be essential (compared to feature **J** being one of the other techniques of page 6) by a person skilled in the art" (P2, page 7, first paragraph).

The board concurs with the opponent that "the different features listed on page 6 [lines 26 to 33] are not alternatives but in fact cumulative techniques to reduce the undesired visual disturbance caused by the defocusing zones" (O1, page 18, point 46). Actually, the technique (ii) mentioned in that section defines the type of the defocusing zone *as such*, whereas the technique (iii) defines a transition curve *between* the zones. According to the patent application as originally filed, page 6, lines 24 and 25, "to eliminate the undesired visual disturbance, the [...] techniques [(ii) and (iii)] are possible". But each technique acts on the lens in a different and independent way. In particular, while the sinusoidal power profile of the defocusing zone, defined in technique (ii), is responsible *inter alia* for projecting multiple non-homogeneous defocused images as defined in feature **G**, the technique (iii) contributes *inter alia* to define how the zones are connected. By connecting the zones via an "integrated progressive transition curve", the visual disturbance, such as diffraction, caused by a transition curve that is not "integrated progressive" is eliminated. The two techniques (ii) and (iii) define two distinct and

unrelated aspects of the lens. Therefore, the two techniques (ii) and (iii) cannot simply be exchanged, as argued by the patentee. Moreover, in the present case, the decisive question when assessing the allowability of an amendment under Article 123(2) EPC is not whether feature **J*** is essential, but whether its omission is directly and unambiguously supported by the content of the application as originally filed.

(b) The patentee generally referred to the "essentiality test" of the boards of appeal, stating that the omission of feature **J*** was allowable under that test:

(i) feature **J*** was not explained as essential in the patent application as filed;

(ii) feature **J*** was not indispensable to the functioning of the invention, as it was substituted by the alternative feature of defocusing zones with a sinusoidal power profile;

(iii) the replacement of feature **J*** did not require any modification of other features to compensate for the change.

Regardless of whether the omission of feature **J*** satisfies the "essentiality test", the board views this test merely as a tool to assist in evaluating the allowability of amendments. The decisive question remains whether the omission of feature **J*** has a direct and unambiguous basis in the application as filed, in line with the "gold standard". As explained in point 1.1.1 above, this is not the case.

(c) At the oral proceedings, the patentee submitted that the transition curve was already integrated in the

claimed progressive power profile of the defocusing zones.

The board is not convinced by this argument. Claim 1 does not define defocusing zones comprising transition curves. Therefore, a transition curve between correcting zones and defocusing zones cannot be seen as being integrated in the progressive power profile of the defocusing zones.

1.2 Feature **H**

Feature **H** represents an unallowable intermediate generalisation (Article 123(2) EPC).

1.2.1 According to the opposition division and the patentee, the basis of feature **H** was to be found on page 3, lines 13-14, and page 3, lines 25-26, of the patent application as originally filed (appealed decision, point 19.5; P2, point I.2), reading "[t]he lens may have a central zone that is a circular first correcting/defocusing zone having a diameter smaller than the pupil of the eye under photopic lighting". At the oral proceedings before the board, the patentee further referred to page 8, lines 8 to 12, disclosing a general lens for retarding the progression of myopia, the general lens including a spectacle lens.

1.2.2 The board is not convinced that the passages on page 3, lines 13-14 and lines 25-26 of the patent application as originally filed may be extracted from the general description of the invention, starting on page 2, line 35, and be considered a disclosure of technical features of a general lens, for instance, a spectacle lens.

As explained by the opponent in writing (O1, points 55 to 65) and orally at the oral proceedings before the

board, the condition defined in feature **H** that the central zone of the claimed lens must be smaller than the size of an eye's pupil makes no technical sense if the lens is not a lens situated at the patient's pupil, such as a contact lens. In particular, during oral proceedings, the opponent referred to page 7, lines 7 to 10, of the application as filed, disclosing that the defocusing and correcting zones of the lens are overlying the patient's pupil at the same time. The lack of technical sense of feature **H** in combination with a general lens is confirmed by the fact that originally filed claim 3, which defines feature **H**, is dependent on originally filed claim 2, which defines a contact lens.

Since present claim 1 refers to a general lens, including, for example, a spectacle lens, rather than being limited to a contact lens (or possibly a corneal or intraocular implant, as defined on page 8, lines 11 and 12 of the application as filed), feature **H** constitutes an unallowable intermediate generalisation.

1.3 Feature **G**

Feature **G** does not define subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).

1.3.1 As submitted by the patentee during the oral proceedings before the board, feature **G** is directly and unambiguously derivable from page 5, lines 36 and 37 of the application as originally filed. Indeed, this passage discloses a lens "having correcting zones and defocusing zones". The expression "correcting zones" means "at least two correcting zones". The expression "defocusing zones" means "at least two defocusing zones". Therefore, the skilled person learns from this passage that the lens has at least

a total number of four (i.e. more than three) correcting zones and defocusing zones as claimed in feature **G**.

1.3.2 The opponent argued that if the passage on page 5, lines 36 and 37 were considered the basis for feature **G**, this would exclude one of only two disclosed embodiments, namely the 3-zone contact lens shown in figure 2. Therefore, the skilled person would not interpret the passage on page 5, lines 36 and 37 in this sense. Moreover, it could not be deduced directly and unambiguously from said passage that the total minimum number of correcting zones and defocusing zones was exactly four, as defined by feature **G**.

1.3.3 The board is not convinced by the opponent's arguments. While the passage on page 5, lines 36 and 37, in the board's view, is a general statement disclosing a lens with a total number of more than three correcting zones and defocusing zones, it does not state that all embodiments of the invention must comply with this statement. Moreover, contrary to the opponent's assertion, the board is unable to see how the sentence on page 5, lines 36 and 37, could be interpreted differently than as explained in point 1.3.1 above.

1.4 In conclusion, claim 1 does not fulfil the requirements of Article 123(2) EPC due to the omission of feature **J*** and due to feature **H** corresponding to an unallowable intermediate generalisation.

2. Auxiliary requests 1 to 26 and 28 to 30 - amendments

Claim 1 contains subject-matter extending beyond the content of the patent application as originally filed (Article 123(2) EPC).

2.1 Claim 1 of auxiliary requests 1 to 26 and 28 to 30 does not comply with the requirements of Article 123(2) EPC for at least one of the two following reasons:

- claim 1 omits feature **J***,
- claim 1 comprises feature **H** in combination with a general lens.

See the detailed reasons given in relation to the main request under point 1. above.

2.2 During the oral proceedings, the parties merely referred to their written statements, which did not contribute any new aspect to the discussion on added subject-matter compared to that of the main request.

3. Auxiliary request 27

3.1 Admittance

Auxiliary request 27 is admitted into the proceedings under Article 12(4) RPBA, because it was filed by the patentee as soon as necessary, namely in response to the opponent's statement of grounds of appeal and because, in the board's view, it represents a fair attempt to overcome the objections raised against the main request.

3.2 Remittal of the case

The patentee requested the board to remit the case to the opposition division for further prosecution. The board rejected this request, as it considered that it was expedient to deal with the case itself.

3.3 Novelty

The subject-matter of claim 1 lacks novelty over D1 (Article 54(1) EPC).

3.3.1 It is undisputed by the patentee that the embodiment shown in figure 8 of D1 discloses all the features of claim 1 except for the following features **A***, **D***, **J** and **J***:

- feature **A***: a contact lens for retarding the progression of myopia in a human eye;

- feature **D***: at least one defocusing zone having a progressive power profile for projecting multiple non-homogenous defocused images in front of at least a part of [the] retina to inhibit myopic eye growth, the at least one defocusing zone having a range of less negative powers than the optical power for correcting refractive power of the correcting zone;

- feature **J**: the defocusing zones have a sinusoidal power profile

- Feature **J***: the correcting and defocusing zones are connected to each other through integrated progressive transition curves.

3.3.2 The board is of the opinion that features **A***, **D***, **J** and **J*** are anticipated by D1 for the following reasons:

3.3.3 Feature **A***

(a) "a contact lens"

As argued by the opponent during the oral proceedings before the board, in view of paragraph [0014] of D1, which states that "[t]he present power distributions are applicable to contact lenses, scleral lenses, intraocular

lenses, and lenses impressed or surgically shaped within the corneal tissue", the power function shown in figure 8 of D1 and described in paragraph [0070] of D1 relates *inter alia* to a contact lens.

(b) "for retarding the progression of myopia in a human eye"

As further argued by the opponent, "if the independent claim defines the product by a result to be achieved that claim must state the essential features necessary to achieve the result claimed, i.e. the retarding of progression of myopia in the human eye" (O1, point 72). In the present case, the essential feature having said effect of retarding the myopia progression is feature **D***, i.e. the defocusing zone having a progressive power profile projecting multiple non-homogeneous defocused images in front of the retina.

As shown in figure 8 of D1, a defocusing zone having a progressive power profile (80, 83) is connected to the correcting zone with a distance power (84) through an integrated progressive transition curve (83). Since the optical power of the defocusing zone in figure 8 is continuously varying and is larger than the distance power (84), multiple non-homogeneous defocused images are projected in front of the retina, thereby providing the claimed effect of retarding the progression of myopia.

(c) For the above reasons, feature **A*** is disclosed in D1.

3.3.4 Feature **D***

For the reasons explained in point 3.3.3 (b) above, figure 8 of D1 discloses the first part of feature **D*** concerning a defocusing zone having a progressive power

profile (80, 83). Concerning the second part of feature **D***, figure 8 of D1 discloses that for negative lenses correcting myopia, the defocusing zone (80, 83) has a range of less negative powers than the distance power (84) of the correcting zone. Accordingly, the defocusing zones in D1 project defocused images in front of the retina, and not behind the retina as argued by the patentee.

3.3.5 Feature **J**

(a) Feature **J** comprises the expression "sinusoidal power profile".

(b) The opposition division and the patentee interpret the term "sinusoidal" narrowly in the sense of the mathematical sine function: "the power profile in the defocusing zones should follow a sinus curve" (appealed decision, page 4, fourth paragraph).

(c) According to the opponent, the expression "sinusoidal power profile" was to be interpreted more broadly in the sense of "pseudo-sinusoidal profiles ('like a sinusoidal pattern' [see patent application as originally filed, page 9, lines 32 and 33]), which are not exact mathematical sine functions" (O1, page 7, point 19). Moreover, "the skilled person would be aware that any curve can locally be approximated with and assimilated to a portion of a sine function, as is commonly done using Fourier analysis" (O1, page 8, point 21). Moreover, the opponent submitted that "[s]ince stepwise power profiles would obtain the similar effect as a sinusoidal profile, the exact shape of the power profile is not critical" (O1, page 10, point 36).

(d) The board notes the following:

(i) The patent does not define what a sinusoidal power profile is, other than to contrast it with a square profile (patent application as originally filed, page 9, lines 9 and 10). From the suffix -oid (meaning "similar to something", "resembling" or "having the likeness of") in "sinusoidal" it can only be inferred that a sinusoidal power profile refers to a power profile that is somehow similar to a sine power profile.

(ii) Progressive power profiles have the property to be suitable for projecting multiple non-homogeneous defocused images. However, the patent does not disclose any additional property that is exclusively and specifically due to the fact that its shape follows a sinusoidal power profile. A sinusoidal shape is just one example of many (see patent application as originally filed, e.g., page 6, lines 27 and 28; page 9, lines 20 to 22; page 9, lines 6 to 9).

(iii) It is questionable whether it is technically straightforward to provide defocusing zones with a progressive power profile that precisely follows a mathematical sine function. The patent does not disclose how to produce a power profile that follows a mathematically exact sine curve.

In view of points (i) to (iii) above, and as a claim wording should be given its broadest but technically reasonable meaning, the board agrees with the opponent that the expression "sinusoidal power profile" does not refer to an exact mathematical sine function, but only to a wavy shape resembling a sine function.

(e) The power profile P(r) in figure 8 of D1, apart from the areas in which the power is constant and equal to the distance power (84), has at least some areas that have a wavy shape resembling a sine function.

(f) For the above reasons, feature **J** is disclosed in D1.

3.3.6 Feature **J***

Figure 8 of D1 discloses correcting zones having areas with a constant distance power (84) that connect to zones having a progressive power profile (80, 83). These zones having a progressive power profile (80, 83) can be divided arbitrarily in defocusing zones having a progressive power profile (80, 83) and so-called "integrated progressive transition curves" connecting the correcting zones and the defocusing zones. Therefore, D1 discloses feature **J***.

3.3.7 The patentee submitted the following arguments for showing that in its view features **A***, **D***, **J** and **J*** are novel over D1.

(a) According to the patentee, the embodiment shown in figure 8 of D1 and described in paragraph [0070] does not relate to a contact lens.

The board cannot follow this argument. In addition to paragraph [0014], the opponent, during the oral proceedings, referred to further exemplary paragraphs such as [0062], [0065] and [0069], which confirm that the invention of D1 relates, *inter alia,* to contact lenses. Even though paragraph [0070] does not explicitly mention contact lenses, paragraph [0024] states that figure 8 shows a specific power distribution of the invention of D1, and since the

invention of D1 relates, *inter alia*, to contact lenses (see [0014]), there is no doubt that figure 8 of D1 relates, *inter alia*, to contact lenses.

(b) The patentee submitted in writing (P1, point II.2.1) and orally during the oral proceedings that the power profiles of D1 were not suitable for retarding progression of myopia. The aim of the invention of D1 was to solve problems caused by presbyopia, rather than retarding the progression of myopia. D1 proposed progressive lenses that provide clear vision both near and far, i.e. the lenses of D1 generate two points of focus at which two clear images were visible. According to the patentee, due to the fact that two clear images could be seen, the myopia would be progressing when using the lens of D1. Feature **A*** excluded the formation of two clear images as provided by the lens of D1. In contrast, the claimed lens provided a single point of focus at which a single clear image was visible, in combination with a series of defocused images, located in front of the retina. Therefore, the embodiments of D1 could not anticipate the claimed lens.

The board cannot follow the argumentation of the patentee for the following reasons:

(i) The power profile P(r) of figure 8 does not generate two (sharp) focal points. It is true that the areas in figure 8 where the optical power P(r) is constant and equal to the distance power (84) generate a clear image of a distant object. However, outside of these areas of constant optical power (84), the optical power is continuously increasing up to a maximum and then decreasing symmetrically

until reaching again the constant optical power (84). The areas in which the optical power is varying do not generate a clear focus point but rather a series of defocused images, the so-called "multiple non-homogeneous defocused images" defined in feature **D*.** In other terms, the embodiment of figure 8 of D1 provides the same optical effect of retarding the progression of myopia as the claimed lens.

(ii) Presbyopia is an age-related, gradual loss of the eye's ability to focus on nearby objects. D1 mentions presbyopia to explain that lenses are required to solve this problem by providing lenses which allow to continue to see clearly far objects and additionally to see clearly near objects. To achieve this, D1 discloses a lens that has areas with constant optical power (84) for clear vision of distant objects and areas with lower optical power for vision of nearby objects. However, contrary to the patentee's assertion, these areas for vision of nearby objects do not have constant power, but rather continuously varying power.

(c) During the oral proceedings before the board, the patentee argued that figure 8 did not show a power profile having a range of negative powers as claimed.

The board does not agree with the patentee. Although figure 8 does not disclose any numerical data on the refractive power P(r), it is clear from the overall disclosure of D1 that the invention of D1 consists, *inter alia*, and even primarily, in the correction of myopia, requiring negative refractive power ("negative lenses gain particular benefit", [0014] of D1). During

the oral proceedings before the board, the opponent explained that the invention of D1 "is also of value to correct distance vision when near vision correction is not required" ([0069] of D1), i.e. when the maximum optical power is zero and therefore the optical power profile P(r) is negative.

(d) During the oral proceedings before the board, the patentee further argued that the power peak (80) shown in figure 8 of D1 was a sharp peak and could not be considered to have a sinusoidal power profile.

The board is not convinced by the patentee's argument. As argued by the opponent during the oral proceedings, claim 1 merely requires a portion of the defocusing zone to have a sinusoidal power profile. In the board's view, this portion of a defocusing zone having a sinusoidal power profile is disclosed in the smoothly varying portion of the power distribution (80, 83) shown in figure 8 of D1.

3.3.8 It follows from the above that the subject-matter of claim 1 is anticipated by the embodiment shown in figure 8 of D1.

4. Auxiliary request 31 - admission

Auxiliary request 31 is not taken into account in the appeal proceedings (Article 13(2) RPBA).

4.1 According to the patentee, the filing of the set of claims of auxiliary request 31 was "motivated by the opinion of the Board" (P2, page 9, fourth paragraph), as expressed in the board's communication pursuant to Article 15(1) RPBA. Claim 1 of auxiliary request 31 differed from claim 1 of the main request essentially in that features were amended

to overcome the objections raised preliminarily by the board under Article 123(2) EPC.

4.2 According to Article 13(2) RPBA, "[a]ny amendment to a party's appeal case made after (...) notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned".

4.3 The board is unable to see any such exceptional circumstances justifying filing auxiliary request 31 only after the board's communication. Indeed, the board informed the patentee, in point 8 of the communication annexed to the summons to oral proceedings, of its preliminary view that feature **G**, **J** and **H** comprised subject-matter extending beyond the application as filed. However, these objections were raised by the opponent already during the first-instance proceedings. The fact that a board agrees with the views of one of the parties (in the present case, the board was provisionally convinced by the objections raised by the opponent under Article 123(2) EPC) is not exceptional in general, and the other party has to be prepared for such a situation. Therefore, in the present case, the patentee could and should have filed auxiliary request 31 in advance of the board's communication to allow for a well-prepared discussion during the oral proceedings. This would have required that the board had the opportunity to issue a written preliminary opinion on auxiliary request 31, giving the parties a chance to submit written comments in response.

4.4 The patentee submitted the following arguments in favour of admitting auxiliary request 31.

4.4.1 During the oral proceedings before the board, the patentee, referring to point 77 of the opponent's statement of grounds of appeal (O1), submitted that the opponent altered its interpretation of the embodiment of figure 8 of D1. Such an alteration of interpretation represented exceptional circumstances within the meaning of Article 13(2) RPBA.

The board cannot follow the patentee's argument. First of all, as put forward by the opponent, the interpretation of D1 according to point 77 of O1 was known to the patentee well before the board's communication. Therefore, if auxiliary request 31 was to be considered a response to the opponent's interpretation of D1, provided in point 77 of O1, then the patentee should have filed auxiliary request 31 with its reply to O1. Secondly, as further put forward by the opponent, no relevant change of the interpretation of figure 8 of D1 was made by the opponent, either in point 77 of O1 or during the oral proceedings before the board.

4.4.2 During the oral proceedings before the board, the patentee submitted that it was "hearing the board's opinion for the first time", that all the features added to claim 1 of auxiliary request 31 — compared to claim 1 of the main request — were at least individually present in claim 1 of one of auxiliary requests 1 to 30, and that the amendments were "helpful" in rendering the subject-matter of claim 1 novel over D1.

The board cannot follow the patentee's arguments. None of the three reasons put forward by the patentee constitute exceptional circumstances that should have prevented the patentee from filing auxiliary request 31 in response to the opponent's statement of grounds of appeal.

5. For the above reasons, the board comes to the conclusion that all of the patentee's requests are either not allowable or not taken into account in the proceedings, that the decision under appeal must be set aside and that the patent is to be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

L. Gabor R. Bekkering

Decision electronically authenticated