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D E C I S I O N
of 17 May 2001

Case Number: T 0037/98 - 3.2.6

Application Number: 87306021.4

Publication Number: 0257752

IPC: A61F 13/15

Language of the proceedings: EN

Title of invention:

Composite prelaminated tapes for diaper closures

Patentee:

MINNESOTA MINING AND MANUFACTURING COMPANY

Opponents:

Koester GmbH & Co. KG
AVERY DENNISON CORPORATION

Headword:

-

Relevant legal provisions:

EPC Art. 54(2), 56

Keyword:

"Public prior use (no) - insufficient evidence"
"Novelty (yes)"
"Inventive step (yes) - *ex post facto* analysis"

Decisions cited:

T 0093/89, T 0221/91, T 0267/91, T 0097/94

Catchword:

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Case Number: T 0037/98 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 17 May 2001

Appellant I: Koester GmbH & Co. KG
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Appellant II: AVERY DENNISON CORPORATION
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 7 November
1997 concerning maintenance of European patent
No. 0 257 752 in amended form.

Composition of the Board:

Chairman: P. Alting van Geusau
Members: T. Kriner
M. Tardo-Dino

M. J. M. Bidet
M. J. Vogel

Summary of Facts and Submissions

- I. Appellant I (Opponent I) and Appellant II (Opponent II) each lodged an appeal, received at the EPO on 6 January 1998 and 16 January 1998 respectively, against the interlocutory decision of the Opposition Division dispatched on 7 November 1997 which maintained the European patent No. 0 257 752 in amended form. The appeal fees were paid simultaneously with filing of the appeals and the statements setting out the grounds of appeal were received at the EPO on 13 February 1998 and 28 February 1998, respectively.
- II. The oppositions had been filed against the patent as a whole and were based on Article 100(a) in conjunction with Article 56 EPC.

The Opposition Division held that the grounds for opposition cited in Article 100(a) EPC did not prejudice the maintenance of the patent in the amended version submitted as the main request with letter of 6 June 1997.

- III. From the documents considered by the Opposition Division, the following documents played a role in the appeal proceedings:

D1: DE-A-3 141 113

D2: Statement under oath by Mrs Barbara Sillack, dated 19 November 1993

D3: Comparative drawings of BS 160 and the subject-matter of the patent in suit

- D6: Sample of 3M material "19/83/00/0 4006"
- D9: Samples of BS 160 and the subject-matter of the patent in suit
- D10: Letter of Paul Hartmann AG, dated 14 October 1983 including an annex "Spezifikation für ein Klebeband für Höschenwindeln"
- D11: Delivery invoice of BS 160
- D12: Various documents of the Koester OhG, dated 1983
- D16: Various documents of the Koester OhG, dated 1985 - 1987
- D17: Travel report, dated 1986
- D18: Various documents of the Koester OhG, dated 1985 and 1986
- D19: Various documents of the Koester OhG, dated 1983
- D20: Statement under oath by Mr Dusko Colakovic
- D21: Statement under oath by Mr Milan Cosovic
- D22: Statement under oath by Mrs Barbara Sillack

Documents D2 - D5 and D9 - D22 were cited by appellant I as evidence for an alleged public prior use of ELKA-Tape-Laminat BS 160, BS 390 and BS 400.

D6 was cited by appellant II as evidence for an alleged public prior use of a tape material 3M 4006.

IV. Oral proceedings, took place on 17 May 2001.

The Appellants requested that the decision under appeal be set aside and the patent in suit be revoked.

The Respondent requested that the appeal be dismissed and the patent be maintained as amended according to the decision of the Opposition Division or on the basis of the sets of claims in accordance with auxiliary requests 1 to 4 filed with letter dated 10 July 1998.

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

"A roll of tape comprising an elongate prelaminated tape composite wound convolutedly upon itself about an annular core, especially suited for preparing a tape closure for disposable diapers by simply severing said elongate prelaminated tape composite parallel to the axis of the core at intervals corresponding to the predetermined width of said closure, the length of each closure corresponding to the width of the roll of tape, said prelaminated tape composite comprising in combination

- (a) a fastening tape (12) comprising an elongate strip of sheet backing material (13), having a bonded section (16) and a fastening section (17), being substantially as wide as said tape composite, and having a pressure-sensitive adhesive layer (14, 15) on a first surface of said backing material;
- (b) a release tape (18), having first and second surfaces, the first surface releasably adhered to said pressure-sensitive adhesive layer (14, 15) over said fastening section (17);
- (c) a layer of pressure-sensitive adhesive (19) coated only over the second surface of said release tape;

- (d) a fingerlift (20) adhered, at the free end of said fastening section (17), to the pressure-sensitive adhesive layer (14, 15) on the first surface of the backing material, and
- (e) a unifying strip (21) adhered to said adhesive layer (14, 15) on the first surface of the backing material and to the adhesive layer on the release tape,

characterized in that the adhesive layer on the fastening tape comprises a layer of first pressure-sensitive adhesive (14) coated over at least the fastening section and a layer of a second pressure-sensitive adhesive (15) coated over the bonded section, said unifying strip (21) being centered along a junction of said bonded section and said fastening section such that it is adhered to the second pressure-adhesive layer (15) coated over the bonded section; and the second pressure-sensitive adhesive layer (15) having a 90° peel strength at least 1.5 N/25 mm higher than the 90° peel strength of said first adhesive layer (14)."

Claim 1 of the first auxiliary request differs from claim 1 of the main request by an amendment of the characterising portion so that it reads as follows "characterized in that, for preparing a refastenable tape closure: the adhesive layer on the fastening tape comprises a layer of first pressure-sensitive adhesive (14) coated over at least the fastening section and a layer of a second pressure-sensitive adhesive (15) coated over the bonded section for permanently adhering the fastening tape to a diaper, said unifying strip (21) being centered along a junction of said bonded section and said fastening section such that it is adhered to the second pressure-adhesive layer (15)

coated over the bonded section; and the second pressure-sensitive adhesive layer (15) having a 90° peel strength at least 1.5 N/25 mm higher than the 90° peel strength of said first adhesive layer (14)".

Claim 1 of the second auxiliary request differs from claim 1 of the main request by an amendment of feature (e) so that it reads "a unifying strip (21) comprising a strip of film directly adhered to said adhesive layer (14, 15) on the first surface of the backing material and to the adhesive layer on the release tape".

Claim 1 of the third auxiliary request differs from claim 1 of the main request by an amendment of feature (a) and an amendment of the first characterising feature so that they read as follows:

"a fastening tape (12) comprising an elongate strip of sheet backing material (13), having a bonded section (16) and a fastening section (17), being substantially as wide as said tape composite, and having a first pressure-sensitive adhesive layer (14, 15) on a first surface of said backing material", and
"the adhesive layer on the fastening tape also comprises a layer of a second pressure-sensitive adhesive (15) coated over the first pressure-sensitive adhesive layer on the bonded section".

Claim 1 of the fourth auxiliary request differs from claim 1 of the third auxiliary request by an amendment of feature (e) so that it reads
"a unifying strip (21) comprising a strip of film directly adhered to said adhesive layer (14, 15) on the first surface of the backing material and to the adhesive layer on the release tape".

VI. In support of its requests Appellant I relied essentially on the following submissions:

The present documents concerning the ELKA-Tape-Laminat BS 160, BS 390 and BS 400 were sufficient to prove the public prior use of these laminates according to the usual standard. Any demand for more evidence would be unrealistic and would not correspond to real life situations.

As confirmed by D20 and D21, BS 390 and BS 400 were identical to BS 160. A sample of BS 160 which had been produced before the priority date of the patent in suit was contained in D9. The structure of this tape laminate was shown in D3. This was confirmed by D2, D20, D21 and D22. D9 and D3 showed amongst others that the layer of the fastening tape of BS 160 comprised a layer of a first adhesive coated over the fastening section and a layer of a second adhesive coated over the bonded section of the tape laminate. D10 which described only a single material for the adhesive layer on the fastening tape, was not in contradiction to D3 and D9, because this document was not complete. Therefore, although no technical drawings or product specifications of the Elka-Tape Laminat BS 160, BS 390 and BS 400 had been available, there was enough evidence to prove the structure of these laminates.

With respect to the public availability of these tape laminates documents D11, D12, D19, D2 and D22 showed that BS 160 had been sold in large amounts to different companies before the priority date of the patent in suit. Moreover, documents D16, D17 and D18 proved that also BS 390 and BS 400 had been sent to different companies. Although BS 390 and BS 400 had been

delivered to these companies only for test purposes, they had been made public, because the companies who received these tape laminates were competitors and no secrecy agreement existed.

Consequently the public prior use of the Elka-Tape-Laminat BS 160, BS 390 and BS 400 had been sufficiently proved according to the standard required by the EPO.

VII. Appellant II supported Appellant I's conclusion but additionally submitted that the subject-matter of claim 1 did not involve an inventive step with respect to D6 and D1.

The most relevant state of the art was represented by the prior used tape material 3M 4006 which comprised most features of the claimed tape material with the exception of the two layers of adhesive on the fastening tape which differed from each other by their peel strength in order to make the fastening section of the fastening tape refastenability. Since refastenability of diaper closures was already an essential issue before the priority date of the patent in suit, it had been obvious for the skilled person to look for possibilities of how to enable a safe securing of the bonding section of 3M 4006 to a diaper and of how to make the fastening section of 3M 4006 less adhesive. D1 referred to diaper closures and therefore constituted a prior art which would have been considered by the skilled person when looking for suitable measures for refastenability of such devices. This document suggested the use of a relatively weak adhesive for the fastening section and of a relatively strong adhesive for the bonding section of a fastening tape. Since the provision of such different adhesives not only resulted

in a safe connection between the bonding section and a diaper but additionally in a releasable connection between the fastening section and the diaper, it was obvious for the skilled person to include the teaching of D1 in the tape material 3M 4006 in order to make its fastening section refastenable. Consequently the subject-matter of the patent in suit did not involve an inventive step.

The argumentation of Appellant II was supported by Appellant I.

VIII. The Respondent disputed the views of Appellant I and Appellant II. His arguments can be summarized as follows:

It was not disputed that the Elka-Tape Laminat BS 160 had been available to the public before the priority date of the patent in suit. However, there was no evidence which clearly disclosed the structure of BS 160. Instead of a technical drawing or a technical specification of this tape laminate, Appellant I merely filed documents which did not unequivocally show what BS 160 was. With respect to the piece of tape affixed to D9, there was no proof that this was a true sample of BS 160, let alone a sample of BS 160 which was available before the priority date of the patent in suit. The sketch of BS 160 according to D3 which had been drawn after the publication date of the patent in suit did not show all details of BS 160 (see letter of Appellant I dated 22 November 1993, page 5, section 2.2). Furthermore, this document was in contradiction to D10. While D3 showed a fastening tape coated with two different layers of adhesives, D10 referred to a single adhesive to be coated on the fastening tape. D2

was also not suitable to clearly describe the structure of the adhesive coating of the fastening tape of BS 160. D2 only stated that in 1983 tape closures for diapers manufactured by Appellant I had different adhesives with different adhesive properties. In contrast to other statements in D2, this paragraph did not however refer to BS 160.

Since the evidence concerning BS 160 could not show what kind of tape laminate had been used before the priority date of the patent in suit, Appellant I did not prove the alleged public prior use of BS 160 up to the hilt as stipulated by the case law of the Boards of Appeal (see for example T 97/94).

Furthermore, according to D16, D17 and D18, only test samples of BS 390 and BS 400 had been delivered in small amounts to three customers before the priority date of the patent in suit. The delivery to several customers did not however mean that these samples had been made available to the public, because there existed an inherent secrecy agreement between a manufacturer and each of his customers during a development period. Also the Boards of Appeal had repeatedly decided that supplying samples to a customer for testing purposes did not constitute public prior use (see for example T 221/91 and T 267/91). Therefore, the delivery of test samples of BS 390 and BS 400 to several customers could also not be regarded as public prior use.

It was true that the tape material 3M 4006 had been available to the public before the priority date of the patent and that it represented the most relevant state of the art. The subject-matter of the contested patent

differed from the known material by the provision of two layers of different adhesives on the fastening tape to make the claimed tape composite refastenable.

Refastenable tapes had been known before the priority date of the contested patent, however not in form of a roll of a prelaminated tape but only in form of composite strips of tape which had been combined in situ from a plurality of individual rolls of tapes. Therefore, the object underlying the patent in suit was to provide a prelaminated tape in form of a roll which could be used for forming refastenable closures for diapers.

There was no suggestion to achieve this object by coating the bonded section of the fastening tape with an adhesive which had a higher peel strength than the adhesive coated on the fastening section of the fastening tape. D1 did not refer to a refastenable fastening section but only to a highly adhesive bonding section. To avoid that the bonding section requires a large section of the fastening tape (see D1, page 3, paragraph 3), D1 teaches to use a relatively strong adhesive on the bonding section so that the size of this section may be reduced without a decrease of its adhesive strength (see D1, page 4, paragraph 2). Consequently the skilled person would not consider D1 when looking for a suggestion as to how to achieve a prelaminated tape which could be used as a refastenable closure for diapers. The Appellants' statement according to which it was obvious for the skilled person that the use of different adhesives on the fastening section and on the bonded section of a fastening tape as suggested by D1 was suitable to solve the object underlying the patent in suit was therefore

based on hindsight.

Since there was no further state of the art which could give an indication in the direction of the claimed roll of tape, the subject-matter of the contested patent was based on an inventive step.

Reasons for the Decision

1. The appeal is admissible.
2. *The alleged prior use of Elka-Tape-Laminat (D2 to D5 and D9 to D22)*
 - 2.1 BS 390 and BS 400
 - 2.1.1 In accordance with the case law of the Boards of Appeal, a product made available for test purposes is to be treated as confidential (see T 221/91, T 267/91 and T 782/92).

In the present case a limited quantity of the Elka-Tape-Laminat BS 390 and BS 400 was delivered to three customers of Appellant I. As shown by D16, D17 and D18, the delivered material was used exclusively for test purposes, even after the priority date of the patent in suit. This is confirmed by the fact that such a laminate is usually delivered in large quantities (see for example D11 which refers to the delivery of BS 160).

Consequently it has to be concluded, that the delivered material had to be treated as confidential and that BS 390 and BS 400 was not available to the public

before the priority date of the patent in suit.

- 2.1.2 The argumentation of Appellant I that the delivery of BS 390 and BS 400 to several competitors without any secrecy agreement resulted in the fact that these tape laminates had been made available to the public does not put this conclusion in doubt.

In a case where only test specimens were sent to a customer, it has to be assumed on principle that there existed at least an inherent secrecy agreement. If this should exceptionally not be true, the exception from the usual practice has to be proved. The mere statement that there was no secrecy agreement, as made in the present case, is not sufficient for this purpose.

The fact that the test specimens were sent to several competitors does not in principle defeat the assumption of a secrecy agreement. In such a case it has to be assumed that a secrecy agreement existed with each of the competitors.

Therefore, the delivery of test specimens of BS 390 and BS 400 to several customers without any proof that no secrecy agreement existed, cannot be regarded as an act which results in a public availability of these tape laminates.

2.2 BS 160

- 2.2.1 In accordance with the case law of the Boards of Appeal, in cases where practically all of the evidence in support of an alleged public prior use lays within the power and knowledge of the opponent and the patent proprietor has no access to it, the opponent has to

prove his case up to the hilt (see for example T 97/94, OJ EPO 1998, 467, reasons, 5.1).

2.2.2 In the present case Appellant I is the manufacturer of BS 160, and the Respondent had no access to the evidence in support of the alleged public prior use. Therefore unequivocal proof has to be presented in respect of

- (a) when the use occurred, in particular with respect to the filing or priority date of the contested patent,
- (b) how, where and through whom the prior use occurred, and
- (c) what was used, in particular in comparison with the subject-matter of the contested patent

(see for example T 93/89, OJ EPO 1992, 718, point 8.1).

There is no doubt that the first two requirements (a, b) are met with respect to BS 160. This was also accepted by the Respondent. However, the evidence submitted to show what BS 160 is, does not allow an unequivocal identification of the structure of this tape material. Having regard to D9, there is no evidence that the specimen attached to this document is in fact a piece of BS 160, let alone a piece of BS 160 produced before the priority date of the patent in suit. As admitted by Appellant I (see letter of 22 November 1993, page 5, paragraph 2.2), the sketch of BS 160 according to D3 has been drawn after the priority date of the patent in suit and does not show all details of its structure. Furthermore, the

structure of BS 160 shown in D3 is not supported by the specification according to D10. While the fastening tape shown in D3 comprises two different adhesive layers, D10 describes a fastening tape for BS 160 which is coated with only a single layer of adhesive (1511.551, see page 2 of D10). Consequently there is no evidence which unequivocally shows the true structure of BS 160. On the contrary, as a result of the contradiction between the evidence submitted doubts remain as to what exactly has been made available to the public under the name of Elka-Tape-Laminat BS 160. Therefore the evidence submitted to prove the alleged public prior use of BS 160 does not meet the required standard of proof.

- 2.2.3 Appellant I's argumentation according to which D2, D20, D21 and D22 confirmed that the structure of BS 160 corresponded to the one shown in D3, and that D10 was not complete and therefore not in contradiction to D3, is not convincing.

D2 and D22 do not refer to D3 and do not explicitly explain that the fastening tape of BS 160 comprises two different layers of adhesives.

D20 and D21, both state that D3 and the comments on D3 made in the notice of opposition have been presented to the signatories, and that these comments are considered to be correct. With respect to the provision of two different adhesives on the fastening tape, the notice of opposition does not refer to BS 160, but only explains that the tape laminates produced by Appellant I in 1982, 1983 included a fastening tape coated with two different adhesives (see letter of 22 November 1993, page 6, paragraph 2.3). Hence D20 and

D21 do not include a clear statement that the fastening tape of BS 160 is coated with two different adhesive layers.

However, even if D2, D20, D21 and D22 were considered as supporting the disclosure of the sketch of BS 160 according to D3, there would remain a contradiction between the content of D3 and D10.

D10 is a specification of Elka-Tape-Laminat BS 160 which was sent to a customer (Paul Hartmann AG) of Appellant I. There is no indication in D10 that this specification is incomplete, nor does any evidence exist which could prove that the specification does not describe all elements of BS 160. Furthermore, it is not understandable why the customer should not have received a complete specification of BS 160 including a complete information concerning the structure of the fastening tape.

In the absence of a technical drawing or an original specification of BS 160 it is therefore impossible to decide whether the true structure of this tape material is shown in the sketch according to D3 or in the specification according to D10.

2.3 With respect to the above assessments the Board comes to the conclusion that the alleged prior use of Elka-Tape-Laminat does not form part of the applicable state of the art and cannot be considered for the evaluation of novelty and inventive step.

3. *Novelty*

3.1 The public prior use of the tape material 3M 4006, a

sample of which is shown in D6, has been acknowledged by the Respondent. Furthermore, the Respondent admitted that this tape material has all the features defined in the pre-characterizing portion of claim 1 according to the main request.

Additionally the sample of D6 shows that feature of the characterizing portion of claim 1 according to which the unifying strip of 3M 4006 is centered along a junction of said bonded section and said fastening section such that it is also adhered to the pressure-sensitive adhesive layer coated over the bonded section.

However, the adhesive layer on the fastening tape of 3M 4006 does not comprise a layer of a first pressure-sensitive adhesive coated over at least the fastening section and a layer of a second pressure-sensitive adhesive coated over the bonded section, wherein the second pressure-sensitive adhesive has a 90° peel strength of at least 1.5 N/25 mm higher than the peel strength of said first adhesive layer. Furthermore, the unifying strip of 3M 4006 is not adhered to the second pressure-sensitive adhesive layer.

3.2 D1 discloses, in particular in its Figure 4 and the corresponding description a roll of tape (see the paragraph bridging pages 7 and 8) which comprises an elongate prelaminated tape composite wound convolutely upon itself about an annular core, said prelaminated tape composite comprising in combination

(a) a fastening tape comprising an elongate strip of sheet backing material (9), having a bonded section (11) and a fastening section (12), being

substantially as wide as said tape composite, and having a pressure-sensitive adhesive layer (16, 18) on a first surface of said backing material;

- (b) a release tape (13, 15), having first and second surfaces, the first surface releasably adhered to said pressure-sensitive adhesive layer over said fastening section;
- (c) a layer of pressure-sensitive adhesive (17) coated only over the second surface of said release tape; and
- (d) a fingerlift at the free end of said fastening section,

wherein the adhesive layer on the fastening tape comprises a layer of first pressure-sensitive adhesive (18) coated over at least the fastening section and a layer of a second pressure-sensitive adhesive (16) coated over the bonded section.

Since the second pressure-sensitive adhesive layer has a peel strength several times higher than the peel strength of the first adhesive layer (see page 7, column 2 and page 9, example 2), D1 implicitly additionally discloses that the second pressure-sensitive adhesive layer has a 90° peel strength at least 1.5 N/25 mm higher than the 90° peel strength of the first adhesive layer.

However, the tape disclosed in D1 has no unifying strip, and the fingerlift of this tape is not adhered to the pressure-sensitive adhesive layer on the first surface of the backing material.

3.3 In view of the above assessments, the subject-matter of claim 1 according to the main request is novel.

4. *Inventive step*

4.1 The most relevant state of the art is undisputedly represented by the prior used tape material 3M 4006.

Starting from this material, the objective of the subject-matter of the patent in suit may be regarded as to provide a composite prelaminated tape in a single roll from which refastenable closures for disposable diapers can be prepared (see patent specification, column 1, line 30 to column 2, line 10 and column 2, lines 44 to 50).

This objective is achieved by the provision of a fastening tape comprising a layer of a first pressure-sensitive adhesive coated over at least the fastening section and a layer of a second pressure-sensitive adhesive coated over the bonded section, wherein the second pressure-sensitive adhesive layer has a 90° peel strength at least 1.5 N/25 mm higher than the 90° peel strength of said first adhesive layer, whereby the unifying strip is inevitably adhered to the second adhesive.

4.2 It is undisputed that such a fastening tape is shown in D1. This document suggests coating of the bonded section of a fastening tape with an adhesive having a higher adhesive force than the adhesive coated over the fastening section of this tape, in order to reduce the size of the bonded section without risking a decrease of the adhesiveness of the tape when fixed to a diaper (see page 4, paragraph 2). D1 does however not refer to

refastenability of the fastening section. Therefore, the skilled person had no reason to consider D1 when looking for a solution for the objective described above. Without the knowledge of the solution according to the patent in suit he would rather look for suggestions as to how to design the fastening section or as to how to adjust the fastening section and the surface of a diaper to each other in order to enable a refastenability of the fastening section. In the absence of such a suggestion, the provision of the subject-matter of the patent in suit requires an inventive activity.

- 4.3 The argumentation of the Appellants according to which it was obvious to use the teaching of D1 on the tape material 3M 4001 is not convincing.

It is true that D1 discloses those features of claim 1 according to the main request which are not included in the tape material 3M 4001 and that a combination of this tape material and D1 could lead to the subject-matter of the patent in suit. D1 does however not suggest coating of the fastening section with an adhesive which is less strong than the adhesive on the bonded section so that the fastening section may be fixed to a diaper and released from the diaper if required. D1 merely teaches to coat the bonded section with a much stronger adhesive than the fastening section so that the ratio between the bonded section and the fastening section may be reduced (see page 2, paragraph 3 and page 8, paragraph 2). A reversal of this teaching in the sense that the fastening section has to be coated with an adhesive which is less strong than the adhesive on the bonded section so that the fastening section is refastenable when the tape is used

as a diaper closure cannot be regarded as obvious, because D1 is silent about such a possibility. A corresponding interpretation of D1 would only be obvious, if the teaching of the patent in suit was known.

Therefore, the conclusion that the subject-matter of claim 1 according to the main request could be achieved in an obvious way by combining 3M 4006 with D1, was only possible on the basis of an ex post facto analysis. However, if the problem/solution approach is used for the evaluation of inventiveness, the claimed roll of tape material has to be regarded as involving an inventive step, because there is no suggestion for the solution of the objective underlying the patent in suit.

4.4 In view of these assessments, the Board comes to the conclusion that the subject-matter of claim 1 according to the main request cannot be derived in an obvious manner from the available prior art and accordingly involves an inventive step. The patent can therefore be maintained as amended according to the decision of the Opposition Division.

5. As the Respondent's main request is allowable, there is no need to consider the auxiliary requests.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau