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**Datasheet for the decision  
of 28 November 2006**

**Case Number:** T 0681/01 - 3.3.07

**Application Number:** 97307021.2

**Publication Number:** 0828022

**IPC:** D06P 1/44

**Language of the proceedings:** EN

**Title of invention:**

A treated fabric, a method of treatment and a window covering product comprising such material

**Patent Proprietors:**

HUNTER DOUGLAS INDUSTRIES B.V.

**Opponents:**

01: Junkers + Müllers GmbH

02: LOUVER-LITE Ltd

**Headword:**

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**Relevant legal provisions:**

-

**Relevant legal provisions (EPC 1973):**

EPC Art. 54, 69, 83, 84, 111, 123

EPC R. 57a

**Keyword:**

"Claim construction - reliance on Article 69 EPC to restrict claim (no)"

"Prior use - confidentiality (no)"

"Novelty - Main request, first auxiliary request (no)"

"Amendment allowable (Article 123(2)EPC) - second auxiliary request (no)"

"Novelty third auxiliary request over particular prior use (yes)"

"Remittal (yes)"

**Decisions cited:**

T 0472/92, T 0595/89

**Headnote:**

(1) Article 69 EPC and the protocol thereto cannot be relied on to read into the claim an implicit restrictive feature not suggested by the explicit wording of the claim (see point 2.1.1)

(2) There must be something in the circumstances that suggests that a confidential relation existed before a delivery which appears to be the result of an ordinary commercial transaction can be disregarded as not making the delivered goods available to a member of the public.



Case Number: T 0681/01 - 3.3.07

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.07  
of 28 November 2006

**Appellants:** HUNTER DOUGLAS INDUSTRIES B.V.  
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**Representative:** Bonsmann, Manfred  
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**Representative:** Bridle, Andrew Barry  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 8 May 2001  
revoking European patent No. 0828022 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** S. Perryman  
**Members:** G. Santavicca  
B. ter Laan

## Summary of Facts and Submissions

I. The appeal is against the decision of the Opposition Division to revoke European patent 0 828 022, which claims a priority date of 20 September 1996, and whose independent claims as granted read as follows:

"1. A fabric material having a first finish on a first side and a second finish on a second side; said first finish comprising a mixture including a first pigment having a first particle size and said second finish comprising a mixture including said first pigment and a second, light reflective pigment having a second particle size; said second particle size being larger than said first particle size; the particles of the first pigment being capable of permeating said fabric, whereas the particles of the second pigment remain substantially on the second side; and said second side of said fabric having substantially the same colour as said first side."

"8. A method of treating a fabric to provide a fabric material according to any preceding claim, to obtain a first finish on a first side of said fabric material and a second different finish on an opposite second side of said fabric material, characterised in that said first and second finishes are applied simultaneously by a single operation comprising the steps of:

providing said fabric material having a hydrophilic character;

applying a fluid dispersing medium to the second side of said fabric, said fluid dispersing medium comprising:

first pigment particles for providing said first finish, said first pigment particles having a first size; and  
second pigment light reflective particles for providing said second finish, said second pigment particles having a second size larger than said first size;

allowing said first pigment particles to permeate substantially through said fabric to the first side while at least said second pigment particles remain substantially on the second side; and subsequently drying said fabric material."

"28. A window covering product comprising a fabric material according to any one of claims 1 to 7, or a fabric material provided by the method of any one of claims 8 to 27."

II. The patent had originally been opposed on the grounds that the claimed subject-matter lacked novelty and inventive step (Article 100(a) EPC) having regard to various prior uses alleged to have taken place before the priority date of the patent in suit, invoked by opponents 01 against all of the claims as granted, and by opponents 02 to the extent of Claims 1-7, 28 and 29 as granted. The prior uses invoked by opponents 01 were supported *inter alia* by the following items of evidence:

E3: Sample of fabric material (Article n. 24112/8);

E4: Sample of fabric material (Article n. 25219/9);

- E5: Sample of fabric material (Article n. 40535/4325);
- E6: Statutory declaration of Mr. Klaus Germes;
- E7: Declaration of Dipl.-Ing T. Feicks dated 20 January 2000;
- E10: Copy delivery notes n. 9508100089 and 9507200150 of 19 June 1995 concerning the delivery of fabric material corresponding to sample E4 to Aqualona Products Ltd. (GB);
- E11: Copy invoices n. 1381 of 20 July 1995 and 1773 of 11 August 1995 addressed to Aqualona Products Ltd. (GB) and concerning the fabric material corresponding to sample E4;
- E14: Expert opinion of Prof. Dr. Joachim Hilden on the fabric materials of samples E3 and E4;
- E15: Bayer Farben Revue, 1986, 24.Jahrgang, cover page and pages 2 and 52 to 58;
- E16: Production record of fabric material 24112/8 with samples of fabric material (together with a photocopy thereof identified as E16a);
- E17: Production record of fabric material 25219/9 with samples of fabric material (together with a photocopy thereof identified as E17a).
- E18: Declaration of Dipl.-Ing. T. Feicks, dated 5 February 2001, explaining documentation of articles sold to Aqualona Products Ltd.

III. The decision under appeal concerned a set of amended claims filed on 28 February 2001 as the Main Request as well as further amended claims according to Auxiliary Requests 1 to 5 submitted during the oral proceedings held on 7 March 2001.

Claim 1 of the Main Request before the Opposition division differed slightly from Claim 1 as granted to read:

"1. A fabric material ...; the particles of the first pigment having ~~being capable of permeating~~ permeated said fabric to said first side, whereas the particles of the second pigment having remained substantially on ~~the~~ said second side; and said second side of said fabric having substantially the same colour as said first side."

(For ease of comprehension, the Board has indicated additions compared to claim 1 as granted in bold and underlined, deletions by striking out and some unchanged passages by dots.)

The Opposition division revoked the patent having regard to prior uses invoked by opponents 01, without considering the prior use invoked by opponents 02, on the basis of reasoning which can be summarised as follows:

- (a) The amendments to the claims of all the requests fulfilled the requirements of Article 123 EPC.
- (b) The evidence supplied by opponent 01 was sufficient to establish that fabric materials corresponding to samples E3 and E4 had been made available to the public in 1995, thus before the priority date of the patent.

- (c) As explained in document E14, microscopic analysis of samples E3 and E4 showed that these samples had a first finish of pigment on a first side, and a second finish comprising a mixture of the same pigment particles and larger pearlescent particles on the second side. According to point 3.2 of E14 from the exact correlation of the printing pattern on both sides and the slightly lower colour intensity of the first side both particles had been applied in one coating or printing step, the smaller pigment particles having permeated the fabric. Since samples E3 and E4 presented surface areas having substantially the same colour on both sides all the features required by Claim 1 were present and the claim lacked novelty.
- (d) The further amendments made to the respective Claims 1 of the First and Second Auxiliary Requests did not remove the novelty objection.
- (e) Claim 1 of the Third Auxiliary Request was directed to "A window covering comprising a fabric material". The term "window covering" could not be considered as implying any specific technical limitation, and samples E3 and E4 had to be regarded as suitable for window coverings. Neither this change or other changes made compared to Claim 1 as granted served to establish novelty of the Claim 1 of this request over samples E3 and E4.
- (f) In Auxiliary Request 4, Claim 1 was directed to a "Reflective window covering comprising a fabric material ... having substantially equal heat and light reflective properties as a metallized



fabric." As this did not prescribe any degree of heat and light reflection it could not render the claimed subject matter novel over samples E3 and E4.

(g) The Fifth Auxiliary Request had a Claim 1 based on Claim 8 as granted and directed to a method of treating a fabric. This was considered to lack inventive step over what the skilled man would learn from inspection of samples E3 and E4 and from consideration of document E15.

IV. The patent proprietors lodged an appeal against that decision and paid the appeal fee. In their statement setting out the grounds of appeal, the appellants *inter alia* enclosed a new Main Request and a new Auxiliary Request 1.

The respondents (opponents 01 and 02) countered the arguments in the statement setting out the grounds of appeal and raised objections against the claims of the auxiliary requests submitted therewith, and respondents 02 (opponents 02) pointed out that they had not yet had the opportunity to be heard in respect of their alleged prior use at oral proceedings before any instance.

Then, in a letter dated 8 May 2002 in response to the arguments submitted by the opponents during the appeal proceedings, the appellants enclosed further amended claims as Auxiliary Request 2.

Finally, in response to a communication of the Board in preparation of the oral proceedings (see Point VI, *infra*), the appellants enclosed in their letter dated

27 October 2006 a new Main Request and new First to Eighth Auxiliary Requests for consideration by the Board.

V. Oral proceedings were held on 28 November 2006, at which the appellants in response to formal objections raised by the Board to the previous main request, made the claims as granted their Main Request. After an initial debate on the subject-matter claimed in the Main Request and the First and Second Auxiliary Requests, the appellants declared that they deleted each Claim 29 from the First and the Second Auxiliary Requests filed with letter dated 27 October 2006. Then, they submitted a set of seven amended claims as the new Third Auxiliary Request.

VI. The respective Claim 1 of requests on which a decision was asked for at the closure of the debate of the oral proceedings before the Board of Appeal were as follows (for ease of comprehension, the Board has indicated additions compared to claim 1 as granted by bold and underlined, deletions by striking out and unchanged passages by dots):

*Main request:*

Claim 1 as granted (see point I. above).

*First Auxiliary Request:*

"1. A window covering product comprising a fabric material having .... side."

*Second Auxiliary Request:*

"1. A pleated blind or roller shade comprising a fabric material having .... side."

*Third Auxiliary Request:*

"1. A pleated blind or roller shade comprising a fabric material having a first finish on a first side and a second finish on a second pearlescent side; said first finish comprising a mixture including a first pigment having a first particle size and said second finish comprising a mixture including said first pigment and a second, light reflective pearlescent pigment having a second particle size; said second particle size being larger than said first particle size; the particles of the first pigment being capable of permeating said fabric, whereas the particles of the second pigment remain substantially on the second side; and said second side of said fabric having substantially the same colour as said first side."

Claims 2 to 7 of the Third Auxiliary Request were dependent claims also directed to a pleated blind or roller shade.

VII. The appellants essentially argued as follows:

*Main Request (Claims as granted)*

- (a) The fabric material defined in Claim 1 as granted was novel over the fabric material underlying the prior use invoked by opponents 01, in particular

over that of samples E3 and E4. The distinguishing feature defined in Claim 1 as granted was "said second side of said fabric having substantially the same colour as said first side". That feature meant that a side had the same single colour as the other side and not merely that the corresponding parts on each side matched each other in colour as in samples E3 and E4. This distinction clearly appeared if the claimed feature was interpreted not literally but in the light of the description, as required by Article 69 EPC and its protocol. Since the correct interpretation of the claims should be the same whatever issue was being assessed, whether novelty, inventive step or infringement, and in the present case the appellants could not amend the invoked feature to bring out the sought-for distinction, because a more specific fall-back position was missing in the description, it was appropriate to rely on Article 69 EPC to interpret the claim in the light of the description and its purposes. From the description, in particular from Figures 3 and 4 which showed the use of doctor knives and screen printing, it was apparent that multicoloured patterns were not supported, and hence also to be excluded from the protection conferred by Claim 1 as granted. To fulfil the purpose of the invention it was essential that a substantial area of the fabric was light- and heat-reflective, which was obtainable with pigments of a single colour on both sides. Any construction of Claim 1 which ignored that would not be considered by the skilled person.

Since the feature "said second side of said fabric having substantially the same colour as said first side" had been inserted in Claim 1 in suit during the examination proceedings to achieve novelty, the description should have been adapted to the new claims. If any passages in the description still referred to multicoloured patterns, they should be deleted, and ignored for the purpose of interpreting the claim.

Contrary to the arguments of the respondents, cut-out pieces of the multicoloured patterns of fabric materials according to samples E3 and E4 having both sides of the same colour had not been made available.

- (b) If novelty was nevertheless not acknowledged by the Board, then the prior use should in any case be disregarded as not proven. The evidence submitted by opponents 01 to back the invoked prior use did not comply with the standard of proof established by the case law of the boards of appeal, namely certain "up to the hilt" as in T 472/92 (OJ EPO 1998, 161). In particular, three reasonable doubts arose:
- (i) whether any fabric material had actually been delivered to Aqualona before the priority date of the patent in suit;
  - (ii) whether that delivery was free from restrictions;
  - (iii) whether any of the fabric materials delivered to Aqualona was identical to the samples which were analysed as described in E14.

(b)(i) As regards the first doubt: The assertions in Declaration E6 that an order had been fulfilled and that the materials should have been received after some days from the delivery dates, had not been corroborated by sufficient evidence and thus had not been proven; the delivery notes were not the original pieces, nor were they signed; it was apparent that invoices had been prepared, not however that they had been paid; the invoices concerned several consumer goods and it had not been demonstrated whether all of them had actually been delivered; since the ordered goods were not sent directly to Aqualona Products Ltd. but to an agent, a confirmation of the receipt of the goods by the final client should have been provided. Further, the exact date on which the fabric material underlying the prior use invoked had actually been made available to the public could not be gathered from the evidence on file, because several dates were mentioned in the documents, which in any case related to the delivery of the ordered material, if any, to the agent, not to Aqualona. Hence, actual delivery of fabric materials corresponding to those of samples E3 and E4 before the priority date of the patent in suit had not been proven.

(b)(ii) If fabric materials such as those of samples E3 and E4 had been delivered to Aqualona, it had not been proven either that they were made available free of restrictions. No copy of any brochures of Aqualona promoting the delivered fabric materials for shower curtains had ever been

available, let alone any copies of the standard conditions of sale between the appellants and Aqualona or a copy of the request by Aqualona for the allegedly sold materials. There was a reasonable doubt whether this was a transaction which made the material available to the public, especially because it was not contested that the opponents made the fabric materials corresponding to samples E3 and E4 for the first time for Aqualona. Since the quantities of the fabric material alleged to have been delivered was not too big a quantity for a sample, the selling of the products was implicitly confidential as established in T 472/92 (*supra*). If there was any doubt about confidentiality, it should be exercised in favour of the appellants, since the onus of proof of the alleged public prior use was on the respondents.

(b)(iii) Even assuming that the fabric materials were delivered to Aqualona free of restrictions, there was no conclusive evidence on file that the fabric materials of samples E3 and E4 were identical to the fabric material delivered, hence that the material sold was identical to the samples analyzed in E14. It had been declared that samples E3 and E4 were taken from a sample store, but no evidence of the content of that store, let alone of the allegation that for every new material a sample was placed in that store, had ever been provided. Hence, the origin had not been proven either. Since samples E3 and E4 were not labelled, as were samples E16 and E17 for instance, they could have been made and replaced at any time in

that store. Also the argument that a single sample number (24112/8) ensured the continuity and identical correspondence of the characteristics of the fabric material was not convincing in the absence of any proof thereof. In any case, internal documents of the opponents would not be sufficient to inevitably prove a prior use, as established in T 595/89 (not published in the OJ; Reasons, 3.1). Summing up it was impossible to know from E14 or from any other item of evidence on file whether the fabric materials alleged to have been made available to the public by opponents 01 in 1995 possessed all of the features of Claim 1 in suit.

- (c) As regards samples E16 and E17, nobody had ever argued that those fabric materials were supplied to Aqualona nor that they were identical to the fabric materials claimed in the patent in suit. Some delivery dates had in fact been changed, showing that it would have been possible to change the dates mentioned in the cards accompanying the samples. In any case, samples E3 and E4 differed from those attached to E16 and E17. And there was no trace left of any individual numbers and dates normally allocated to any single roll of any prepared fabric materials.

*First Auxiliary Request*

- (a) The amendments to the claims of the First Auxiliary Request had a basis in Claims 1 and 28 as granted, which were based on those as filed. In particular, the protection conferred had not been extended. The



amendments aimed at overcoming the grounds of opposition lack of novelty and lack of an inventive step.

- (b) The appellants did not consent to the introduction of a fresh ground of opposition under Article 100(b) EPC against Claim 8, in view of the feature "having a hydrophilic character", which was present in the claims as granted and had not been objected to during the opposition proceedings.
- (c) As to novelty, the feature "window covering product" differed from the feature "a product suitable for window covering", because the former actually stood ready as a window covering product that should simply be put on the window, whereas the latter only was suitable for that purpose. As regards the purpose of the covering action, it was the reflection of heat and light as described in the patent in suit. Since the fabric materials for shower curtains corresponding to those of samples E3 and E4 were not suitable for heat and light reflection, the claimed subject-matter was novel.

*Second Auxiliary Request*

- (a) The amendments to the claims of the Second Auxiliary Request had a basis in the application as filed. Claim 8 was clear, since the feature "to provide a pleated blind or roller shade" included the making of pleats and roller shades.
- (b) Claim 1 according to the Second Auxiliary Request was restricted to a pleated blind or roller shade.

A pleated blind required that at least one pleat was present, and a roller shade required the presence of a roller. Since the fabric materials of E3 and E4 did not contain any of pleats and rollers, the objection of lack of novelty had been overcome.

*Third Auxiliary Request*

- (a) The amendments to the claims of the Third Auxiliary Request had a basis in the application as filed and aimed at overcoming the grounds of opposition lack of novelty and lack of an inventive step.

VIII. The respondents 01 and 02 essentially argued as follows:

*Main request*

- (a) Fabric materials having a single colour on both sides were not sought-for by the appellants themselves, who had neither excluded multicolour patterns in the application as filed nor restricted the claims to that during the examination proceedings. The approach to claim interpretation of the appellants was not acceptable, so that multi-coloured patterns on both sides of the fabric materials fell under the scope of Claim 1 in suit and destroyed its novelty.
- (b) The evidence put forward showed conclusively that material in accordance with samples E3 and E4 had been manufactured and delivered to Aqualona, without any obligation of confidentiality, well before the priority date, and the analysis of samples E3 and E4 given in document E14 showed that

all features required by claim 1 were met. In particular, the identity between the material of samples E3 and E4 and that delivered to Aqualona was proven by their same identification number. samples E16 and E17, found during further searches in the premises of the opponents, anyhow showed the actual production of fabric materials corresponding to those of samples E3 and E4 at the time the order from Aqualona was placed.

- (c) As regards the many objections raised by the appellants, the position of the respondents was:
- (i) since the numbering of the fabric materials was consistent, more information on the sample store was not necessary;
  - (ii) the dates of 1998 on the delivery notes had automatically been printed by the electronic system and were not related to the actual dates of the orders;
  - (iii) the numbering VAL 81.13.00 on E11 was not a date;
  - (iv) the data on E16 and E17 corresponded to the data on the delivery notes and invoices;
  - (v) the lapse of time between the dates on the delivery note E10 and those on invoice E11 was not longer than a normal one;
  - (vi) the quantities of the fabric materials processed were clear indication that the delivery did not concern samples;
  - (vii) the material was delivered to the client many months before the priority date of the patent in suit, such that it must have been available to the public before that date.

*First Auxiliary Request*

- (a) Claim 1 of the First Auxiliary Request had been limited to a window covering product, the meaning of which was however not clear. The amendment thus contravened the requirements of Articles 123(3) and 84 EPC.
- (b) Opponents 02 voiced for the first time a new ground of opposition under Article 100(b) EPC against Claim 8, in view of the presence of the feature "having a hydrophilic character".
- (c) As to novelty, if the claims were allowable, since the term "window covering" merely designated the intended use of the fabric material, that restriction could be disregarded. In particular, it was contested that a window covering product was in a form having only the function of heat and light reflection. Instead many other functions such as ensuring privacy, providing decoration, sight protection, obscuring, etc. fell under the term "window covering" in Claim 1. Therefore, the feature introduced in Claim 1 did not bring any new distinction and the claim still lacked novelty over the prior use invoked by opponents 01.

*Second Auxiliary Request*

- (a) Since according to the sole embodiment described in the application as filed pleated blinds and roller shades required a pearlescent side to replace the metallised side of known products, the amendments to the claims of the Second Auxiliary Request,

which did not include the further limitation "pearlescent side", had no basis in the application as filed and did not comply with Article 123(2) EPC.

- (b) Also, Claim 8 referred to a method of treating a fabric to provide a pleated blind or roller shade but did not define any steps of making a pleated blind and roller shade. Moreover, in the application as filed, there was no basis for a process where the fabric material was then converted to a pleated blind or roller shade. Therefore, Claim 8 was open to an objection of lack of clarity or of added subject-matter.
- (c) Consequently, the Second Auxiliary Request was not allowable.

#### *Third Auxiliary Request*

- (a) No objections were voiced against the amendments to the claims of the new Third Auxiliary Request filed during the oral proceedings before the Board.
- (b) Opponents 01 objected that the fabric material of sample E5 was still prejudicial to novelty. Since that objection had not been dealt with in the decision under appeal, it would however be pursued upon remittal to the first instance.
- (c) Opponents 02 objected to lack of an inventive step over a brochure included in the evidence of the prior use invoked by them. However, they acknowledged that also that point had not been dealt with in the decision under appeal, and thus

would be pursued upon remittal of the case to the first instance.

IX. The appellants (patent proprietors) requested that the decision under appeal be set aside and that the patent be maintained as granted as Main Request or on the basis of the set of claims submitted as First or Second Auxiliary Request claims filed on 27 October 2006 or as Third Auxiliary Request on the basis of the seven claims submitted at the oral proceedings on 28 November 2006.

X. The respondents 01 and 02 (opponents 01 and 02) requested that the appeal be dismissed.

### **Reasons for the Decision**

1. The appeal is admissible.

2. *Main Request - Novelty*

2.1.1 The normal rule of claim construction is that the terms used in a claim should be given their ordinary meaning in the context of the claim in which they appear. If in the field of technology to which the claim relates, terms used in the claim have a well-established meaning to the skilled person in that field, different from what might appear to be the ordinary meaning of the term, then this special meaning as a term of the art can be accepted as being the correct meaning in the claim, if such well-established special meaning is consistent with what is said in the description and other claims. But, in this case, it has not been argued that any terms in the claim have a well-established

special meaning. Where several interpretations of a claim are possible, consistent with the terms used in the claim, the description can be looked to and the interpretation chosen that is consistent with the description. But the description may not be used to rewrite the claim and redefine the technical features required by the claim in a way not warranted by the wording of the claim itself. In particular the description cannot be relied on to exclude subject-matter from the claim which the ordinary meaning of the terms used would include as part of what is claimed. Such narrowing down cannot be justified by reference to Article 69 EPC and the protocol thereto whose purpose was to allow the extent of protection conferred by the claims to be interpreted more liberally on the basis of the description and drawings than might have followed from giving the wording of the claim its strict literal meaning.

2.1.2 The appellants are understood to be contending for a narrow construction of Claim 1 which would exclude from its subject-matter anything which does not have substantially the same **single** colour on both sides **over the whole surface** of the fabric material. For this they rely in particular on the feature in the claim "said second side of said fabric having substantially the same colour as said first side", and on the fact that the description refers to possible use in pleated blinds and roller shades and that because of this some sort of functional limitation concerning heat- and light reflection is implicitly contained in the claim.

2.1.3 The claim refers to a fabric material without specifying that it must be suitable for any particular

purpose. In this situation it is impossible to read into the claim some implicit feature relating to heat- and light reflection: the claim simply does not require the fabric material to have as technical feature any defined degree of heat- and light reflection properties.

2.1.4 The claim requires a first finish on a first side and a second finish on a second side. This will be met whether the first and second finishes completely cover their respective sides or only partially cover their respective sides. The claim is broadly enough worded to cover finishes applied for decorative purposes, where partial coverage to achieve a decorative effect would be normal.

2.1.5 As regards the feature "said second side of said fabric having substantially the same colour as said first side", this appears to be the consequence of the feature in Claim 1 of "the particles of the first pigment being capable of permeating the fabric, whereas the [larger] particles of the second pigment remain substantially on the second side", provided the colour of the particles of the first pigment dominates over any colour attributable to the second pigment. The two sides of the fabric will match in colour even where the finishes only partly cover the respective sides, having either the colour of the fabric or of substantially that of the first pigment.

2.1.6 The Board thus construes the claim as not being limited by any implicit feature that the fabric material has to have substantially the same single colour on both sides over the whole surface, but that only the explicitly mentioned features are required by the claim.



2.1.7 Nor does the Board see anything in the description which would be inconsistent with construing the claim as in point 2.1.6 above. The appellants have referred to the embodiments of Figures 3 and 4 using a knife coating or screen printing unit to apply the pigments, as indicating that multicoloured patterns were to be excluded. The schematically shown figures do not allow any conclusion as to whether the whole surface is to be covered. The use of a screen printing unit would appear to allow also patterns to be printed. Paragraph [0016] of the description states:

*"A further advantage of a fabric material for a window covering product according to such an embodiment is a reflective side that can be colour matched to the non-reflective side, but still offer the same reflective properties. This decorative advantage is not available to metallised fabrics which always have a distinct grey or metal-like appearance on their reflective sides. Obviously other inorganic particles or alternatively reflective metal particles may be used if different effects are sought".*

2.1.8 The Board cannot here see any intention to exclude multicoloured patterns, nor can the Board see any technical reason to read into Claim 1 a feature excluding multicolour patterns.

*Prior public use of fabric materials corresponding to those of samples E3 and E4*

2.2 The respondents (opponents 01) have relied on the supply of fabric suitable for shower curtains, corresponding to those of samples E3 and E4 in these proceedings, during the course of 1995 (the year before the priority date of 20 September 1996 of the patent in suit), printed at their plant in Mönchengladbach, Germany and sold and delivered to their customer Aqualona Products Limited, North London, for the purpose of being resold, and without any obligations of confidentiality, as being two separate instances of the state of the art, made available to the public prior to the priority date of the patent in suit.

2.3 Regarding fabric corresponding to sample E4, the evidence for this sale and supply included the declaration (E6) by Mr. Germes, a manager of the respondents, stating *inter alia* that fabric material for shower curtain having the article number 25219/9, the denomination "AQUAPOLY 180 cm HYDRANGEA NEW PEARL PEACH" and corresponding to sample material E4, had been sent for delivery to Aqualona Products Ltd. on 20 July 1995, under no obligation of secrecy or confidentiality, for resale purposes. Mr Germes also stated that as far as he knew the materials were received some days after the date of the delivery note date, based on the facts that no objection had been raised and the invoices were paid within the time limits.

2.4 The article and client numbers appearing on the copies of two delivery notes (E10), and the two invoices (E11)

concerning respectively 499,40 and 535,40 m of the fabric material AQUAPOLY 180 cm HYDRANGEA NEW PEARL PEACH all tie up with the Production Record of fabric material 25219/9 (E17 and E17a) for fabric made for Aqualona Products during the wording weeks 28/95 and 29/95. These documents were not available to the public, but do serve as corroborating evidence to confirm the correctness of what is stated in Mr Germes' declaration.

2.5 Sample E4 was not itself supplied to Aqualona Products Limited but apart from the declaration by Mr Germes its identity with material AQUAPOLY 180 cm HYDRANGEA NEW PEARL PEACH is strongly evidenced by the fact that visual inspection shows that its colour is peach with a matt peach one side, and a pearly peach the other side, and the pattern corresponds to the pattern attached to the Production Record (E17 and E17a) which the Board was informed represented an earlier stage of production before the final calendering.

2.6 There is no direct evidence of receipt by Aqualona Products Ltd., but for something which took place more than nine months before the priority date the Board considers that the declaration by Mr Germes that no objections had been raised and that the invoices were paid can be taken as sufficient evidence of actual delivery to Aqualona Products Ltd. before the priority date.

2.7 The evidence for the sale and delivery of fabric material corresponding to sample E3 is equivalent to that for sample E4.

2.8 The appellants have sought to suggest that the deliveries were subject to some sort of obligation of confidentiality, so that even if they took place they would not amount to something being made available to the public. They relied on decision T 472/92, but this makes clear that there must be something that suggests that a confidential relation existed: in that case the supplier was one of the companies who had founded the joint venture that was being supplied, and in the absence of a full explanation confidentiality was in that case presumed. Here the Board has the evidence of Mr Germes that no confidential obligation was involved, and the Board views the supply as an ordinary commercial transaction involving no confidentiality, and certainly no confidentiality as to anything that can be learnt from inspecting the supplied fabric material. The quantity involved, and that it was to be paid for, are quite inconsistent with the supplies being made as samples in some confidential relationship. The Board views the supplies here as being made to Aqualona Products Ltd. as a member of the purchasing public who is free to disclose any information that can be gained from inspection of the material.

2.9 Given the length of time before the priority date that the deliveries took place, the Board is left with no reasonable doubt that receipt of these fabric materials took place before the priority date. Evidence as to the precise delivery date is not necessary in this case and would serve no useful purpose. The Board cannot categorize the doubts the appellants seek to raise as having any reasonable basis.

2.10 The Board concludes that fabric material in accordance with samples E3 and E4 was part of the state of the art at the priority date of the patent in suit.

2.11 The next question to be decided is whether the fabric material of sample E4 possesses the physical features of the claimed fabric material. That fabric material has been analysed as described in report E14. According to the conclusions of E14:

(a) The fabric material of sample E4 was made of 100% PES and had been prepared by a single operation (i.e. by coating on one side only) using pearlescent and normal pigments;

(b) Because of their particle sizes, the pearlescent pigment remained on the coating side, whereas the other pigment having a smaller size penetrated into the fabric material.

2.12 From this, from its own inspection of sample E4, and from the fact that the manufacture of sample E4 as detailed in the first declaration of Dipl.-Ing. T. Feicks (E7) is wholly consistent with the conclusions in report E14, the Board considers that the skilled person could by inspection of fabric material according to sample E4 derive the information that such fabric material possesses all of the physical features required by Claim 1 under consideration.

2.13 As the subject-matter of Claim 1 is not novel, the Main Request does not meet the requirements of the EPC and must be refused.

*First Auxiliary Request*

3. *Amendments*

- 3.1 Compared to Claim 1 as granted, Claim 1 according to the First Auxiliary Request has been amended by the insertion at the beginning of the claim of "A window covering product", and a comma inserted after the expression "light reflective".
- 3.2 The claim is essentially a combination of Claims 1 and 28 as granted, the latter being directed *inter alia* to a window covering product comprising a fabric according to Claim 1 as granted.
- 3.3 Since no new matter has been added by the amendment to Claim 1 and no extension of the protection conferred by Claim 28 arises, the requirements of Article 123 EPC, paragraphs (2) and (3), are fulfilled. The amendment has been carried out to overcome the ground of opposition under Article 100(a) EPC, lack of novelty, and thus fulfils the requirements of Rule 57a EPC.
- 3.4 The appellants contend for a particular meaning of the expression "window covering product", i.e. a product which not only is suitable for that purpose but is made up in a particular form or shape for it. The Board does not agree that this can be considered the normal meaning, but rather takes the same view as the Opposition division that it has no special meaning but covers anything suitable for covering a window. The term might exclude a carpet or floor covering but not something intended as a curtain such as the fabric material corresponding to sample E4. Nor can the Board

consider the use of "product" as necessarily implying something made up to cover a specific window. The Board considers that "product" while also covering this, is general enough to cover a fabric material suitable for use as a curtain, such as E4.

3.5 The subject matter of Claim 1 of the First Auxiliary Request is not novel over fabric material according to sample E4, as this meets all requirements of this claim corresponding to the requirements of Claim 1 of the main request, and no distinction over E4 can be attributed to the feature "window covering product". The First Auxiliary Request must thus be refused.

4. *Second Auxiliary Request*

4.1 Compared to Claim 1 as granted, Claim 1 according to the Second Auxiliary Request has been amended by the insertion of the words "A pleated blind or roller shade comprising a", at the very beginning of the claim; and a comma inserted after the expression "light reflective".

4.2 The only reference to a pleated blind or roller shade in the description is in relation to an embodiment described in Paragraph [0016] (corresponding to page 4 lines 3 to 19 of the application as filed). This describes use of a fabric material as a replacement for metallised fabrics in known pleated blinds and rollers, which fabric material has a "pearlescent side" obtained by using "pearlescent pigments".

4.3 The further features of "pearlescent side" and "pearlescent pigments" are however not included in

Claim 1 according to the Second Auxiliary Request. Claim 1 here thus relates to a generalized pleated blind or roller shade which has no basis in the application as filed. The requirements of Article 123(2) EPC are thus not fulfilled, and the Second Auxiliary Request cannot be allowed.

5. *Third Auxiliary Request*

5.1 Compared to Claim 1 as granted, Claim 1 according to the Third Auxiliary Request filed during the oral proceedings before the Board contains the following amendments:

- (a) "A **pleated blind or roller shade comprising a**", at the very beginning of the claim;
- (b) "on a second **pearlescent** side" (Claim 1, line 1); and,
- (c) "light reflective **pearlescent** pigment" (Claim 1, line 3).

5.2 The expression "pleated blind or roller shade" has been inserted at the beginning of all of dependent Claims 2 to 7. These amendments have a basis in the application as filed (page 4, lines 3 to 19).

5.3 Since no new matter has been added by the amendments to Claim 1 and, in view of the further restrictions imparted to the claim by the amendments, which concern particular embodiments of "window covering" as claimed in Claim 28 as granted, no extension of the protection conferred by Claims 1 and 28 as granted arises, and the requirements of Article 123 EPC, paragraphs (2) and (3), are fulfilled.



5.4 The amendments to the claims have been carried out to overcome the grounds of opposition under Article 100(a) EPC, e.g. lack of novelty, and thus fulfil the requirements of Rule 57a EPC.

6. *Novelty*

The respondents have not argued that fabric material according to samples E3 or E4 can be considered a pleated blind or roller sheet, or that such fabric material takes away the novelty of Claim 1 of this request, nor can the Board see any objection of lack of novelty over fabric material corresponding to samples E3 and E4, so that novelty of the subject-matter of Claims 1 to 7 of the Third Auxiliary Request over this state of the art can be acknowledged.

7. *Remittal*

7.1 As the Board has only been concerned with novelty over a prior use of a fabric material corresponding to samples E3 and E4, but not with novelty over other alleged prior uses, such as that of sample E5 or that invoked by respondents (opponents 02), and the question of inventive step has yet to be considered, the Board considers it appropriate to exercise its discretion under Article 111(1) EPC in favour of remittal of the case for further prosecution to the first instance.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
  
2. The case is remitted to the first instance for further prosecution on the basis of the seven claims filed as Third Auxiliary Request at the oral proceedings on 28 November 2006.

The Registrar:

The Chairman:

C. Eickhoff

S. Perryman