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**Datasheet for the decision
of 17 October 2007**

Case Number: T 0102/04 - 3.3.07

Application Number: 97936773.7

Publication Number: 0918902

IPC: D06N 3/04

Language of the proceedings: EN

Title of invention:

Water-vapour-permeable composite material

Patent Proprietors:

W.L. GORE & ASSOCIATES (UK) LTD

Opponents:

Toray Industries, Inc.

Headword:

-

Relevant legal provisions:

EPC Art. 84, 104, 123(2)

Keyword:

"Amendments - added subject-matter (yes) - Main and Auxiliary requests"

"Claims - clarity (no)"

"Costs - apportionment (no) - withdrawal of the request for oral proceedings by appellant at late stage"

Decisions cited:

T 0091/99

Catchword:

-



Case Number: T 0102/04 - 3.3.07

D E C I S I O N
of the Technical Board of Appeal 3.3.07
of 17 October 2007

Appellants: W.L. GORE & ASSOCIATES (UK) LTD
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Respondents: Toray Industries, Inc.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 25 November 2003
revoking European patent No. 0918902 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: S. Perryman
Members: G. Santavicca
B. Struif

Summary of Facts and Submissions

I. The appeal lies from a decision of the Opposition Division to revoke European patent 0 918 902, which originates from international patent application PCT/GB97/02172 (published as WO-A-98/06891) claiming a priority date of 15 August 1996. The independent claims as granted read as follows:

"1. A composite material for a garment comprising

(a) a water-resistant, water-vapour-permeable, flexible substrate (2) having a first (6) and second (8) side;

(b) a fabric (4) secured to said first side of the substrate; and

(c) a plurality of discrete abrasion-resisting polymeric dots (12) forming a discontinuous lining-forming pattern on the surface of said second side of the substrate and which dots resist abrasion of the flexible substrate."

"28. A garment comprising a composite material as claimed in any preceding claims."

"30. A process of producing a composite material for a garment comprising securing a fabric to a first side of a flexible, water-resistant, water-vapour-permeable substrate; and applying a plurality of abrasion-resisting polymeric dots to a second side of said substrate in order to form a discontinuous lining-forming pattern over the surface of said second side to resist abrasion of the flexible substrate."

II. The European patent had been opposed on the grounds that the claimed subject-matter lacked novelty and an inventive step (Article 100(a) EPC) having regard *inter alia* to the following documents:

- D1: JP-U-64 045 195 (in the form of its English translation D1a);
- D2: JP-Y2-05 033 335 (in the form of its English translation D2a);
- D3: JP-A-62 233 237 (in the form of its English translation D3a);
- D4: JP-B2-03 056 541 (in the form of its English translation D4a);
- B1-34: Items of evidence in support of an alleged prior use of the Entrant Sunlock Fabric garments made by Spyder Active Sports, Inc..

III. The decision under appeal was based on two sets of amended claims filed as the Main and the Auxiliary Requests during the oral proceedings held on 6 November 2003. The respective independent Claim 1 of each of those requests read as follows (emphasis added by the Board to show the amendments to the claims as granted):

Main Request

- "1. A composite material for a garment comprising
 - (a) a water-resistant, water-vapour-permeable, flexible substrate (2) having a first (6) and second (8) side;
 - (b) a fabric (4) secured to said first side of the substrate; and

- (c) a plurality of discrete abrasion-resisting polymeric dots (12) forming a discontinuous lining-forming pattern on the surface of said second side of the substrate and which dots resist abrasion of the flexible substrate; **the polymer having an elastic modulus greater than about 800 psi (5 Nmm²); each dot having a height in the range of 10 to 200 microns; and the abrasion resistance of the composite material being at least 4 times the abrasion resistance of the flexible substrate alone.**"

Auxiliary Request

"1. A composite material for a garment comprising

- (a) a water-resistant, water-vapour-permeable, flexible substrate (2) having a first (6) and second (8) side;
- (b) a fabric (4) secured to said first side of the substrate; and
- (c) a plurality of discrete abrasion-resisting polymeric dots (12) forming a discontinuous lining-forming pattern on the surface of said second side of the substrate and which dots resist abrasion of the flexible substrate; **the polymer having an elastic modulus greater than about 800 psi (5 Nmm²); each dot having a height in the range of 10 to 200 microns; the percentage coverage of the surface of the substrate by the dots being 20 to 80%; and the abrasion resistance of the composite material being at least 4**

**times the abrasion resistance of the
flexible substrate alone."**

The Opposition Division revoked the patent for lack of an inventive step, on the basis of reasoning which can be summarised as follows:

- (a) Amended Claim 1 according to each of the Main and the Auxiliary Requests complied with the requirements of Articles 84 and 123(2) EPC. Thus, they were formally allowable.
- (b) None of cited prior art documents D1 to D4 and the alleged prior use of the Entrant Sunlock Fabric garments anticipated all of the features of the respective Claim 1, whose subject-matters were consequently novel.
- (c) As to inventive step, the closest prior art was the composite material disclosed in D2, which comprised resin printed in the form of projections/indentations providing for outstanding apparel characteristics and durability. In the field of garments, durability was associated with wear resistance, thus with abrasion resistance. Moreover, projections and indentations encompassed dots. Hence, the skilled person seeking to improve the abrasion resistance of that composite would obviously replace the rather soft polymer of D2 with a harder polymer having an elastic modulus higher than 800 psi, which polymers were known from B29, a document disclosing the polymers defined in Claim 1. The further feature of the polymer coverage defined in Claim 1 according to the Auxiliary Request was known from D1 and from D2. Hence, the claimed subject-matter was obvious.

- (d) Since therefore the ground of opposition under Article 100(a) EPC (lack of an inventive step) prejudiced the maintenance of the patent in suit, that patent should be revoked.

IV. On 22 January 2004, the patent proprietors lodged an appeal against that decision and paid the appeal fee on 23 January 2004. In the statement setting out the grounds of appeal, received on 23 March 2004, the appellants *inter alia* enclosed two sets of amended claims, namely Claims 1 to 46 as the Main Request (Appendix 3) and Claims 1 and the remaining claims of the Main Request except Claim 9 as the Auxiliary Request (Appendix 4), respectively, together with an indication of their basis (Appendix 5). The respective independent Claim 1 of each of the Main and Auxiliary requests read as follows (emphasis added by the Board to show the amendments to the claims as granted (in bold) and the further amendments (in bold and italics) to the claims underlying the decision under appeal):

Main Request

"1. A composite material for a garment comprising

- (a) a water-resistant, water-vapour-permeable, flexible substrate (2) having a first (6) and second (8) side;
- (b) a fabric (4) secured to said first side of the substrate; and
- (c) a plurality of discrete abrasion-resisting polymeric dots (12) forming a discontinuous lining-forming pattern on the surface of said second side of the substrate and which

dots resist abrasion of the flexible substrate; the polymer having an elastic modulus greater than about 800 psi (5.5 Nmm^{-2}); the abrasion-resisting polymer being water-vapour-permeable and selected from polyesters, polyamides, silicones, polyurethanes and polyurethane-polyester composites; each dot having a height in the range of 10 to 200 microns; the dots having a substantially smooth, non-angular profile and each of the dots having a cross-section in the plane of the substrate which is substantially circular and a cross-section which is substantially part-spherical in a plane normal to the substrate; the percentage coverage of the surface of the substrate by the dots being 20 to 80%; the abrasion resistance of the composite material being at least 4 times the abrasion resistance of the flexible substrate alone; and the water-vapour permeability of the composite material being in excess of $1500 \text{ g/m}^{-2}/\text{day}$."

Auxiliary Request

- "1. A composite material for a garment comprising
 - (a) a water-resistant, water-vapour-permeable, flexible substrate (2) having a first (6) and second (8) side;
 - (b) a fabric (4) secured to said first side of the substrate; and

- (c) a plurality of discrete abrasion-resisting polymeric dots (12) forming a discontinuous lining-forming pattern on the surface of said second side of the substrate and which dots resist abrasion of the flexible substrate; **the polymer having an elastic modulus greater than about 800 psi (5.5 Nmm⁻²); the abrasion-resisting polymer being water-vapour-permeable and selected from polyesters, polyamides, silicones, polyurethanes and polyurethane-polyester composites; each dot having a height in the range of 10 to 200 microns; in which the centre of each dot is spaced from the centre of an adjacent dot by 200 to 2000 microns; the dots having a substantially smooth, non-angular profile and each of the dots having a cross-section in the plane of the substrate which is substantially circular and a cross-section which is substantially part-spherical in a plane normal to the substrate; the percentage coverage of the surface of the substrate by the dots being 20 to 80%; the abrasion resistance of the composite material being at least 4 times the abrasion resistance of the flexible substrate alone; and the water-vapour permeability of the composite material being in excess of 1500 g/m⁻²/day."**

As regards the further claims, the following amendments had been made:

- A new Claim 2 had been added;
- Claim 25 now concerned "a process for producing a composite **lining** material for a garment **or the like**" comprising the features already defined in respective Claim 1.

V. By letter dated 18 August 2004, the opponents (now respondents) enclosed their observations in response to the statement setting out the grounds of appeal as well as Declaration No. 4 by Mr Uemoto dated 18 August 2004 (B36) and Exhibits MU28-MU31, identified as documents B37 to B40.

VI. In a communication dated 14 August 2007 to prepare oral proceedings the concerns which the Board then had in relation to some of the arguments, evidence or requests presented, *inter alia* those concerning the amendments to the claims, were made known to the parties.

VII. In response to that communication of the Board, the respondents raised objections under Articles 84 and 123(2) EPC against the amendments to the claims of the Main and the Auxiliary Requests (letter dated 17 September 2007).

VIII. By letter dated 11 October 2007, the appellants informed the Board that they did not wish to proceed with the scheduled oral proceedings and that they requested a decision based on the written record. No comments whatsoever were made about the latest objections raised by the respondents under Article 123(2) or 84 EPC.

- IX. The Board informed the parties that the scheduled oral proceedings would nevertheless be maintained (facsimile dated 12 October 2007).
- X. Oral proceedings were held on 17 October 2007, pursuant to Rule 71(2) EPC, in the announced absence of the appellants. After a discussion with the respondents on the amendments to the claims, who inter alia sought to raise an objection under Article 123(3) EPC against the expression "or the like" in Claim 25, the debate was closed for deliberation. Then, the Board announced the decision.
- XI. The appellants had, in writing, essentially argued as follows:
- (a) The amendments to the claims had a basis in the application as filed. In particular, the requirements that the abrasion-resisting polymer should have an elastic modulus greater than 800 psi (5.5 Nmm^{-2}), that it should be water-vapour permeable and be selected among the polymers defined in Claim 1, had all been disclosed in the description as filed. Hence, the amended claims were formally allowable.
 - (b) Novelty had been acknowledged in the decision under appeal, which was not contested.
 - (c) As to inventive step, the skilled person starting from D2 with the aim of improving abrasion resistance should have made a number of choices to arrive at the claimed subject-matter, such as: dots with a optimised form, a harder polymer having an elastic modulus greater than 800 psi suitable for an at least four fold improvement of the abrasion

resistance as well as a specific water-vapour-permeable polymer. However, the mentioned choices were neither obvious from D2 nor were they suggested in any of D1, D4 and the Entrant Sunlock Fabric garment either.

- (d) Therefore, the decision under appeal should be reversed.

XII. The respondents have essentially argued as follows:

- (a) Since the application as filed merely mentioned that a dot-forming polymer made of polyurethane could also be water-vapour permeable, the generic requirement now defined in Claim 1 of the Main and the Auxiliary Requests, i.e. that all of the dot-forming polymers listed in Claim 1 were water-vapour permeable, constituted added subject-matter. Furthermore, not all of the abrasion resisting polymers as disclosed in the application as filed were said to be water-vapour permeable, e.g. PVC. The common property of polymers listed was only their being elastomeric. The absence in Claim 1 of any limitation of the dot-forming polymer to being "elastomeric", together with the generic requirement that it be "water-vapour permeable" had no basis in the application as filed. Furthermore, since water-vapour permeability depended on many factors such as kind of material, thickness and pressure, in the absence of any method for assessing whether or not a dot-forming polymer fulfilled the feature "water-vapour permeable polymer", that feature in Claim 1 was meaningless in the context of dot formation, thus unclear. It was not clear either whether the polyurethane

polymer OLC-5T mentioned in the patent in suit was water-vapour permeable. A clarity objection was raised also against the features "abrasion resisting polymer" and "at least 4.0 times the abrasion resistance of the flexible substrate alone". Finally, the introduction of new Claim 2 in each of the two sets of amended claims and the amendment in Claim 25, "or the like", were neither necessary nor appropriate to overcome a ground of opposition. Indeed, the inclusion of the expression "or the like", contravened also the requirements of Article 123(3) EPC. Consequently, the Main and the Auxiliary Requests defined combination of features not disclosed in the application as filed, which should not be allowed.

- (b) Although none of the prior art items D1, D2, D4 and the Entrant Sunlock Fabric garment disclosed all of the features as claimed, each of D1, D2, D4 and the Entrant Sunlock Fabric garment however was a suitable closest prior art for assessing inventive step. In the absence of any evidence of improvement over the composite materials disclosed in the said prior art, the problem to be solved was the provision of another fabric having sufficient abrasion resistance. The solution to that problem as claimed was obvious in view of any of the following combinations: D4 and the common general knowledge; D4 and D2; D2 and D4; D1 and the common general knowledge; D1 and D2; Entrant Sunlock fabric garment and the common general knowledge; Entrant Sunlock Fabric garment and D2; D2 and D1 or D2 and the Entrant Sunlock Fabric garment.
- (c) The patent proprietors had withdrawn their request for oral proceedings at a late stage of the

proceedings, by a letter expressing an unclear statement of abandonment of the patent, without sending that letter directly to the respondents too. In particular, the appellants had not dealt with the latest objections of the respondents. Following the facsimile sent by the Board concerning the decision to maintain the date set for oral proceedings, the respondents discovered on Friday 12 October 2007 afternoon, from an online inspection of the file, the letter of the proprietors. However, since the outcome of the oral proceedings was uncertain for the respondents, they had to be prepared for all scenarios, in particular on all of material filed on inventive step. Thus, the respondents had no opportunity but to attend the scheduled oral proceedings. This behaviour of the proprietors consequently warranted an apportionment of costs.

XIII. The appellants (patent proprietors) had requested in writing that the decision under appeal be set aside and that the patent be maintained on the basis of the Main or Auxiliary Request filed on 23rd March 2004.

XIV. The respondents (opponents) requested that the appeal be dismissed and that there be an apportionment of costs.

Reasons for the Decision

1. The appeal is admissible.
2. *Procedural matters*

The appellants have requested a decision on the basis of the written record. That record includes much evidence, comparative tests and arguments on the issue of inventive step, which led to revocation by the first instance. While the Board has no wish to disregard the work done on inventive step from both parties during the written proceedings, it cannot address nor decide this issue unless there is a request on file that meets the requirements of Articles 84 and 123(2) EPC. A party wishing to have a decision on inventive step needs first to ensure that there is on file a request meeting these requirements. The appellants here were aware of the objections raised under Article 123(2) and 84 EPC by the respondents (letter dated 17 September 2007) and the possibility that their case might fail on these issues, but chose to ask for a decision on the written record as it stood without addressing those objections or filing any new claims to avoid the objections.

Main request

3. *Amendments*
 - 3.1 Compared to Claim 1 as granted, Claim 1 according to the Main Request contains the following amendments:
 - (a) "the polymer having an elastic modulus greater than about 800 psi (5.5 Nmm⁻²)";

- (b) "the abrasion-resisting polymer being water-vapour-permeable and selected from polyesters, polyamides, silicones, polyurethanes and polyurethane-polyester composites";
- (c) "each dot having a height in the range of 10 to 200 microns";
- (d) "the dots having a substantially smooth, non-angular profile and each of the dots having a cross-section in the plane of the substrate which is substantially circular and a cross-section which is substantially part-spherical in a plane normal to the substrate";
- (e) "the percentage coverage of the surface of the substrate by the dots being 20 to 80%";
- (f) "the abrasion resistance of the composite material being at least 4 times the abrasion resistance of the flexible substrate alone";
- (g) "and the water-vapour permeability of the composite material being in excess of $1500 \text{ g/m}^{-2}/\text{day}$ ".

3.2 The feature "the polymer having an elastic modulus greater than about 800 psi (5.5 Nmm^{-2})" is disclosed generally, i.e. without reference to any polymer, on page 6, lines 28-31, of the application as filed. In particular, that feature is disclosed in connection with polyurethane polymers on page 9, lines 7-9, and in Claims 22 and 52 of the application as filed.

3.3 The feature "each dot having a height in the range of 10 to 200 microns" is disclosed in Claims 8 and 38 as filed.

- 3.4 The features "the dots having a substantially smooth, non-angular profile and each of the dots having a cross-section in the plane of the substrate which is substantially circular and a cross-section which is substantially part-spherical in a plane normal to the substrate" are disclosed in Claims 2, 3 and 32, 33 as filed.
- 3.5 The feature "the percentage coverage of the surface of the substrate by the dots being 20 to 80%" is disclosed in Claims 15 and 45 as filed.
- 3.6 The feature "the water-vapour-permeability of the composite material being in excess of $1500 \text{ g/m}^2/\text{day}$ " is disclosed in Claims 25 and 55 as filed.
- 3.7 Hence, the above features constitute more detailed restrictions on the composite material, defined as fall-back positions in the dependent claims as filed.
- 3.8 However, the remaining added features are only disclosed in the description as filed, in specific contexts, as follows:
- 3.8.1 The feature "the abrasion resistance of the composite material being at least 4 times the abrasion resistance of the flexible substrate alone", as defined in present Claim 1, is disclosed (sentence bridging pages 13 and 14 of the application as filed) only as a further advantageous lower limit that depends on the nature of the abrasion resisting layer. No guidance therefor is given in the application as filed, however, e.g. for selecting the nature of the material e.g. polymer of that layer and for physically making the layer (size

and density of the dots). In fact, Claim 27 as filed only discloses that the abrasion resistance of the composite material as defined in any preceding claim is at least 1.5 times the abrasion resistance of the flexible substrate.

3.8.2 As regards the feature "the abrasion-resisting polymer being water-vapour-permeable and selected from polyesters, polyamides, silicones, polyurethanes and polyurethane-polyester composites" the following should be noted:

- (a) A statement that the abrasion resisting polymer may itself be water-vapour-permeable can be found on page 11, lines 27-28, of the application as filed. That statement follows a previous statement concerning preferred polyurethane polymers being very tough, having high abrasion resistance but not having the water-vapour permeability required for garment applications. Hence, it is not clear whether that statement is general, i.e. applies to all abrasion resistant polymers, or concerns only the polyurethane polymer mentioned before.
- (b) A specific disclosure of an abrasion-resisting polymer having the required elastic modulus greater than 800 psi (5.5 Nmm^{-2}) and being water-vapour-permeable can only be found in Claims 22, 23 and 52, 53 as filed. These specific disclosures only refer to polyurethane polymers however.
- (c) The polymers defined in Claim 1 are mentioned in a list of "suitable elastomeric polymers" that also include polyvinylchloride (PVC) given in the

application as filed (page 10, lines 24-26). The application as filed does not contain any reference to the water-vapour permeability, nor to the elastic module of said "suitable elastomeric polymers" in general. Nor is the term "elastomeric" included in present Claim 1.

4. It follows from the above that the specific combination of all of the features relating to the abrasion-resisting dots such as polymer, water-vapour permeability, minimum elastic modulus of 800 psi, shape, height and 20 to 80% coverage is directly and unambiguously disclosed only in relation to polyurethane polymers, in order to achieve a minimum abrasion resistance of 1.5 times that of the flexible substrate alone.
- 4.1 The application as filed gives no guidance as to how to select any water-vapour permeable polymer within the broadly defined classes in order to make dots having the advantageous abrasion resistance of at least 4.0 times the abrasion resistance of the flexible substrate alone, independently from the nature of the abrasion resisting layer. The omission of the restricting term "elastomeric" in regard to the list of the suitable polymers, and the omission of "PVC" from this list, means that Claim 1 cannot be treated as having a basis on page 10, lines 24-26.
- 4.2 Nor is there any other basis for the subject-matter defined in Claim 1, in so far as it refers to polymers other than polyurethane, in the application as filed. Hence, the modification extends the subject-matter as

filed, so that the requirements of Article 123(2) EPC are not fulfilled.

5. In addition, since the application as filed does not disclose any methods for determining whether the abrasion-resisting polymer making the dots fulfils the requirement of water-vapour-permeability defined in Claim 1, it is not possible to establish which abrasion-resisting, dot-forming polymer falls within the terms defined in Claim 1 (Article 84 EPC). As a case in point, it is not even possible to tell clearly whether the polyurethane OLC-5T used in the examples of the patent in suit is water-vapour-permeable as claimed. If reference was made to D6 (US-A-5 209 969), acknowledged in the patent in suit as the document disclosing the polyurethane OLC-5T, one would only find that the polymer composition "is not highly breathable" (D6, Column 3, line 11). Does a "not highly breathable" polyurethane polymer composition fall under the definition "water-vapour permeable" of Claim 1? There is no answer to that question because it is not clear when a polymer is to be considered "water-vapour permeable".
6. In summary, the combination of features defined in Claim 1 is not directly and unambiguously disclosed (Article 123(2) EPC) and it is not apparent either that that combination is suitable for defining clearly the sought-for protection (Article 84 EPC).

7. Consequently, the Main Request is not allowable.

Auxiliary Request

8. Since Claim 1 according to the Auxiliary Request contains the same combination of features defined in Claim 1 according to the Main Request, which is non allowable for the reasons given *supra*, the Auxiliary Request is not allowable either under Article 123(2) EPC.
9. In view of the above conclusions, it is not necessary for the Board to decide whether the inclusion of a new dependent Claim 2 in the set of amended claims, i.e. of a dependent claim that was not present in the claims as granted, and the inclusion of the terms "lining" and "or the like" in Claim 25 fulfil the requirements of Rule 57a and those of Articles 84 and 123(3) EPC.

Apportionment of costs

10. The respondents have requested an apportionment of costs because the appellants have withdrawn their request for oral proceedings six days before the scheduled oral proceedings, in an allegedly unclear form that left the impression that abandonment of the patent was indeed sought-for, and without sending the letter concerning the withdrawal of the request directly to them too.
 - 10.1 As stated in the Case Law of the Boards of Appeal of the EPO (5th edition 2006, VIIC.8.2.2), in relation to T 0091/99 of 24 January 2003, Point 8 (not published in the OJ EPO), nothing in the EPC prevents a party from

withdrawing a request for oral proceedings at any stage of the procedure. The withdrawal of such a request is not culpable conduct as such and cannot be a factor in assessing whether reasons of equity exist in accordance with Article 104(1) EPC.

10.2 Hence, it has to be established whether the behaviour of the appellants, for reasons of equity, would justify an apportionment of costs.

10.2.1 The Board, upon receipt of the letter of the appellants stating that they no longer wished to proceed with the oral proceedings (faxed on the afternoon of Thursday 11 October 2007), informed the parties that the scheduled oral proceedings would nevertheless be maintained (facsimile dated 12 October 2007). This is not contested by the respondents, who have declared that they had become aware of the letter of the appellants on 12 October 2007, i.e. Friday afternoon, after having received the facsimile of the Board on the same date. So they had four days to decide whether or not to attend the oral proceedings.

10.2.2 Concerning the form of the letter of the appellants, the Board considers from their declaration that the appellants no longer wished to proceed with the oral proceedings scheduled for the 17 October 2007 and from their request for a decision based on the written record that the appellants merely withdrew their request for oral proceedings, i.e. that they were ready to accept a decision without the holding of oral proceedings. No unambiguous statement of abandonment of the patent can be gathered from the letter of the appellants.

10.2.3 Although a lack of courtesy can be seen in the fact that the appellants did not send their letter directly to the respondents, which would have given the respondents one more day for deliberation, that lack of courtesy does not amount to an infringement of any duty they owed the respondents.

10.2.4 In those cases where one party who had requested oral proceedings no longer wishes to attend the oral proceedings, it is common practice for the Board to maintain the fixed oral proceedings in order that there be a final date for any submission of any party involved. Furthermore, the Board in coming to its decision can in compliance with Rule 71(2) EPC discuss the case with and have the assistance of any party who does attend the oral proceedings.

10.2.5 The respondents, who were aware since the 12 October 2007 that the oral proceedings scheduled on 17 October 2007 would take place, although they had already submitted their latest objections after the communication of the Board in preparation for the oral proceedings, i.e. although their written case was on file since 17 September 2007, had nevertheless decided to attend the oral proceedings for the sake of, as it turns out, successfully defending their own interest.

10.3 In these circumstances an apportionment of costs would not be justified for reasons of equity. Consequently, no apportionment of costs is granted.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request by the respondents for an apportionment of costs is refused.

The Registrar:

The Chairman:

K. Götz

S. Perryman