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D E C I S I O N
of 27 February 1997

Case Number: T 0609/94 - 3.4.2

Application Number: 83303373.1

Publication Number: 0098070

IPC: G02F 1/137, G02F 1/133

Language of the proceedings: EN

Title of invention:
Liquid crystal devices

Patentee:
Secretary of State for Defence in Her Britannic Majesty's Gov. of the United Kingdom of Great Britain and Northern Ireland

Opponent:
Asea Brown Boveri AG
Philips Electronics N.V.

Headword:
-

Relevant legal provisions:
EPC Art. 111(1), (2)

Keyword:
"Binding effect of an appeal decision (ratio decidendi)"

Decisions cited:
T 0315/91, T 0843/91, T 0027/94

Catchword:
When, by decision of a Board of Appeal, the case is remitted to the first instance with the order to continue the procedure on the basis of a first set of claims, the first instance is not entitled to reject new claims merely by reference to said decision, when said new claims, while differing from said first claims, do not contravene the ratio decidendi of said decision"

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Case Number: T 0609/94 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 27 February 1997

Appellant: (Proprietor of the patent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 8 July 1994 revoking European patent No. 0 098 070 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: E. Turrini
Members: R. Zottmann
L. Mancini

Summary of Facts and Submissions

I. The Appellant (Patentee) lodged an appeal against the (first) decision of the Opposition Division to revoke the European patent No. 0 098 070 (application No. 83 303 373.1). Said decision was based on the ground that none of the requests complied with Article 123(2) EPC.

The Appellant requested that the patent be maintained on the basis of the claims of a main request or of a first to seventh auxiliary requests.

II. In its decision T 0319/91, the Board of Appeal rejected the main request (hereinafter called **m.r.**) and the first through sixth auxiliary requests (hereinafter called **1st ar, 2nd ar, 3rd ar, 4th ar, 5th ar** and **6th ar**) and remitted the case to the Opposition Division with the order to continue the opposition procedure on the basis of the seventh auxiliary request (hereinafter called **7th ar**).

The Board supplied in substance the following arguments in support of the rejection of the **m.r.** through **6th ar** (see sections 2. through 7. of T 0319/91):

Claims 1 of the **m.r.** and the **1st ar**, an alternative of claim 1 of the **2nd ar** and claim 2 of the **3rd ar** do not include the feature that the liquid crystal device (LCD) incorporates a dye (hereinafter called feature h). However, according to the application as originally filed - reference was particularly made to page 11, lines 6 to 8 and claim 1 - a polarization switch effect which is an essential effect to be obtained by the patent-in-suit is obtainable without a dye for high birefringence materials (hereinafter called feature H') only with LC layers with a thickness (d) of more than

12 µm (hereinafter called feature E') and the cell is disposed between two polarizers (hereinafter called feature U). Since claims 1 of the **m.r.**, the **1st ar** and **2nd ar** do not contain feature E', since claim 2 of the **3rd ar** does not contain features E' and U, since claims 2 of the **4th ar** and **5th ar** contain feature E' but do not contain feature U and since claim 2 of the **6th ar** specifies that d is 6 µm, they are not allowable under Article 123(2) EPC.

III. During the resumed opposition proceedings, the Appellant filed sets of claims as the main request (hereinafter called **M.R.**) and first to fifth subsidiary request (hereinafter called **1st SR, 2nd SR, 3rd SR, 4th SR** and **5th SR**).

The Opposition Division decided that the **M.R.**, **1st SR**, **2nd SR** and **3rd SR** were inadmissible by virtue of Article 111(2) EPC and that the **4th SR** and **5th SR** were unacceptable since claim 1 of each of the latter requests did not involve an inventive step. Thus, the patent was revoked.

The Division argued in substance that neither of the **M.R.** to **3rd SR** could be considered as based on the claims according to the **7th ar**. The **M.R.**, **1st SR** and **2nd SR** differed from the **7th ar** in that feature H was not necessarily included in all the independent claims. The independent claim of **3rd SR** included an alternative feature which did not form part of claim 1 of the **7th ar**. The **4th SR** and **5th SR** were admissible since they included an independent claim comprising feature H and thus claim 1 conformed with the wording of the order given by the Board of Appeal.

IV. Requests

The Appellant requested that the case be remitted to the Opposition Division.

Furthermore, he requested oral proceedings and submittance of the case to the Enlarged Board of Appeal, however only in case of rejection of the request to remit the case to the Opposition Division.

Respondent I requested that the appeal be dismissed and the revocation of the patent be confirmed.

Respondent II only filed observations referring to the grounds of appeal.

V. Wording of all independent claims of the **M.R.** through **3rd SR**

V.1 The independent claims of the **M.R.** read as follows:

"1. A liquid crystal device of the kind in which the presence of pleochroic dye in the liquid crystal material can enable viewing without polarisers, the device having a liquid crystal cell (1) with a layer (2) of a long pitch cholesteric liquid crystal material contained between the cell walls with

- the thickness of the layer (2) is less than 20 μm,

- the ratio of the layer thickness divided by the pitch of the liquid crystal material is between 0.5 and 1,0,

- the liquid crystal material having a positive dielectric anisotropy,

- two cell walls (3, 4) bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements,

- the cell walls being surface treated to align the liquid crystal molecules (23) at the cell wall surface along an alignment direction (R) and with a tilt to the surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

- the elastic and dielectric constants of the material together with the surface alignment and natural pitch of the material being arranged to provide a sharp transmission voltage characteristic in combination with substantially zero hysteresis,

- the device being switchable directly between a light transmissive ON state and a light absorbing non transmissive OFF state and vice versa at substantially the same voltages,

- the device having driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and a logic circuit (10) controlling the driver circuits (8, 9),

- high multiplexibility."

"15. A liquid crystal display comprising a layer of long pitch cholesteric liquid crystal made of the kind in which the switched states are made visible with two polarisers having a cell greater than 12 µm and high birefringence material with

- the thickness of the layer (2) is less than 20 μm,

- the ratio of the layer thickness divided by the pitch of the liquid crystal material is between 0.5 and 1,0,

- the liquid crystal material having a positive dielectric anisotropy,

- two cell walls (3, 4) bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements,

- the cell walls being surface treated to align the liquid crystal molecules (23) at the cell wall surface along an alignment direction (R) and with a tilt to the surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

- the elastic and dielectric constants of the material together with the surface alignment and natural pitch of the material being arranged to provide a sharp transmission voltage characteristic in combination with substantially zero hysteresis,

- the device being switchable directly between a light transmissive ON state and a light absorbing non transmissive OFF state and vice versa at substantially the same voltages,

- the device having driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and a logic circuit (10) controlling the driver circuits (8, 9),

- high multiplexibility."

"20. A liquid crystal device having a liquid crystal cell (1) with a layer (2) of a long pitch cholesteric liquid crystal material between the cell walls with

- the thickness of the layer (2) is less than 20 μm,

- the ratio of the layer thickness divided by the pitch of the liquid crystal material is between 0.5 and 1,0,

- the liquid crystal material having a positive dielectric anisotropy,

- two cell walls (3, 4) bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements,

- the cell walls being surface treated to align the liquid crystal molecules (23) at the cell wall surface along an alignment direction (R) and with a tilt to the surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

- the elastic and dielectric constants of the material together with the surface alignment and natural pitch of the material being arranged to provide a sharp transmission voltage characteristic in combination with substantially zero hysteresis,

- the device being switchable directly between a light transmissive ON state and a light absorbing non transmissive OFF state and vice versa at substantially the same voltages,

- the device viewable by the presence of pleochroic dye and/or polarisers,

- the device having driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and a logic circuit (10) controlling the driver circuits (8, 9),

- high multiplexibility,

characterised in that the tendency to form a scattering texture just above the threshold voltage is suppressed by providing that the values of the natural pitch of the liquid crystal material and the thickness of the layer are chosen to yield a pitch to thickness ratio less than that which would match the natural cholesteric pitch for matching to the surface alignment twist."

"21. A liquid crystal device having a liquid crystal cell (1) with a layer (2) of a long pitch cholesteric liquid crystal material between the cell walls with

- the thickness of the layer (2) is less than 20 μm,

- the ratio of the layer thickness divided by the pitch of the liquid crystal material is between 0.5 and 1,0,

- the liquid crystal material having a positive dielectric anisotropy,

- two cell walls (3, 4) bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements,

- the cell walls being surface treated to align the liquid crystal molecules (23) at the cell wall surface along an alignment direction (R) and with a tilt to the surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

- the elastic and dielectric constants of the material together with the surface alignment and natural pitch of the material being arranged to provide a sharp transmission voltage characteristic in combination with substantially zero hysteresis,

- the device being switchable directly between a light transmissive ON state and a light absorbing non transmissive OFF state and vice versa at substantially the same voltages,

- the device viewable by the presence or pleochroic dye and/or polarisers,

- the device having driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and a logic circuit (10) controlling the driver circuits (8, 9),

- high multiplexibiliity,

- temperature compensation."

V.2 Claim 1 of the **1st SR** is identical with claim 20 of the **M.R.**, and claim 2 of the **1st SR** is identical with claim 21 of the **M.R.**

V.3 The independent claims of the **2nd SR** read as follows:

"1. A highly multiplexed liquid crystal device, comprising:

- a liquid crystal cell (1), comprising
- a layer (2) of a long pitch cholesteric liquid crystal material wherein
- the thickness (d) of the layer (2) is less than 20 µm,
- the ratio (d/p) of the layer thickness (d) divided by the pitch (p) of the liquid crystal material is between 0.5 and 1.0, and
- the liquid crystal material has a positive dielectric anisotropy, and the liquid crystal material comprises an amount of a pleochroic dye,
- two cell walls (3, 4), containing the layer (2) of the liquid crystal material, and bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements, and being surface treated to align the liquid crystal molecules (23) at the cell wall surfaces along an alignment direction (R) and with a tilt to the surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch (p) of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

the elastic and dielectric constants of the material together with the surface alignment and material pitch of the material being arranged to provide a sharp transmission/voltage characteristic with substantially zero hysteresis, whereby the device may be switched directly between a light transmissive ON state and a light absorbing non transmissive OFF state

- driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and

- a logic circuit (10) controlling the driver circuits (8, 9)."

"2. A highly multiplexed liquid crystal device, comprising:

- a liquid crystal cell (1), comprising a cell disposed between a pair of polarisers

- a layer (2) of a long pitch cholesteric liquid crystal material, wherein

- the thickness (d) of the layer (2) is less than 20 µm and equal to or greater than 12 µm,

- the ratio (d/p) of the layer thickness (d) divided by the pitch (p) of the liquid crystal material is between 0.5 and 1.0 and

- the liquid crystal material has a positive dielectric anisotropy, and the liquid crystal material has high birefringence

- two cell walls (3, 4), containing the layer (2) of the liquid crystal material, and bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements, and being surface treated to align the liquid crystal molecules (23) at the cell wall surfaces along an alignment direction (R) and with a tilt to the surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch (p) of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

the elastic and dielectric constants of the material together with the surface alignment and material pitch of the material being arranged to provide a sharp transmission/voltage characteristic with substantially zero hysteresis, whereby the device may be switched directly between a light transmissive ON state and a light absorbing non transmissive OFF state

- driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and

- a logic circuit (10) controlling the driver circuits (8, 9)."

V.4 The independent claim of the **3rd SR** reads as follows:

"1. A highly multiplexed liquid crystal device, comprising:

- a layer (2) of a long pitch cholesteric liquid crystal material having at least one of

- a small or zero temperature dependence of pitch (p), or

- a liquid crystal material whose pitch decreases with increasing temperature to partially or wholly compensate for variations in the threshold voltage with temperature, or

- temperature sensing and varying the addressing voltage levels accordingly,

wherein

- the thickness (d) of the layer (2) is less than 20 µm,

- the ratio of (d/p) of the layer thickness (d) divided by the pitch (p) of the liquid crystal material is between 0.5 and 1.0, and

- the liquid crystal material has a positive dielectric anisotropy, and the liquid crystal material comprises an amount of a pleochroic dye,

- two cell walls (3, 4), containing the layer (2) of the liquid crystal material, and bearing electrode structures (6, 7) which are arranged as a first series of m separate electrodes (6; 6_1 to 6_n) on one wall (3) and a second series of n separate

electrodes (7; 7_1 to 7_n), forming an m x n matrix of separate addressable elements, and being surface treated to align the liquid crystal molecules (23) at the cell wall surfaces along an alignment direction (R) and with a tilt tot he surface in a tilted homogeneous structure,

- the surface alignment and the natural pitch (p) of the liquid crystal material being arranged to provide a progressive molecular twist of greater than π and less than 2π radians across the layer (2), with a uniform tilt direction,

the elastic and dielectric constants of the material together with the surface alignment and material pitch of the material being arranged to provide a sharp transmission/voltage characteristic with substantially zero hysteresis, whereby the device may be switched directly between a light transmissive ON state and a light absorbing non transmissive OFF state

- driver circuits (8, 9) for repetitively applying voltages from a voltage source (11) to the electrodes (6, 7) to RMS multiplex address each addressable element, and

- a logic circuit (10) controlling the driver circuits (8, 9)."

VI. The arguments of the Appellant in support of his request to admit the **M.R.** and the **1st SR** to **3rd SR** are summarized as follows:

There is no basis in the EPC, particularly in Article 111(2), and in decision T 0319/91 for the decision of the Opposition Division rejecting admission of said requests. Rejection of reformulated claims,

provided that the *rationale* of decision T 0319/91 is followed, at only a single instance is incompatible with the requirements of the EPC. To do otherwise will place unreasonable restrictions on patentees in overcoming objections which might arise during the resumed proceedings.

VII. The arguments of Respondent I (Opponent 01) in support of his request to not admit the **M.R.** and the **1st SR** to **3rd SR** are summarized as follows:

The Board of Appeal, in its decision T 0319/91, unambiguously ruled that the proceedings may only be resumed on the basis of the claims of the **7th ar**. Claim 1 of this request contains feature H. Since the **M.R.** and the **1st SR** to **3rd SR** do not contain said feature, they are inadmissible. Since the **4th ar** was rejected incontestably by the Board, it is impossible to treat said request again, not even in a modified form.

VIII. The arguments of Respondent II (Opponent 02) in support of his request to not admit the **M.R.** and the **1st SR** to **3rd SR** are summarized as follows:

There is no reason why this case should be remitted again to the Opposition Division to reconsider the **M.R.** and the **1st SR** to **3rd SR**. According to Article 111(2) EPC, the Opposition Division was bound to the decision T 0319/91, which means that the proceedings may only be resumed on the basis of the distinct set of claims (reference was made to decision T 0843/91). Trying to re-open procedures on sets of claims none of which follows the specific wording of the order of decision T 0319/91 would offend the general principle of legal certainty.

Reasons for the Decision

1. The appeal is admissible.

2. *Binding Effect of the Earlier Decision T 0319/94*

2.1 In the present case it has to be decided whether it was correct that the claims according to the **M.R.** to **3rd SR** were rejected by the Opposition Division merely on the basis of the *ratio decidendi* of decision T 0319/91.

Article 111(2) EPC states unambiguously that the first instance (and the Board of Appeal which is again concerned with the case) is only bound by the *ratio decidendi* of the remitting decision "in so far as the facts are the same". As a consequence, the Opposition Division is not bound by said decision if new claims are submitted which are not in conflict with said *ratio decidendi*.

2.2 According to Article 111(2) EPC it is assumed that the Board took one or several partial decisions and, for the rest, remitted the case for further prosecution and decision to the first instance. The opposition procedure is resumed for the remaining part to be decided - in the present case above all the question of inventive step had to be investigated. In doing so, it is a matter of course that the patentee, also at this stage of the procedure, should have the opportunity to modify the claims (following decision T 0027/94, unpublished). Thereby the modified claims may not be in conflict with the *ratio decidendi* of the earlier decision of the Board of Appeal.

2.3 It is a different situation if the Board dismissed the decision under appeal and remitted the case to the first instance with the order to maintain a patent with claims whose wording had been defined by the Board. In such a case (as in decision T 0843/91 cited by Respondent II), the first instance is not entitled to admit amended claims, since they are part of the *res iudicata* of the decision of the Board.

2.4 In the present case the following points are definitively decided by the earlier decision T 0319/94:

(a) Claim 1 as worded in the **7th ar** complies with Article 123(2) and (3) EPC (see section 8. of T 0319/91).

(b) Claims 1 as worded in the **m.r.**, **1st ar** and **2nd ar**, claims 2 as worded in the **3rd ar** to **6th ar** are not allowable under Article 123(2) EPC (see sections 2. to 7. of T 0319/91).

(c) A claim not including the feature that the LCD incorporates a dye (feature h) is not allowable under Article 123(2) EPC unless it comprises the features that the LC material has a high birefringence ($\Delta n \gtrsim 0.15$) (feature H'), the thickness of the layer (2) is at least 12 µm (feature E') and the cell is disposed between two polarizers (feature U) (*ratio decidendi* as expressed in sections 2. to 8. of decision T 0319/91; see also section II. of the present decision).

In the present case the Opposition Division is, therefore, only bound to the partial decisions (a) to (c). Claims which do not contravene these partial decisions cannot be rejected merely by reference to decision T 0319/91.

The hint at the claims of the **7th ar** in the order of said decision has no binding effect, since it mentions only those claims which are allowable under one aspect of the EPC. A restriction of the examination of a claim to the wording of a formally admissible claim does not follow from said order. The claims of the **7th ar** are, therefore, to be seen as a starting point for the resumed procedure before the Opposition Division after the remittal of the case which does not exclude from the outset claims with a different wording but in accordance with the partial decisions (b) and (c).

2.5 From section 2.4 the following results:

Claim 1 of the **M.R.** does not unambiguously comprise feature h ("A liquid crystal device of the kind in which the presence of pleochroic dye in the liquid crystal material **can** enable viewing without polarizers ... "). Moreover, it does not comprise features E', H' and U.

Claim 15 of the **M.R.** does not disclose features h and E'. The fact that the LCD has a **cell** greater than 12 µm thick does not mean that the LC **layer** is equal to or thicker than 12 µm, since the cell comprises not only the layer but also the walls.

The alternative with feature U of claims 20 and 21 of the **M.R.** and claims 1 and 2 of the **1st SR** does not comprise feature h and the alternative with the feature "the device viewable by the presence of pleochroic dye" does not unambiguously mean that the LCD comprises feature h. Moreover, said claims do not comprise feature E'.

Claim 1 of the **2nd SR** includes feature h.

Claim 2 of the **2nd SR** does not include feature h. However, it includes features E', H' and U.

Claims 1 and 2 of the **3rd SR** include feature h.

An analysis of the independent claims of the **2nd SR** and the **3rd SR** has shown that they are not identical with the claims mentioned in point (b) of section 2.4.

Therefore, the independent claims of the **M.R.** and **1st SR** do not comply with the partial decision of point (c), whereas the independent claims of the **2nd SR** and the **3rd SR** do not contravene the partial decisions of points (b) and (c).

The Opposition Division was, therefore, entitled to reject the **M.R.** and the **1st AR**, but it was not entitled to reject the **2nd SR** and the **3rd SR** merely by reference to decision T 0319/91.

3. The claims of the **2nd SR** and the **3rd SR** (and possibly further claims which comply with the *ratio decidendi* of decision T 0319/91) have not been examined by the first instance as to their substance, particularly as to their inventiveness. Thus, it would, despite of the relatively long duration of the opposition procedure up to now, be inequitable to reject the request of the

Appellant that the case be remitted to the Opposition Division. This would the Appellant deprive of his right to have all claims being allowable with respect to T 0319/91 examined by two instances. Therefore, the Board of Appeal exercises its power pursuant to the second possibility provided by Article 111(1) EPC by remitting the case (again) to the Opposition Division.

The Opposition Division should, in view of the long duration of the case, resume the opposition proceedings as soon as possible and try to treat the case with preference.

To avoid further delay of the final decision, the Appellant has the faculty of submitting as soon as possible a limited number of claims which do not contravene the provisions of sections 2.4 and 2.5 above and the requirements of Article 123(2) and (3) EPC.

4. The erroneous rejection of the **2nd SR** and the **3rd SR** by the Opposition Division from the outset and merely by reference to the earlier decision T 0319/91 is a consequence of a misinterpretation of said decision. Since thus no procedural violation is occurring, the question of reimbursement of the appeal fee is not up for discussion.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the Opposition Division with the order to continue the opposition procedure on the basis of claims to be filed by the Appellant and taking into account the provisions of sections 2.4 and 2.5.

The Registrar: The Chairman:

P. Martorana E. Turrini