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**Datasheet for the decision
of 21 September 2011**

Case Number: T 1838/08 - 3.2.05

Application Number: 98902562.2

Publication Number: 0952908

IPC: B29C 44/00

Language of the proceedings: EN

Title of invention:

Injection molding of microcellular material

Patentee:

Trexel, Inc.

Opponents:

01 Peguform GmbH & Co. KG
03 Bernhard Drewes
06 CLARIANT INTERNATIONAL LTD.

Headword:

-

Relevant legal provisions:

EPC Art. 56, 84

Keyword:

"Inventive step (main request) - no"
"Clarity (auxiliary request) - no"
"Request to refer questions to the Enlarged Board of Appeal - refused"

Decisions cited:

G 0003/97, G 0002/08

Catchword:

-



Case Number: T 1838/08 - 3.2.05

D E C I S I O N
of the Technical Board of Appeal 3.2.05
of 21 September 2011

Appellant: Trexel, Inc.
(Patent Proprietor) 45 Sixth Rd.
Woburn, MA 01801 (US)

Representative: HOFFMANN EITLE
Patent- und Rechtsanwälte
Arabellastrasse 4
D-81925 München (DE)

Respondent I: Bernhard Drewes
(Opponent 03) Destouchestrasse 68
D-80796 München (DE)

Representative: -

Respondent II: CLARIANT INTERNATIONAL LTD.
(Opponent 06) Rothausstr. 61
CH-4132 MUTTENZ (CH)

Representative: Klaus Hütter
c/o Clariant Producte (Deutschland) GmbH
Patent Management
Am Unisys-Park 1
D-65483 Sulzbach (DE)

Respondent III: Peguform GmbH & Co. KG
(Opponent 01) Schlossmattenstr. 18
D-79268 Bötzingen (DE)

Representative: -

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 16 July 2008
revoking European patent No. 0952908 pursuant
to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: W. Zellhuber
Members: H. Schram
M. J. Vogel

Summary of Facts and Submissions

I. The appellant (patent proprietor) lodged an appeal (second appeal) against the (second) decision of the Opposition Division, posted on 16 July 2008, by which European patent No. 0 952 908 was revoked. The Opposition Division held that the subject-matter of claim 1 of the main request and of the first and fourth auxiliary requests did not involve an inventive step, Article 56 EPC, and that the amendments to the second and third auxiliary requests were not occasioned by grounds of opposition, Rule 80 EPC.

More particularly, the Opposition Division held that for assessing inventive step the essential question was whether document D5 (EP-A 0 799 853) enabled the skilled person to produce the article claimed in claim 1 of the main request. It further held that the tests carried out by the appellant did not convincingly prove that document D5 was a non-enabling disclosure and that, this being the case, the burden of proof was not shifted to the opponents, see Reasons for the decision, page 8, line 21, to page 9, line 28.

II. Oral proceedings were held before the Board of Appeal on 21 September 2011 in the absence of respondent III, who had been duly summoned.

III. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of either the set of claims according to the main request or that according to the auxiliary request, both filed on 26 November 2008.

The appellant further requested that the following questions submitted during oral proceedings be referred to the Enlarged Board of Appeal:

"1. Trägt im Beschwerdeverfahren die Beschwerdeführerin grundsätzlich die Beweislast oder trägt sie nur die Beweislast für Tatsachen, die der angefochtenen Entscheidung zugrunde liegen bzw. von der Beschwerdegegnerin unter Beweis gestellt werden.

2. Wenn die Beschwerdeführerin grundsätzlich die Beweislast trägt, findet jedenfalls dann eine Beweislastumkehr statt, wenn der Gegenbeweis ungleich viel einfacher zu führen ist."

Respondents I and II (opponents 03 and 06) requested that the appeal be dismissed.

Respondent III (opponent 01) did not file any observations or requests in the appeal proceedings.

IV. Claim 1 of the main request reads as follows:

"1. An article comprising: a molded microcellular polymeric article formed by urging a flowable material into a molding chamber and allowing the microcellular article to form therein having a shape essentially identical to that of a molding chamber, including at least one portion having a cross-sectional dimension of no more than about 3.175 mm (0.125 inch) and a length to thickness ratio of at least 75 : 1."

Claim 1 of the auxiliary request differs from claim 1 of the main request in that the wording "a flowable

material" has been replaced by the wording "a flowable single phase solution of a polymeric material and a physical blowing agent in a supercritical state", that the word "inch" has been replaced by the expression "inch." and in that the feature "whereby the molding chamber is filled while nucleating said solution" has been added at the end of the claim.

- V. The documents referred to in the appeal proceedings included the following:

D5 EP-A 0 799 853

- VI. The arguments of the appellant, in writing and during the oral proceedings, can be summarized as follows:

Main request - inventive step, Article 56 EPC

Claim 1 of the main request related to a molded polymeric article that was produced by urging a flowable material into a molding chamber. That article was characterised as being microcellular. It had a thin section that was less than 3.175 mm thick and a length to thickness ratio of 75 : 1 or more. As was set forth in the description of the patent in suit, the key to achieving this combination of properties was to nucleate the single-phase, non-nucleated solution while filling the mold.

Document D5 represented the closest state of the art. This document disclosed a process (post-fill nucleation) which was incapable of producing the article of the present invention. There was no disclosure in document D5 as regards a nucleation

taking place during filling of the mold. While document D5 mentioned in the general description of the invention a thickness of 0.5 to 50 mm (see page 5, lines 27 and 28), in all of the Examples the thicknesses were outside the thickness range claimed in claim 1 of the main request. Document D5 did not disclose a thickness of 0.5 to 50 mm in combination with a length/thickness ratio of 75 : 1 or more (the length corresponding to the flow length in the mold). In Example 8 the length to thickness ratio of the sheet was only about 13 : 1 and the thickness was 6 mm.

In the decision under appeal the Opposition Division had taken a simplified and unreasoned approach by stating that all it took to arrive at the subject-matter of claim 1, starting from Example 8 of document D5, was to reduce the thickness of the sheet from 6 mm to 1 mm. However, filling a thinner mold required a higher pressure. Moreover, the ability of the material to expand prior to freezing was significantly reduced for a thin mold. The cooling effect of a thinner mold tended to be more dominant. Filling a thin, elongated mold by the post-fill nucleation process known from document D5 resulted in a highly non-uniform cell distribution and size. For these reasons the thin, elongated article according to claim 1 of the main request could not be produced by any of the methods disclosed in document D5, ie the core back technique, the gas counter pressure technique, or a combination thereof. An experimental report was filed by the appellant by letter of 25 April 2005 (see Section II, pages 18 to 21). It was found that a thin, elongated article as claimed in claim 1 of the main request could not be produced by any of the methods disclosed in

document D5. In the decision under appeal the Opposition Division had stated (see page 9, lines 3 and 4) that the appellant's tests were flawed in that they did not use the polymer of the examples of document D5. The Opposition Division had also stated that document D5 taught that the temperature profile and temperature control had to be adapted to the polymer's characteristics and that the same was true for the pressure profile and pressure control (see eg page 9, lines 11 to 17 and lines 54 to 57 of document D5). The Opposition Division came to the conclusion: *Having regard to the various process parameters and conditions necessarily involved in polymeric material foam injection molding, as outlined in D5, the Opposition Division is not convinced that the test carried out by the Proprietor fully reflects what the skilled person would achieve when applying the teaching of D5 in the light of his full technical knowledge. Therefore, these test results can not be relied on for discarding D5 as a non-enabling disclosure or even shifting the burden of proof to the opponents for proving that the D5 technology allows indeed the production of microcellular articles as claimed (see page 9, second paragraph, of the decision under appeal). This was not a reasoning but mere speculation on the part of the Opposition Division. The key consideration of the Opposition Division as set forth on page 9, fourth paragraph, of the decision under appeal, viz However, it appears undoubted that the microcellular structure will be preserved when the skilled person forms a sheet in the claimed dimensions on the basis of the teaching of D5, eg by reducing the thickness of the sheet to an amount of 1 mm in an appropriate mold, still within the*

preferred thickness range indicated on page 10, line 48 of D5, was again nothing but speculation.

Following the suggestion of the Opposition Division, Example 8 of document D5 was reproduced with the polystyrene grade G757X, both for the mold of 80 mm x 80 mm x 6 mm used in Example 8, and for a mold with the same planar dimensions and a thickness of 1.32 mm, thus having a flow length to thickness ratio of 75 : 1 (see letter dated 26 November 2008, page 5, line 4, page 8, line 6 from the bottom). It was found that the article of Example 8 of document D5 could be replicated with a fill speed of about 1.4 to 1.5 seconds, a part weight of 31.5 g and about a 14% density reduction (see said letter, page 6, second paragraph, in particular Sample 6). However, it was not possible to produce a microcellular plaque of 80 mm x 80 mm x 1.32 mm having a flow length to thickness ratio of 75 : 1.

Respondent II had argued that the polystyrene grade G757X used by the appellant in its experiments had a lower melt flow rate than the polystyrene grade Toporex 555-57 actually used in Example 8 of document D8. In order to confute the allegation that a small difference in the melt flow rate had an impact on the results, four further grades of GPPS, viz. American Styrene MB 3150, Ineos 1290, Ineos 1600 and Ineos 3100, having melt flow rates in the range of 1.5 to 11, were investigated (see letter dated 27 June 2011, point 2, last paragraph of page 2, to page 10, second paragraph). The experimental results showed that potential differences in the melt flow rate had little impact.

The respondents had not shown that it was possible to produce a thin, elongated article as claimed in claim 1 of the main request. The Opposition Division held that the experimental report filed by the appellant's letter of 25 April 2005 did not shift the burden of proof to the respondents. In appeal two further experimental reports had been filed by the appellant, which showed that document D5 was not an enabling disclosure for making thin, elongated microcellular articles. This raised the question from what point on the burden of proof shifted to the respondents, especially in view of the fact that proving that something does not work was disproportionately much more difficult than showing that something does work.

Auxiliary request - clarity, Article 84 EPC

Claim 1 of the auxiliary request defined the matter for which protection was sought. It was impossible to obtain a thin, elongated microcellular article when the mold was filled with material that had already been nucleated, or when the material was nucleated after filling the mold. The only way to produce a microcellular article having a thin section less than 3.175 mm thick and having a length to thickness ratio of 75 : 1 or more, was to nucleate the solution while filling the mold. This answered the question how the process feature "whereby the molding chamber is filled while nucleating said solution" could be seen from the product: if the article was microcellular, it could only have been produced by filling the molding chamber while nucleating the solution of the polymeric material and the physical blowing agent in a supercritical state.

VII. The arguments of respondents I and II, in writing and during the oral proceedings, can be summarized as follows:

Main request - inventive step, Article 56 EPC

Document D5 represented the closest state of the art. This document disclosed a molded thermoplastic resin product and a process for making same. A melted thermoplastic resin and a supercritical blowing agent, carbon dioxide and/or nitrogen, were formed into a mutually-dissolved state, then cooled while maintaining a pressure equal to or higher than a critical pressure of the blowing agent. The thus cooled molten resin composition was metered and filled into a mold (see page 4, line 54, to page 5, line 21). The object of the invention according to document D5 was to produce a large molded product having cells of uniform and small diameter, and having high impact strength (see page 3, lines 46 and 47, page 4, lines 5 to 9, page 11, lines 14 to 20, and page 12, lines 2 to 5). The thickness of the microcellular article was in the range of 0.5 to 50 mm, preferably from 1 to 40 mm, more preferably from 2 to 30 mm (see page 10, lines 47 and 48). The thickness of the sheet of Example 8, 6 mm, was in the most preferred range.

The subject-matter of claim 1 of the main request concerned a product per se, there was no indication in the claim of the process by which it was made. The appellant had argued that the key to producing a thin, elongated article was to nucleate the single-phase, non-nucleated solution while filling the mold. However,

according to the passage on page 9, lines 2 to 4, of the patent in suit it was also possible to accumulate nucleated material outside the mold, which was then injected into the mold. This process, viz nucleating the material prior to injection, was also disclosed as an alternative in document D5 (see page 9, lines 31 to 33). The same process should yield the same product. The only difference between the subject-matter of claim 1 of the main request and the microcellular polymeric article known from document D5 was the length to thickness ratio of at least 75 : 1. The need for thin, elongated articles as claimed in claim 1 of the main request was given in many useful applications known to the person skilled in the art. For this reason the subject-matter of claim 1 of the main request did not involve an inventive step.

The process described in document D5 comprised a gas-dissolving step, a cooling step, a metering and injection step and an expansion-controlling step (see page 8, line 12, to page 10, line 7). The three experimental tests filed by the appellant were not as close as possible to the temperature and pressure profiles and the respective control thereof stated in document D5 (see in particular page 9, lines 11 to 15, and lines 54 and 55). The appellant had reported that in the attempt to produce a thin, elongated article as claimed in claim 1 of the main request large cells were found. However, there was no indication in the experimental reports that the advice in document D5 (see page 7, lines 25 and 28), viz adding one or more of various foam stabilizers to the thermoplastic resin if smaller cell diameters were desired, had been followed. Consequently, the tests performed by the

appellant did not prove that document D5 was a non-enabling disclosure of subject-matter within the scope of claim 1 of the main request.

Auxiliary request - clarity, Article 84 EPC

It had not been shown by the appellant how the process features could be seen from the resulting product. Claim 1 of the auxiliary request thus lacked clarity.

Reasons for the Decision

MAIN REQUEST

1. *Objection of lack of inventive step, Article 56 EPC*
- 1.1 The present invention relates to a molded microcellular polymeric article, and, in particular, to very thin articles, ie articles "including at least one portion having a cross-sectional dimension of no more than about 3.175 mm (0.125 inch)", cf claim 1 as granted and paragraphs [0001] and [0015] of the patent in suit.

During the first appeal proceedings the feature "and a length to thickness ratio of at least 75 : 1" was added at the end of the claim, cf claim 1 of the main request and paragraph [0073] of the patent in suit.

The requirement that a portion of the article has a thickness ≤ 3.175 mm defines the *thinness* of the article in an absolute sense, whereas the requirement that a portion of the article has a thickness \leq one

seventy-fifth of its length specifies its relative *thinness* or relative elongatedness.

Claim 1 of the main request is a product claim. A product claim must be interpreted in an absolute sense, i.e. independently of the process by which it is made. It may be noted that a product-by-process claim must also be interpreted in that absolute sense, ie the protection conferred extends to the product as such, irrespective of the process by which it is made.

- 1.2 The appellant submitted during the first appeal proceedings and subsequent second opposition proceedings that the key to achieving the article according to claim 1 of the main request was to nucleate the single-phase solution of polymeric material admixed with blowing agent while filling the mold. The claimed article could not be produced by any of the methods described in document D5, nor by any method described in the other prior art documents cited by the respondents. With respect to the post-fill nucleation method described in document D5, results of experiments conducted by the appellant were presented, see letter dated 11 August 2005, point II (page 18, line 6, to page 21, line 7, and Annex IV).

The question whether document D5 is an enabling disclosure or not for producing thin and elongated articles as defined in claim 1 of the main request was an essential question in the second opposition proceedings (see point I above).

With its statement of grounds filed on 26 November 2008 during the present appeal proceedings (see point 2,

pages 2 to 8) the appellant filed results of additional experiments conducted by itself with a view to reworking Example 8 of document D5 for a sheet "having dimensions 80x80x6 (thickness) mm" as specified on page 13, line 53, of document D5, albeit with the polystyrene grade G757X instead of Toporex 555-57 used in Example 8 but no longer available. After it was established that the techniques disclosed in document D5 for forming a plaque of 80x80x6 (thickness) mm could be replicated, the techniques were applied to a sheet with the same length and width as the sheet of Example 8 but having a thickness of 1.32 mm (and a (flow) length to thickness ratio of about 75 : 1). The appellant reported that it was not possible to form such thin, elongated microcellular sheet, because the material froze before the part was filled and the cell structure was no longer a microcellular article, ie an article containing cells of maximum size less than about 100 microns in diameter and/or having a cell density $> 10^6/\text{cm}^3$.

When asked by the Board during the oral proceedings why a thickness considerably smaller than the cross-sectional dimension of no more than about 3.175 mm mentioned in claim 1 of the main request was chosen, the appellant replied that this had been done following the suggestion set forth by the Opposition Division on page 9, fourth paragraph, of the decision under appeal (reproduced in its entirety in point VI above). It may be noted that the Opposition Division was of the opinion that *"the microcellular structure will be preserved when the skilled person forms a sheet in the claimed dimensions on the basis of the teaching of D5, eg by reducing the thickness of the sheet to an amount*

of 1 mm". It is clear that the Opposition Division realized that forming a sheet having the dimensions as claimed in claim 1 of the main request starting from Example 8 of document D5 may be done in more than one way. Reducing the thickness to 1 mm was given only as an example.

The appellant reported that the thin and elongated plaque contained (elongated) cells having a size of more than 100 μm . However, document D5 contains several hints as to how the cell diameter can be controlled, see eg page 9, lines 54 and 54. Document D5 further discloses that in order to make cell diameters very small, one or more of various foam stabilizers may be added to the thermoplastic resin, see page 7, lines 25 to 28. There is no evidence that foam stabilizers were used in the experiments performed by the appellant.

In the judgment of the Board, the evidence furnished by the appellant does not constitute convincing proof that document D5 is not an enabling disclosure for producing thin and elongated articles as defined in claim 1 of the main request. Consequently, on the basis of said evidence, the burden of proof does not shift to the respondents.

- 1.3 Document D5 represents the closest state of the art. This document discloses a molded microcellular polymeric article formed by urging a flowable material into a molding chamber and allowing the microcellular article to form therein having a shape essentially identical to that of a molding chamber, see eg page 4, line 54, to page 5, line 21. The average cell population of the article lies in the range of from 10^8

to 10^{16} cells/cm³ (see page 4, line 56). The article thus qualifies as a "microcellular" article as defined in paragraph [0022], lines 9 to 11, of the patent in suit, see also decision T 516/05 of 7 March 2007 of Board 3.2.05 issued in the first appeal proceedings, point 3 of the Reasons.

The thickness of the produced article may generally be in the range of 0.5 to 50 mm, preferably from 1 to 40 mm, more preferably from 2 to 30 mm, see page 5, lines 26 and 27, and page 10, lines 47 and 48.

In the judgment of the Board, the general teaching of document D5 is that articles having a thickness as small as 0.5 mm can be produced by the process described on page 5, lines 2 to 21, which encompasses articles including at least one portion having a cross-sectional dimension of no more than about 3.175 mm.

The subject-matter of claim 1 of the main request differs from the molded microcellular polymeric article known from document D5 in that the article has at least one portion having a length to thickness ratio of at least 75 : 1.

In the judgment of the Board, it is within the customary practice of the person skilled in the art, who starts from document D5 in order to produce a thin and elongated molded microcellular polymeric article, to choose the length and the thickness of (a portion of) said article accordingly, as the need may be, eg as claimed in claim 1 of the main request. This was not contested by the appellant as such (what was contested

was that it was possible to produce such an article by any of the methods disclosed in document D5).

Since that argument was not accepted by the Board (see point 1.2 above), it is to be concluded that the subject-matter of claim 1 of the main request does not involve an inventive step.

AUXILIARY REQUEST

2. *Formal admissibility, Article 84 EPC*

Claim 1 of the auxiliary request now contains the process features (i) "formed by urging a flowable single phase solution of a polymeric material and a physical blowing agent in a supercritical state into a molding chamber" and (ii) "whereby the molding chamber is filled while nucleating said solution".

Drafting a product claim as a product-by-process claim is normally only allowable if it is impossible to define the claimed product other than in terms of its process of manufacture and if the process features result in a product that is distinguishable from a product made by a different process. If a product made by a different process is not distinguishable from the product made by the claimed process, a lack of clarity arises, since the matter for which protection is sought is not defined, contrary to Article 84 EPC, first sentence.

With respect to process feature (i) it may be noted that this feature is already known from document D5, see page 5, lines 2 to 22. Arguably, if a physical

rather than a chemical blowing agent is utilised, the blowing agent must be in a supercritical state in order that a microcellular article is formed.

With respect to process feature (ii) this raises the question whether it can be unambiguously determined by analyzing the final article that the molding chamber was filled while nucleating the solution.

The appellant has argued that the tests proved that the article according to claim 1 of the auxiliary request could only be obtained by filling the mold while nucleating the solution.

The appellant did not argue that the inherent product features of claim 1 of the auxiliary request were different from those of the article according to the main request. It is established case law that it is not possible to confer novelty or inventive step on a product claim by including a reference to a new or inventive process in said product claim, because a product(-by-process) claim must be interpreted in an absolute sense, i.e. independently of the process by which it is made.

In the judgment of the Board, the article according to claim 1 of the main request and therefore also the article according to claim 1 of the auxiliary request can be obtained by the method disclosed in document D5 for the reasons given in point 1 above.

It follows that the claim 1 of the auxiliary request lacks clarity, Article 84 EPC.

3. *Request for referral of questions to the Enlarged Board of Appeal*

3.1 After deliberation by the Board on the formal admissibility of the auxiliary request, the oral proceedings were resumed and the Chairman announced that the Board had come to the conclusion that claim 1 of the auxiliary request was not clear (which implied, as announced before the oral proceedings were adjourned, that the appeal would be dismissed). The request for referral of two questions to the Enlarged Board of Appeal was filed by the appellant at the time the Chairman started to state the final requests of the parties pursuant to Article 15(5) of the *Rules of Procedure of the Boards of Appeal* (RPBA, see Supplement to OJ EPO 1/2011, page 46).

The questions formulated in German by the appellant (see point III above) concern, or put simply, the issue "When does a party bear the burden of proof, and when does the burden of proof shift to the other party?". The questions read in English (translation by the Board):

1. Does the appellant in appeal proceedings bear the burden of proof as a matter of principle or does he only bear the burden of proof for facts on which the contested decision is based or for facts put to the proof by the respondent?

2. If the appellant bears the burden of proof as a matter of principle, does the burden of proof shift to

the other party at least when it would be disproportionately far easier to prove the opposite?

- 3.2 Article 112(1)(a) EPC provides that, in order to ensure uniform application of the law or if a point of law of fundamental importance arises, the Board of Appeal shall, during appeal proceedings relating to a particular case and either of its own motion or following a request from a party to the appeal proceedings, refer any question to the Enlarged Board of Appeal if it considers that a decision is required for the above purposes.

This is clearly the case if a Board should consider it necessary to deviate from an interpretation or explanation of the Convention contained in an earlier opinion or decision of the Enlarged Board of Appeal, cf Article 22 RPBA.

- 3.3 According to the established case law, each party bears the burden of proof for the facts it alleges, see eg decision G 3/97 OJ EPO 1999, 245 - Opposition on behalf of a third party/INDUPACK, point 2 of the Order: *The burden of proof is to be borne by the person alleging that the opposition is inadmissible*). See also interlocutory decision G 2/08 (dated 15 June 2009, not published in the OJ EPO - Objection to a member of the EBA, suspicion of partiality, point 1.2 of the Reasons: *In such a case the burden of proof lies with the party who raises the objection, ...*).

In the present case the Board has no intention to deviate from an interpretation or explanation of the Convention contained in an earlier opinion or decision

of the Enlarged Board of Appeal, cf Article 22 RPBA. Neither is the interpretation or explanation of an Article or a Rule of the EPC in dispute, nor has a point of law of fundamental importance arisen that would warrant a referral, cf Article 112(1)(a) EPC. The appellant did not cite any decision of Boards of Appeals expressing diverging views on the question "Which party bears the burden of proof?". It follows that none of the prerequisites mentioned in point 3.2 for referring a question the Enlarged Board of Appeal is met.

The Board is in a position to provide the answers to questions 1. and 2. formulated by the appellant (see points III and 3.1) in line with the jurisprudence as follows. The answer to question 1. simply is: No, the appellant in appeal proceedings only bears the burden of proof for the facts it alleges. As the answer to the first question is no, question 2. serves no purpose. However, for completeness' sake, the question under what circumstances the burden of proof shifts to the other party is addressed below.

- 3.4 It is established case law that, if one party furnishes convincing proof of the fact it alleges, the burden of proof for the other party's contrary assertion shifts to the latter, see Chapter VI.H.5.2, "Shifting of the burden of proof", of the book *Case Law of the Boards of Appeal*, 6th Edition, July 2010, pages 569-571.

The Board considers that in the present case the evidence furnished by the appellant did not constitute convincing proof for the allegation made by that party (cf point 1.2 above, last paragraph). Hence there is no

basis for deviating from the general principle that the burden of proof for an allegation made by a party rests with that party.

Moreover, the second part of question 2. formulated by the appellant, viz [...], *does the burden of proof shift ... at least when it would be disproportionately far easier to prove the opposite?*, aims at introducing an additional criterion to the question of when the burden of proof shifts to the other party. In the opinion of the Board, determining what is disproportionately far easier, proving an assertion or proving the contrary assertion, may be difficult, if not impossible, to judge in advance, since there seem to be no objective general criteria for deciding this.

In the judgment of the Board, an answer to the second part of question 2. is not required for the purpose of ensuring uniform application of the law. Nor can it be said that said question raises a point of law of fundamental importance, contrary to Article 112(1)(a) EPC.

- 3.5 The request for referral to the Enlarged Board of Appeal is therefore refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Meyfarth

W. Zellhuber