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**D E C I S I O N**  
**of 18 September 1996**

**Case Number:** T 0643/91 - 3.3.3

**Application Number:** 84111763.3

**Publication Number:** 0138146

**IPC:** B32B 27/32

**Language of the proceedings:** EN

**Title of invention:**  
Packaging laminate and use thereof

**Patentee:**  
AB Tetra Pak

**Opponent:**  
1. Unilever N.V.  
2. International Paper Company

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 56, 84, 114(1), 107, 108, 123(2)  
EPC R. 65(1)

**Keyword:**  
"Admissibility of one of the appeals (no) - party to the proceedings as of right"  
"Clarity (yes) - expression sufficiently clear to discern the claimed subject-matter from the prior art"  
"Closest document - addresses the same problem as the patent in suit"  
"Inventive step (yes) - no hint at the relevance of desired properties, nor at the specific blend resulting in those properties"

**Decisions cited:**  
T 0606/89

**Catchword:**  
-



Case Number: T 0643/91 - 3.3.3

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.3  
of 18 September 1996

**Appellant:**  
(Opponent 2)

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(Opponent 1)

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**Decision under appeal:**

Interlocutory decision of the Opposition Division  
of the European Patent Office posted 3 July 1991  
concerning maintenance of European patent  
No. 0 138 146 in amended form.

**Composition of the Board:**

**Chairman:** R. Young  
**Members:** B. ter Laan  
S. Perryman

## Summary of Facts of Submissions

- I. Mention of the grant of European patent No. 0 138 146 in respect of European patent application No. 84 111 763.3, filed on 2 October 1984, claiming priority from an earlier application in Sweden (8305473 of 5 October 1983), was announced on 10 August 1988, on the basis of ten claims, Claim 1 reading:

"Packaging laminate including a carrier layer, an extruded plastics layer of a mixture of linear low density polyethylene (LLDPE) and of low density polyethylene (LDPE), a barrier layer of gas impervious material such as aluminium and an adhesive layer, characterized by the following sequence of layers

a liquid-tight material layer (5)

a carrier layer (4)

a LDPE-layer (6)

a barrier layer (7)

an adhesive layer (9)

a mixed LLDPE/LDPE-layer (8)

comprising between 50 and 90% by weight of LLDPE."

Claims 2 to 8 were dependent and referred to preferred embodiments of the laminate of Claim 1.

Independent Claim 9 referred to the use of the packaging laminate of the preceding claims for the packaging of edible oil or food containing such oil.

Claim 10 was dependent and referred to a preferred embodiment of the use of Claim 9.

- II. On 5 May 1989 and 9 May 1989 respectively, two Notices of Opposition were filed and revocation of the granted patent in its entirety was requested under Article 100(a) EPC (lack of inventive step) by

Opponent 1, and under Article 100 EPC (lack of novelty and inventive step) by Opponent 2. These objections were essentially based upon the following documents:

- D1: JP-A-58 132 555, corresponding to the later published
  - D1a: GB-A-2 117 536,
- D7: US-A-3 972 467 and
- D8: E.W. Veazey in "Paper, Film and Foil CONVERTER", Feb. 1982, pages 41 to 46: "The Potential Of LLDPE In Coextruded Film.",

the latter having been introduced outside the nine months opposition period.

III. By an interlocutory decision delivered orally on 15 January 1991 and issued in writing on 3 July 1991, the Opposition Division held that the patent in amended form, i.e. on the basis of Claims 1 to 6 filed on 15 January 1991, complied with the requirements of the EPC. Claim 1 read as follows:

"Packaging laminate including a carrier layer, an extruded plastics layer of a mixture of linear low density polyethylene (LLDPE) and of low density polyethylene (LDPE), a barrier layer of gas impervious material such as aluminium and an adhesive layer, characterized by the following sequence of layers

- a liquid-tight material layer (5)
- a carrier layer (4)
- a LDPE-layer (6)
- a barrier layer (7)
- an adhesive layer (9)
- a mixed LLDPE/LDPE-layer (8)

comprising about 85% by weight of LLDPE, that the mixture of LLDPE/LDPE has a melt index in the range of between 3,5 and 7 g/10 min and that the mixed LLDPE/LDPE-layer (8) is used as an inner layer of a package for packaging edible oil or food containing edible oil."

Claims 2 to 6 were dependent and referred to preferred embodiments of the laminate of Claim 1.

The Opposition Division held that:

- (a) The requirements of Articles 123(2) and 123(3) EPC were met since new Claim 1 was a combination of the original Claim 1 with three originally dependent claims and part of the description.
- (b) D1a, which had been used by all parties as a translation of the prior published document D1, described a packaging film for light-sensitive material comprising, in sequence, a craft paper carrier layer, an LDPE layer, an aluminium barrier layer, an LDPE adhesive layer and a mixed LLDPE/LDPE layer containing e.g. 89.5 or 79% by weight of LLDPE, which layer could be extruded. These values could not be considered to anticipate the "about 85%" of the present claims. Also, neither the melt index nor the liquid-tight material layer were disclosed, so that the opposed patent differed from the disclosure of D1a in three points and from the other documents on file in even more aspects.

Hence the claimed subject-matter was novel.

- (c) With respect to the presence of an inventive step, D1a was considered to be the closest document. The problem of the patent in suit was seen as the

improvement of the stress cracking properties of laminates like those known from D1a, destined for the packaging of edible oils or products containing such oils. A reduction of stress cracking was achieved by using the specific mixture of 85% LLDPE in the mixed LLDPE/LDPE layer as claimed, and extrusion was facilitated by the selection of a specific melt index. The good results could be seen from the graphs submitted by the Proprietor (now Respondent), and were not suggested by D1 or any of the other documents, in particular D7, which described a different sequence of layers, nor by D8, which, although disclosing the better oil resistance properties of an LLDPE/LDPE layer, did not suggest the use of blends having about 85% LLDPE or the specified melt index range.

- IV. Opponent 1 lodged an appeal against the above decision on 27 August 1991 and paid the prescribed fee simultaneously, but did not file any Statement of Grounds in support of the appeal.

On 30 August 1991 the Appellant (Opponent 2) lodged an appeal against the above decision and paid the prescribed fee on the same day. The Statement of Grounds of Appeal was filed on 5 November 1991.

- V. Oral proceedings were held on 18 September 1996, during which the Respondent filed a new set of six claims as its sole request, of which Claim 1 reads:

"Use of a packaging laminate including a carrier layer, an extruded plastics layer of a mixture of linear low density polyethylene (LLDPE) and of low density

polyethylene (LDPE), a barrier layer of gas impervious material such as aluminium and an adhesive layer, for a package for packaging edible oil or food containing edible oil, characterized by the following sequence of layers

a liquid-tight material layer (5)

a carrier layer (4)

a LDPE-layer (6)

a barrier layer (7)

an adhesive layer (9)

a mixed LLDPE/LDPE-layer (8)

comprising about 85% by weight LLDPE, that the mixture of LLDPE/LDPE has a melt index in the range of between 3,5 and 7 g/10 min and that the mixed LLDPE/LDPE-layer (8) is the inner layer of said package."

Claims 2 to 6 were dependent and referred to preferred embodiments of the use of the laminate of Claim 1.

VI. The written and oral arguments of the Appellant may be summarised as follows:

(a) The objection under Article 123(2) EPC was maintained since the melt index of the LLDPE/LDPE mixture as defined in Claim 1 had been disclosed only in combination with specific melt index ranges for the two components as could be seen from the wording of Claim 8 as granted and from the description. The objection under Article 123(3) EPC was not maintained.

(b) The term "about" before "85% by weight LLDPE" in Claim 1 was vague. It was unclear whether it encompassed e.g. 50 or 90% by weight LLDPE, or e.g. 79.0 and 89.5, values disclosed in D1a. The

description was not helpful either, as the expression "substantially the same" in column 3, lines 35 to 44, in particular lines 39 to 41, was equally unclear.

- (c) Although the Appellant initially maintained its novelty objection, during the oral proceedings it was accepted that the claimed subject-matter was novel.
- (d) By reference to the Appellant's letter dated 13 November 1990, filed during the opposition proceedings, it was pointed out that D1 differed from the claimed laminate in the absence of the water-tight layer, whereas D7 differed in that the polyethylene layer consisted solely of LDPE.

D7 was considered the closest document because it described laminates having most features in common with the present laminates and because, like the patent in suit, it addressed the same problem of stress crack resistance in laminates used for packaging oil containing products. In view of the teachings of D1a and also D8, which described the improved properties of LLDPE and LLDPE/LDPE blends, it was obvious to exchange the LDPE layer of D7 for the presently claimed mixture of LLDPE/LDPE. Furthermore, contrary to the Respondent's assertions based upon unsubstantiated experimental data (which should therefore be disregarded), a mixture containing an amount of about 85% by weight of LLDPE did not possess properties that were different from the mixtures disclosed in D1a, containing 89.5 or 79% by weight of LLDPE. This had been demonstrated by



counter-experiments carried out by the Appellant and attached to the Statement of Grounds. To support these arguments, the Appellant, with the Statement of Grounds, submitted four additional documents not mentioned during the opposition proceedings and, by a letter filed on 26 November 1991, six further documents.

VII. The Respondent (Proprietor) argued essentially as follows:

- (a) The appeal of Opponent 1 was not admissible as no Statement of Grounds had been filed and this party should therefore be excluded from the further proceedings.
- (b) The numerous late filed documents could only be accepted to support arguments that had already been presented during the proceedings. However, they could not be admitted as "regular references".
- (c) As regards Article 123(2) EPC, the present melt index range was disclosed in the original description; there was no obligation to restrict Claim 1 to the specific embodiment of a dependent claim.
- (d) D1a, which was the closest document, referred to light-shielding laminates for packaging light-sensitive products, and did not relate to the present problem, the prevention of crack formation in the laminate leading to weakening of the protection against edible oils, which occurred especially at the edges of the package where the laminate was folded. The patent in suit solved the problem by modifying the laminate of D1a in three respects: the addition of an outer layer and the

selection of a mixture of LLDPE/LDPE containing an amount of about 85 % by weight of LLDPE, with a melt index of 3.5 to 7 g/10 min. The tests carried out by the Respondent demonstrated that a ratio of 85/15 LLDPE/LDPE resulted in balanced elongation properties in both machine and cross or transverse direction, which could not have been foreseen from the teachings of any of the cited documents alone or in combination. The tests upon which the Appellant relied to show otherwise, were not suited as the exact conditions of each of the tests were not given.

VIII. The Appellant requested that the decision under appeal be set aside and the patent be revoked.

The Respondent requested that the decision under appeal be set aside and that the patent be maintained on the basis of Claims 1 to 6 submitted at the oral proceedings on 18 September 1996.

## Reasons for the Decision

### *Admissibility of the appeals*

1. Opponent 1 filed a Notice of Appeal and paid the prescribed fee, but failed to file a written statement setting out the grounds of appeal. Therefore, the appeal has to be rejected as inadmissible (Article 108 in conjunction with Rule 65(1) EPC). The appeal of Opponent 2, however, is admissible and gives rise to proceedings before the Board of Appeal. For this reason, Opponent 1 is considered to be "any other party

to the proceedings" under Article 107 EPC and, as a consequence, is a party to the appeal proceedings as of right. Accordingly, this party cannot be excluded from the proceedings and was in fact summoned to the oral proceedings, but did not, in the event, attend.

*Late filed documents*

2. The Appellant, apart from experimental data, also filed four additional documents with the Statement of Grounds of Appeal and six more documents at an even later stage in the proceedings. However, during the oral proceedings it was agreed to discuss only those documents that were related directly to the experimental evidence filed in response to the information provided by the Respondent during the oral proceedings before the Opposition Division. These documents are: Attachments 1 and 2 (experimental data by the Appellant), filed with the Statement of Grounds of Appeal, and Document I (DI: 1982 Paper Synthetics Conference, pages 173 to 179: "Extrusion coating of linear low density polyethylene"), filed on 26 November 1991. As the parties agreed upon this point and in view of the relevance of the documents, the Board has, in its discretion under Article 114(1) EPC, admitted them into the proceedings.

*Amendments*

3. As can be seen from points I and V above, Claim 1 differs from Claim 1 as granted in three features: (a) the use of the laminate for a package for packaging edible oil or food containing edible oil, (b) the LLDPE content of about 85% by weight of the LLDPE/LDPE mixture and (c) the melt-index of that mixture.

- 3.1 Feature (a) is based upon the description as originally filed, page 1, lines 11 to 28 and page 5, lines 28 to 36. Feature (b) finds its basis on page 6, lines 5 to 12 and original Claim 6. Feature (c) can be found on page 6, lines 33 to 34.
- 3.2 The Appellant's objection under Article 123(2) was mainly based upon the wording of Claim 8 as granted, in which the melt index range of the mixture was related to that of each of its components. However, Claim 8 as granted was not present in the application as originally filed and hence cannot serve as a proper basis for that objection. The only disclosure of melt indices in the original application is to be found on page 6, lines 26 to 35, in particular lines 30 to 34, where it can be read that the melt index is an important factor for the extrudability of the LLDPE/LDPE mixture, the LDPE **preferably** having a melt index of 5.5 to 8 g/10 min together with an LLDPE of melt index about 3.7 g/10 min (emphasis added). In a separate sentence it is stated that the melt index of the mixture ought to be between 3.5 and 7.0 g/10 min. From this passage it is clear that the melt indices of each of the components are merely given by way of (preferred) example, but not as an obligatory feature of how to obtain the melt index of the mixture. Therefore, the Appellant's argument must fail and Claim 1 complies with Article 123(2) EPC.
4. The Appellant's objection under Article 123(3) EPC was not maintained, and, as a claim directed to the specific use of a laminate (present Claim 1) does not extend the scope of protection of a claim directed to the laminate as such (Claim 1 as granted), the requirements of Article 123(3) EPC are also fulfilled.

5. As regards the clarity of the term "about 85% by weight LLDPE", if the expression "about" is sufficiently clear to discern the claimed subject-matter from the prior art, then the term is "clear" within the terms of Article 84 EPC.
- 5.1 In the present case, it is evident from the description of the patent in suit that the value of 85% plays a crucial role for the presence of balanced elongation properties in the machine and cross directions (column 3, lines 35 to 44) which is itself stated to be responsible for the good performance of the package.
- 5.2 During the oral proceedings at the opposition stage the Respondent had filed additional data showing an optimal balance of the elongations in machine direction and in transverse or cross direction for a mixture of about 85% by weight of LLDPE and 15% by weight of LDPE. However, no details were given as regards the exact conditions for making those measurements. By way of counter argument the Appellant with its Statement of Grounds also filed experimental data showing that no such balance of elongation properties was associated with the 85/15 ratio in the LLDPE/LDPE blend, which however also suffered a lack of information as regards the exact conditions. Only during the oral proceedings at the appeal stage did it become clear that both parties had performed their experiments under quite different conditions.
- 5.2.1 The Respondent in giving evidence, stated that first packages were made up with an innermost LLDPE/LDPE blend layer, then used to store edible oil, then the package was emptied and all layers were chemically removed from the innermost one. Measurements were then made on the innermost LLDPE/LDPE blend layer which had actually been used for storing oil. It was these measurements which surprisingly, even for the inventor,

showed that for the mixture of about 85% by weight of LLDPE and 15% by weight of LDPE elongations in the machine direction and in the transverse or cross direction were equal.

- 5.2.2 The Appellant's tests on the other hand had been made on layers which had not been used in a package.

The Appellant had been in possession of the results quoted by the Respondents for some years, without querying the exact conditions under which the determinations were made. While it is unfortunate that the Appellants were under a misapprehension as to the conditions used by the Respondents, the Appellants as opponents needing to establish their case, should have queried the conditions used at the latest when their own results turned out to be different.

- 5.2.3 As there is no indication whatsoever in the patent specification of the special way in which the Respondent measured its films, and as the Appellant also did not provide sufficient information regarding its measurement conditions, the Board cannot rely on the test reports of either of the parties.

- 5.3 Since the statement in question is in a granted patent and there is no conclusive evidence to the contrary (see point 5.2 above), the onus of proof being for the Appellant/Opponent, it has to be accepted that that statement is correct and hence that balanced elongation behaviour is in fact associated with the value of about 85% LLDPE in the blend.

- 5.4 There is no suggestion in the prior art, nor in the patent in suit, that such an effect is obtained at the nearest values specifically disclosed in D1a, viz 79% and 89.5%.

- 5.5 Consequently, the term "about 85%" is to be interpreted narrowly as meaning only those blends which contain sufficiently close to precisely 85% by weight LLDPE to exhibit, in substance, the balanced elongation behaviour referred to at column 3, lines 35 to 44 of the patent in suit.
- 5.6 Thus, in the context of this patent, the term "about 85%" in Claim 1 is clear and satisfies Article 84 EPC.

*Novelty*

6. In the course of the oral proceedings held before the Board the Appellant accepted that the presently claimed subject-matter was novel. As none of the cited documents, either explicitly or implicitly, discloses all the features of Claim 1, the Board sees no reason to decide otherwise.

*Closest document*

7. The patent in suit concerns a packaging laminate and use thereof. Such laminates are disclosed in both D1a and D7.
- 7.1 D1a describes a film for packaging light-sensitive materials having at least one light-shielding film comprising polyethylene polymer and not less than 1 weight % of light-shielding material, wherein not less than 50 weight % of the total polyethylene polymer is linear low density polyethylene (Claim 1). In Figure 6 and Table 3 a laminate having the following layers is disclosed: paper/adhesive(LDPE)/aluminium/adhesive (LDPE)/carbon black + LDPE + LLDPE, the latter in an amount of e.g. 79 or 89.5% by weight of the mixture forming that layer. The melt index of the LDPE is 2.4, that of the LLDPE 2.5 g/10 min. The latter figure,

although omitted from the text of D1a, is evident by taking into consideration the original Japanese text itself (D1, page 300, column 01, lines 1 to 4). This laminate thus differs from the present one in three aspects: (i) the amount of LLDPE in the LDPE/LLDPE layer, (ii) the melt indices of the polyethylene components of that layer and (iii) the absence of a further outer layer on the carrier layer. The problem it refers to is to provide a laminate for packaging light-sensitive material, which has also moistureproofness, physical strength, gas-shielding properties and good packaging workability. (D1a, page 1, lines 5 to 7 and 40 to 42).

7.2 D7 describes a laminate comprising a layer of paperboard base stock, a first layer of a thermoplastic material bonded to said layer of paperboard base stock; a layer of a polymer film bonded to said layer of paperboard base stock, said polymer film having specified tensile strength at the yield point and elongation at fracture; and a second layer of a thermoplastic material bonded to said layer of polymer film. In Figure 2 a laminate having the following layers is disclosed: thermoplastic material (e.g. LDPE)/paperboard/adhesive(e.g. LDPE)/high strength polymer film (e.g. Nylon)/adhesive (e.g. LDPE)/aluminium/thermoplastic material(e.g. LDPE). This laminate thus differs from the present one in the presence of a high strength polymer film between the barrier and carrier layers and in the absence of LLDPE in the contents-adjacent outer layer. It addresses the problem of durability of containers holding certain penetrative fill products over an extended period of time, when the fluid tends to seep through the coating into the paperboard carrier layer. Such seep was found to occur mainly at sites where the laminate had been folded and flexed (column 1, line 24 to column 2, line 46).



- 7.3 From the above it is clear that the laminates of both D1a and D7 have many features in common with the present laminate, but only D7 addresses the same problem as the patent in suit. Therefore, the Board considers D7 to be the closest prior art document (see also decision T 606/89 dated 18 September 1990, not published in OJ EPO).

*Problem and solution*

8. Although the laminates obtained in D7 are said to have good folding and flexing resistance, the solution it offers requires an additional layer having high tensile strength at the yield point, thus making the laminate more complicated to produce.
- 8.1 In view of this, the technical problem underlying the patent in suit may thus be seen in using a laminate that has good resistance against folding and flexing so that the package made from it will not suffer from seepage of the contents due to crack formation, which laminate is simpler to produce than that of D7.
- 8.2 According to the patent in suit this problem is to be solved by using a specific laminate as indicated in Claim 1, in particular in which the high strength polymer (nylon) layer of D7 is unnecessary and the contents-adjacent thermoplastic (e.g. LDPE) layer is replaced by a layer of mixed LLDPE/LDPE comprising about 85% by weight of LLDPE, of specified melt-index range.
- 8.3 It was not disputed by the Appellant that the measures constituting the solution of the technical problem (see point 8.1, above) provided a package which was effective for the claimed use. On the contrary, at the oral proceedings the Appellant argued strongly that the reason why the package laminate according to the patent

in suit "worked" was attributable to factors other than the parameters which appear in Claim 1, namely the amount of about 85% LLDPE in the contents-adjacent layer and the melt index of the LDPE/LLDPE mixture.

8.4 This argument does not cast doubt on the effectiveness of the solution provided by the claimed subject-matter, but rather implies that such a solution could have been obtained at other values of the above-mentioned parameters. This latter implication, however, is not convincing in the light of the conclusion reached concerning the evidence of the parties in relation to the amount of LLDPE, there being no concrete evidence whatever throwing doubt on the relevance of that parameter (see point 5.2 above).

8.5 Consequently, the Board finds it credible that the claimed measures provide an effective solution of the stated problem.

*Obviousness*

9. It remains to be decided whether the claimed subject-matter is obvious having regard to the documents on file.

9.1 D7 solves the problem of crack formation during the folding of the package made out of the laminate by providing an additional layer of high tensile strength material within the laminate. Thus, the question to be answered is: was it, in view of D7 itself and the other cited documents D1a, D8 and D1, obvious for the skilled person to solve the problem by modifying the outer layer of the laminate which was to be on the inside of the package in the way described in present Claim 1?

- 9.2 There is no hint at taking such a measure in D7 itself, since the high strength polymer film is mandatory and there is no mention of LLDPE for any purpose, let alone that of providing crack resistance.
- 9.3 The oil resistant properties and the resistance to physical abuse of LLDPE (D8: page 41, column 2, full paragraphs 5 and 6; DI: page 173, introduction) as well as its usefulness for packaging laminates for edible oil containing products (D1a: page 5, lines 44 to 46 and 61 to 65; D8: page 144, column 1, from the last paragraph onward) are, however, known. So are the difficult processing of LLDPE and the desirability of blending LLDPE with LDPE to facilitate extrusion (D1a: page 1, lines 15 to 19 and page 2, lines 1 to 3 and 43 to 44; D8: page 143, column 1, last sentence; DI: page 176, Table I). D1a also describes the use of blends of LLDPE and LDPE with carbon black as an outer layer of packaging laminates, e.g. having an amount of LLDPE of 79 and 89.5% by weight, so that the skilled person might consider using a blend of LLDPE and LDPE in general, and even of a blend containing 79 or 89.5% by weight of LLDPE in particular, for the contents-adjacent outer layer of the laminate.
- 9.4 However, as none of the cited documents mentions the relevance of balanced elongation properties for crack prevention, the skilled person could not infer the importance of that feature, let alone that using the specific amount of about 85% by weight of LLDPE in the blend would result in those balanced elongation properties. Therefore, the skilled person would not be led to use a simplified laminate for forming a package for edible oil or edible oil containing products having a mixed LDPE/LLDPE layer as the inner layer, which mixture comprises about 85% by weight of LLDPE.

This is also valid in spite of the disclosure of DI, table I, where a mixture of LDPE/LLDPE in a ratio of 15/85 is described. The information contained in Figure 3 (balanced Elmendorf tear in machine and cross direction for cast film at an LDPE/LLDPE ratio of 75/25) and in Figure 4 (a more or less balanced Elmendorf tear over the whole range of 0% to 100% LLDPE for a laminate having a paper carrier layer) would, if anything, direct the skilled person to using a 75/25 ratio in a laminate intended for the present use.

In view of the above, the Board concludes that the use of a laminate as defined in Claim 1 is inventive.

- 9.5 Since the amount of about 85% LLDPE in the LLDPE/LDPE blend by itself is not obvious, it is unnecessary to take into account any contribution of the melt index of the blend components to non-obviousness.
10. As Claim 1 is allowable, the same goes for dependent Claims 2 to 6, which are directed to preferred embodiments of the use according to Claim 1, and the patentability of which is supported by that of Claim 1.

**Order**


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

1. The decision under appeal is set aside.
2. The matter is referred back to the first instance with the order to maintain the patent on the basis of Claims 1 to 6 submitted at the oral proceedings on 18 September 1996, and a description yet to be adapted.

The Registrar:

  
E. Görgmaier

The Chairman:

  
R. Young