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D E C I S I O N
of 18 December 2003

Case Number: T 0117/99 - 3.2.5

Application Number: 91901880.4

Publication Number: WO 92/11989

IPC: B29C 45/06

Language of the proceedings: EN

Title of invention:
Apparatus and method for use in injection moulding

Applicant:
BRENT, David Rudy

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 82, 84, 123(2)
EPC R. 27, 86(3)

Keyword:
"Amended documents prima facie not allowable, refused under Rule 86(3) EPC"

Decisions cited:
-

Catchword:
-

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Case Number: T 0117/99 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 18 December 2003

Appellant: BRENT, David Rudy
20 Chantry Close
Sunbury on Thames
Middlesex TW16 7TH (GB)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 7 October 1998 refusing European application No. 91901880.4 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: W. Moser
Members: W. R. Zellhuber
H. M. Schram

Summary of Facts and Submissions

I. The appeal is against the decision of the Examining Division refusing the European patent application No. 91 901 880.4 (published under WO 92/11989) because of lack of unity (Article 82 EPC), lack of clarity (Article 84 EPC) and extension beyond the content of the application as filed (Article 123(2) EPC).

The decision under appeal was based on the set of 54 claims submitted as "desired amended claims" by the appellant on 15 December 1997. That set of claims comprised several independent apparatus claims.

II. In the course of the appeal procedure, the appellant *inter alia* submitted the following documents:

- on 25 November 2002, a set of 36 claims filed as "EPO amended 36 claims" including one independent claim;

- on 24 February 2003, a set of 35 claims filed as "EPO amended 35 claims" including one independent claim;

- on 22 April 2003, a set of 34 claims filed as "EPO amended 34 claims" including one independent claim;

- on 1 October 2003, a set of 27 claims filed as "EPO amended 27 claims" including 17 independent claims.

III. The appellant requests that the decision under appeal be set aside and that the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003 be allowed and that the examination of the application in suit be proceeded on the basis of this set of claims.

He further requests to be given the opportunity to replace claim 1 of that set of claims by a new claim 1 and five dependent claims drafted as laid down respectively in paragraphs A6 and A9 of his letter filed on 1 October 2003.

He further requests that the appeal be heard by an Enlarged Board of Appeal.

IV. The preamble and the first feature of the characterizing portion of all independent claims of the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003, ie. claims 1, 3, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, read as follows:

"An injection moulding apparatus comprising:

- a movable carrier (11),
- a plurality of mould sets (13) on the carrier (11),
- driving means (90 - 93) for moving the carrier (11) to move the mould sets (13) in turn into an injection station (46),
- clamping means (47) at the injection station (46) for clamping in a closed condition at least one of said mould sets (13),
- an injection head (60) at the injection station (46),
- feed means (61) for feeding a moulding composition through the injection head (60) into a mould set (13) at the injection station (46),
- positioning means for moving the injection head (60) between an injection position and a withdrawn position,

- each mould set (13) comprising first (14) and second (15) mould tools between which there is one or more mould cavities (17), and
- where said carrier (11) also moves the mould sets (13) into an opening station (27),

characterised in that

- there are openings in the carrier (11) providing access for operating means to operate on a mould tool set while the second mould (15) rests on the carrier (11)".

The remaining features of the characterizing portion of independent claims 3 and 5 are as follows:

- claim 3:

  "and for the said operating means

  – wherein the mould set (13) there is a sprue element (19) that defines a sprue passage (94) which, when the sprue element (19) is in the charging position, provides communication between the mould cavity (17) and an inlet to the mould set (13) and, when in the severing position, the inlet is out of communication with the mould cavity (17) and,

  – there is a severing device for severing a moulded sprue from a moulding formed in the mould set (13), and the severing device includes a sprue element (19) mounted in one of the tools for movement relative to the tools between a severing position and a charging position, and biasing means for urging the sprue element (19) into the severing position."

- claim 5:

"and for the said operating means

– there is a plurality of disentangling means at the opening station (27) for disengaging a moulding from the tools of the mould set (13), where the means can operate on opposite sides of the mould set (13)."

The remaining features of the characterizing portion of independent claims 1, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 concern:

claim 1: means for moving the first mould tool with respect to the second mould tool between a closed condition and an open condition;
claims 6, 7 and 8: clamping means at the injection station;
claim 9: retaining and releasing means for each mould set retaining the mould set in a closed condition and for setting in an inoperative condition the retaining means of a mould set at the releasing station;
claims 14 and 15: feed means for feeding the moulding composition upwards to the injection head;
claim 16: positioning means for adjusting the position of the injection head;
claim 17: positioning means for moving the injection head relative to the injection body;
claim 18: first positioning means for adjusting the position of the injection head and second positioning means operable independently of the first positioning means for moving the injection head between the injection and the withdrawn position;

claim 20: moving means, in which the injection head is mounted on an injection body for movement relative thereto;
claims 21 and 22: heat transfer means at one or more heat transfer stations;
claim 23: heat exchange means at a cooling station.

V. In the course of the appeal procedure, it was *inter alia* referred to document

D3: GB-A 558 620.

VI. In the statement setting out the grounds of appeal, cf. in particular point A.1.3, the appellant argued that he had not had an opportunity to comment on the objections raised in the decision under appeal against the set of 54 claims submitted as "desired amended claims" on 15 December 1997.

As regards the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003, the appellant argued essentially as follows:

The claims had been amended to overcome, *prima facie*, all the objections raised by the Board with regard to the previously filed claims.

In particular, the independent claims were part of a single invention within the terms of Article 82 EPC and Rule 30 EPC. None of the cited prior art suggested an injection apparatus comprising, in combination, the features of the preamble of the independent claims and the first feature of the characterizing portion of the independent claims.

In the apparatus of document D3, there was no clamping means at the injection station for clamping in a closed condition at least one of the mould sets. Moreover, no opening for access was disclosed, and any possible "opening" was continuously "filled" with clamping rods and a plunger which all moved with the carrier.

As regards claim 3 of the set of claims filed as "EPO amended 27 claims" on 1 October 2003, the objection of lack of clarity raised by the Board with regard to the corresponding former claim on file, ie. claim 14 of the set of claims filed as "EPO amended 34 claims" on 22 April 2003, had been overcome by clarifying the two positions and the elements concerned.

As regards claim 5 of the set of claims filed as "EPO amended 27 claims" on 1 October 2003, the objection of lack of disclosure in the application as filed of the features of claims 17 and 18 of the set of claims filed as "EPO amended 34 claims" on 22 April 2003, which corresponded to claim 5 now on file, were invalid. These features were disclosed in the description (the appellant referred to pages 26/27 but cited the paragraph bridging pages 25 and 26 of the application as filed). Moreover, the openings in the carrier were clearly shown in the drawings.

The objections regarding the description not being brought in line with the subject-matter of the claims were an issue that needed to be properly addressed when all the claims had been agreed. This included the indication of the background art useful for understanding the invention in the independent claims.

The appeal should be heard by an Enlarged Board of Appeal. In particular the issue of "Unity of invention" and its consideration within the International Agreement regarding the harmonisation in the treatment of "Unity of Invention" involved a point of law and was an extremely important issue of specific and general application.

VII. In a communication dated 11 July 2002, cf. point 3, the Board noted that it appeared that the arguments, why the claims on which the decision under appeal had been based did not meet the requirements of Articles 82, 84 and 123(2) EPC, had not been presented to the appellant before issuing the decision, and that, in such a case, the Board might consider remitting the case to the first instance without taking up a position on the objections effectively raised.

The Board further noted that, however, in the present case, the Board considered such a remittance for formal reasons inappropriate, in particular with regard to the duration of the examining procedure, the advanced stage of the examination/appeal procedure, and the fact that the claims underlying the decision under appeal did not appear to form a suitable basis for further prosecution, because it appeared that these claims did not meet the requirements of Articles 82, 84 and 123 (2) EPC for the reasons given in the decision under appeal and that the arguments brought forward by the appellant in this respect were not convincing (cf. point 2).

VIII. In the communication dated 11 July 2002, the Board further noted that, cf. point 2.3, in the statement

setting out the grounds of appeal, the appellant proposed incorporating the feature of claim 48 ("access") of the set of claims filed as "desired amended claims" on 15 December 1997, on which the decision under appeal is based, into any of the various independent claims in order to overcome the objection of lack of unity (Article 82 EPC). (The feature of the characterizing portion of that claim 48 reads as follows: "access is provided to the mould set (13) through openings in the carrier (11) on which the mould set rests for any of said means to operate on the mould set (13)".)

According to the Board's preliminary opinion expounded in the communication dated 11 July 2002, however, the incorporation of the feature of claim 48 of the set of the "desired amended claims" into any of the independent claims did not seem suitable to solve the problem of lack of unity. It appeared that an injection moulding apparatus comprising mould sets mounted on a movable carrier, wherein such an access is provided to the mould sets, belonged to the prior art. It was *inter alia* referred to document D3, which appeared to suggest a movable carrier 11 comprising openings giving access to the mould set 21, 22 for retaining means 26 and ejection means 36, 38. Therefore, the features of claim 48 of the set of claims filed as "desired amended claims" on 15 December 1997 did not seem to give rise to a single inventive concept within the meaning of Article 82 EPC.

In a communication dated 31 January 2003, cf. point 2, the Board further noted that document D3 appeared to disclose an injection moulding apparatus comprising,

among others, a plurality of mould sets 20, 21, 22 on a movable carrier 11 and clamping means 42, 43, 44 for clamping in a closed condition at least one of said mould sets.

IX. Furthermore, in the Board's communication dated 11 July 2002, the attention of the appellant was drawn to the following points:

(a) a decision could be taken only on the claimed subject-matter as a whole, which implied that, if any of the claims on file did not meet the requirements of the EPC, the whole application had to be refused and the appeal had to be dismissed, respectively, cf. point 4.1;

(b) a patent could only be granted if the application met the requirements of the EPC. One of these requirements concerned unity of invention (Article 82 EPC). That requirement had to be met, independently of whether or not the same or a similar set of claims had been found allowable by other authorities, in particular, Japanese or US-authorities.

In order to meet the requirements of Article 82 EPC, it appeared that the application had to be limited to **one** of the groups of claims listed in paragraph 1.3 of the decision under appeal. The subject-matter to be excised might form the subject of one or more divisional applications, cf. point 4.2;

(c) consequently, if the appellant intended to prosecute the application in suit on the same or similar documents, it was likely that the appeal would be dismissed, cf. point 4.3;

(d) if the appellant intended to file amended documents, then, according to Rule 86(3) EPC, in conjunction with Rule 66(1) EPC, admitting them would be a matter of discretion to be exercised by the Board. According to Rule 86(3) EPC, the applicant might, of his own volition, amend once the description, claims and drawings provided that the amendment was filed at the same time as the reply to the communication. Since, pursuant to Rule 66(1) EPC, Rule 86(3) EPC was applicable to appeal proceedings *mutatis mutandis*, no further amendment might be made without the consent of the Board because, in the course of the examination procedure, the appellant had already amended the application several times, cf. point 4.4;

(e) if the appellant intended to prosecute the application in suit, it might be advisable to consult a professional representative, in particular, with regard to the age of the application and the problems to be dealt with, the present stage of the examining/appeal procedure, the duration of the proceedings and the relatively little progress achieved thereby. It was noted that important requirements such as novelty and inventive step (Articles 54 and 56 EPC) had not yet been examined, cf. point 4.5.

X. In a communication dated 4 August 2003, cf. point 6, the Board noted that

- the set of claims filed as "EPO amended 36 claims" on 25 November 2002 did not seem to meet the requirements of Articles 54 and 56 EPC;

- neither of the sets of amended claims filed as "EPO amended 35 claims" on 24 February 2003 and as "EPO amended 34 claims" on 19 April 2003, respectively, was, prima facie, allowable, in particular, because neither the requirements of Article 84 EPC nor the requirements of Article 123 (2) EPC were met; and,

- consequently, these amended sets of claims were refused under Rule 86(3) EPC, in conjunction with Rule 66(1) EPC.

The attention of the appellant, cf. point 7, was further drawn to the fact that

- it thus appeared that the appellant's request that a patent be granted had to be rejected, and, consequently, that the appeal would have to be dismissed, and that

- any request based on documents (claims, description, drawings) which were not instrumental in overcoming the objections raised in the communication dated 4 August 2003, and which, as a whole, were not *prima facie* allowable would be refused under Rule 86(3) EPC, in conjunction with Rule 66(1) EPC.

XI. Among the objections raised in the Board's communication dated 4 August 2003 with regard to the set of 34 claims filed as "EPO amended 34 claims", on 22 April 2003, cf. points 5.3 and 5.4, were the following:

(a) "*Claim 14 refers twice to "a sprue element (19)", "a severing position", and "a charging position", without indicating whether the same or different elements and positions, respectively, are concerned, which appears to render the claim unclear (Article 84 EPC)*"

(b) "*The features of claims 17 and 18 do not seem to be disclosed in the application as filed. It appears that there is no disclosure of providing openings in the carrier for disengaging means (Article 123(2) EPC).*"

(c) "*Finally, the description has not been brought in line with the subject-matter of the claims. This concerns, in particular, the introductory part on pages 2 and 3, exposing the various aspects of the invention, which seem to be different from the invention as now defined in the single independent claim 1. It thus appears that the claims are not supported by the description, contrary to the requirements of Article 84 EPC.*

Furthermore, the description does not seem to refer to the background art useful for understanding the invention as defined in claim 1. In particular, document D3, seems to disclose an injection moulding apparatus comprising all the

features of the preamble of claim 1 as well as the first feature of the characterizing part of claim 1 filed on 19 April 2003 thus representing prior art useful for understanding the invention, (cf. Rule 27(b) EPC)."

XII. By a communication dated 31 January 2003, the appellant was invited to attend oral proceedings before the Board of Appeal on 15 May 2003. They were arranged at the instance of the Board in accordance with Article 116(1) EPC.

In the appellant's written submissions received on 7 February 2003 (letter dated 5 February 2003), on 25 February 2003 (letter dated 21 February 2003), and on 22 April 2003 (letter dated 15 April 2003), he declared his intention "… to avoid the need for an Oral Hearing, because of the very significant stress and anxiety attending such a hearing would involve", (submission of 7 February 2003, page 1, third paragraph).

In the written submissions received on 1 May 2003, on 6 May 2003, on 8 May 2003, on 9 May 2003, and on 12 May 2003, the appellant requested adjournment of the oral proceedings because of medical reasons and because of a one-day Hearing set before the High Court of Patent Judge in London during the 3 day "Hearing Window" of 30 June to 2 July 2003.

On 12 May 2003 and upon request of the Board (cf. communications dated 9 May 2003 and 12 May 2003, respectively), the appellant submitted an Opinion of a Medical Expert.

By a communication dated 12 May 2003, the oral proceedings to be held on 15 May 2003 were cancelled by the Board.

Reasons for the Decision

1. The Board concurs with the Examining Division that the set of claims filed as "desired amended claims" on 15 December 1997, on which the decision under appeal is based, does not meet the requirements of Articles 82, 84 and 123(2) EPC for the reasons given in the decision under appeal (cf. communication of the Board dated 11 July 2002, point 2).

2. On 1 October 2003, the appellant filed as "EPO 27 amended claims" a set of 27 claims in order to overcome the objections raised by the Board in the previously dispatched communications. This set of claims replaces the previously filed sets of claims which all had been found at least *prima facie* non-allowable. Hence, the appellant requests that the decision under appeal be set aside and that the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003 be allowed, and that the examination be proceeded on the basis of these documents.

3. Prior to the filing of these documents, the Board had already pointed out to the appellant in its communications dated respectively 11 July 2002 and 4 August 2003 that,

- after having amended once the description, claims and drawings, no further amendment may be made without the consent of the Board according to Rule 86(3) EPC, cf. point IX (d) above, and
- that any request based on documents (claims, description, drawings) which were not instrumental in overcoming the objections raised in the communication dated 4 August 2003, and which, as a whole, were not *prima facie* allowable would be refused under Rule 86(3) EPC, cf. point X, above.

4. In the Board's judgement, the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003 is not *prima facie* allowable for the following reasons.

4.1 The set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003 comprises 17 independent claims. Drafting such a large number of independent claims cannot be regarded as instrumental in overcoming the objections raised in the Board's communication dated 4 August 2003 with regard to the set of 34 claims filed as "EPO amended 34 claims" on 22 April 2003, which included a single independent claim. The appellant did not substantiate the necessity of filing a set of claims comprising so many independent claims.

Moreover, the plurality of independent claims gives rise to the objection of lack of unity (Article 82 EPC), which had already been a subject of the decision under appeal and of the Board's communication dated 11 July 2002.

Accordingly, the appellant was aware that, for being allowable, a European patent application must meet the

requirements of the EPC, including the requirement of unity as set out in Article 82 EPC.

He was also aware of the fact that the feature "access is provided to the mould set (13) through openings in the carrier (11) on which the mould set (13) rests for any of said means to operate on the mould set (13)" cannot be regarded as forming a basis for a single inventive concept linking together the independent claims then on file, given the fact that this feature belonged to the prior art, cf. point VIII, above. In this context, reference was *inter alia* made to document D3.

Actually, document D3 discloses, cf. Figures 1 to 3 and page 2, line 48 to page 4, line 42, an injection moulding apparatus according to the preamble of all independent claims of the set of 27 claims filed as "EPO amended 27 claims", and including openings in the carrier according to the first feature of the characterizing portion of all independent claims of the set of 27 claims filed as "EPO amended 27 claims", (see also the Board's communication dated 11 July 2002, point 2.3 and the Board's communication dated 31 January 2003, point 2).

In particular, the apparatus of document D3 comprises clamping means (cylinders 42, piston rods 43, a pressure plate 44) **at the injection station** for clamping in a closed condition at least one of said mould sets, cf. page 4, lines 48 to 68 and Figures 3 and 6 to 9, and there are openings in the carrier 11 providing access for operating means (a plunger 38, cf. page 3, lines 55 to 75; a pair of clamping rods 26, cf.

page 3, lines 14 to 23) to operate on a mould tool set **while the lower mould tool** (die shoe 20, die block 21) **rests on the carrier**, cf. Figure 3.

Therefore, an injection moulding apparatus comprising in combination the features of the preamble of the independent claims and the first feature of the characterizing portion of the independent claims of the set of 27 claims filed as "EPO amended 27 claims" is known from document D3.

Therefore, such a combination of features cannot constitute a single inventive concept linking together the independent claims. The remaining features of the independent claims of the set of 27 claims filed as "EPO amended 27 claims" concern different elements which are arranged at different parts of the injection apparatus and have different functions and purposes which are independent from each other, cf. point IV above. Consequently, the application in suit does not relate to one invention only, or to a group of inventions so linked as to form a single inventive concept, contrary to the requirements of Article 82 EPC.

The arguments brought forward by the appellant with regard to the apparatus of document D3, cf. point VI above, are not convincing. As shown above, in the apparatus of document D3, there are clamping means at the injection station for clamping in a closed condition at least one of the mould sets and there are openings in the carrier providing access for operating means. The attention of the appellant has already been drawn to this factual situation in the Board's

communications dated 11 July 2002 and 31 January 2003, respectively (cf. point VIII above).

4.2 Furthermore, claim 3 of the set of 27 claims filed as "EPO amended 27 claims" refers twice to "a sprue element (19)", "a severing position", and "a charging position", without indicating whether the same or different elements and positions, respectively, are concerned, which renders the claim unclear (Article 84 EPC). The attention of the appellant has already been drawn to this factual situation in the Board's communication dated 4 August 2003 in respect of claim 14 of the set of 34 claims filed as "EPO amended 34 claims" on 22 April 2003, cf. point XI above.

The features of the characterizing portion of claim 5 of the set of 27 claims filed as "EPO amended 27 claims" are not disclosed in the application as filed. The appellant cited a passage in the application as filed (published version), ie. the paragraph bridging pages 25 and 26. According to that passage, the disengaging means may be provided at opposite sides of the mould set. However, that passage is silent about any openings in the carrier for these disengaging means. Accordingly, the requirements of Article 123(2) EPC are not met. The attention of the appellant has already been drawn to this factual situation in the Board's communication dated 4 August 2003 in respect of claims 17 and 18 of the set of 34 claims filed as "EPO amended 34 claims" on 22 April 2003, cf. point XI above.

4.3 Furthermore, the description has not been brought in line with the subject-matter of the claims which gives rise to the fact that the claims are not supported by

the description, contrary to the requirements of Article 84 EPC. Moreover, the description does not refer to the background art useful for understanding the invention, contrary to Rule 27(1)(b) EPC. The attention of the appellant has already been drawn to this factual situation in the Board's communication dated 4 August 2003, cf. point XI above.

In addition, in the Board's communication dated 4 August 2003, the appellant was reminded that any request based on documents (claims, description, drawings) which, **as a whole**, were not *prima facie* allowable would be refused under Rule 86(3) EPC, in conjunction with Rule 66(1) EPC, cf. point X above.

4.4 Consequently, in the Board's judgement, the set of 27 claims filed as "EPO amended 27 claims" is not *prima facie* allowable; thus, the Board does not give its consent to the requested amendment of the application in suit.

The request of the appellant that the decision under appeal be set aside and that the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003 being allowed and that the examination being proceeded on the basis of these documents is therefore rejected under Rule 86(3) EPC, in conjunction with Rule 66(1) EPC.

5. The appellant further requests that he be given the opportunity to replace claim 1 of the set of 27 claims filed as "EPO amended 27 claims" on 1 October 2003 by a new claim 1 and five dependent claims drafted as laid down in paragraphs A6 and A9 of his letter received by the EPO on 1 October 2003. However, such an amendment

only concerns claim 1 of said set of claims. It would thus not have any impact on the *prima facie* non-allowability of the other independent claims of said set of claims.

That request is therefore also rejected.

6. As a "fall-back position", it has been argued by the appellant that, on the grounds that he had had multiple independent claims granted by the Patent Offices of Japan and the U.S.A and that there is an International Tri-partite Agreement as to harmonisation in the treatment of "Unity of Invention", it would be just that he be given the opportunity to have at least the same or similar independent claims allowed for his European patent.

However, a European patent can only be granted if the application meets the requirements of the EPC. One of these requirements concerns unity of invention (Article 82 EPC). That requirement has to be met, irrespective of whether or not the same or a similar set of claims had been found allowable by other authorities, in particular, Japanese or US-authorities (cf. the Board's communication dated 11 July 2002, point 4.2).

Furthermore, according to Article 113(2) EPC, the European Patent Office shall consider and decide upon the European application only in the text submitted to it or agreed by the applicant. In other words, a decision can be taken only on the claimed subject-matter as a whole, which implies that, if any of the claims on file does not meet the requirements of the

EPC, the application has to be refused or, as the case may be, the appeal has to be dismissed. In such a case, neither the Examining Division nor the Board are obliged to examine the remaining claims or to indicate which of the claims filed by the appellant might possibly be allowable (cf. the Board's communication dated 11 July 2002, point 4.1).

7. The issue of whether or not, in the present case, unity of invention within the meaning of Article 82 EPC exists cannot be examined isolated from the specific facts of the case at hand. Furthermore, the fact that the same or a similar set of independent claims may have been found allowable with regard to the requirement of unity of invention by other authorities, in particular by the Patent Offices of Japan and the USA, is a question which concerns a particular case and the way the respective authorities interpret the respective law under the respective circumstances with regard to that particular case. Therefore, in the Board's judgement, the above-mentioned issue cannot give rise to an important point of law, nor does it represent a question to be decided in order to ensure uniform application of the law (Article 112(1) EPC). Consequently, the request of the appellant that the appeal be heard by the Enlarged Board of Appeal is refused under Article 112(1)(a) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Dainese W. Moser