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D E C I S I O N
of 23 October 2001

Case Number: T 1077/99 - 3.2.1

Application Number: 89911311.2

Publication Number: 0438451 (WO 90/03919)

IPC: B67D 3/00

Language of the proceedings: EN

Title of invention:

Liquid container support and hygienic liquid dispensing system

Patentee:

ELKAY MANUFACTURING COMPANY

Opponent:

OASIS CORPORATION

Headword:

-

Relevant legal provisions:

EPC Art. 54(2), 56, 114(2), 123(2), 123(3)

Keyword:

"Belated allegation of public prior use (disregarded)"

"Extension of scope (main request, yes)"

"Addition of subject-matter (no)"

"Inventive step (yes)"

Decisions cited:

-

Headnote/Catchword:

G 0010/91, T 0986/93



Case Number: T 1077/99 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 23 October 2001

Appellant: OASIS CORPORATION
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Representative: Ruschke, Hans Edvard, Dipl.-Ing.
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Respondent: ELKAY MANUFACTURING COMPANY
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 1 October
1999 concerning maintenance of European patent
No. 0 438 451 in amended form.

Composition of the Board:

Chairman: F. Gumbel
Members: S. Crane
H. Preglau

Summary of Facts and Submissions

- I. European patent No. 0 438 451 was granted on 11 January 1995 on the basis of European patent application No. 89 911 311.2, which claimed priority from US 257 627 dated 14 October 1988.
- II. The granted patent was opposed in its entirety by the present appellants on the grounds that it subject-matter lacked novelty and/or inventive step (Article 100(a) EPC).

Of the prior art documents introduced in the course of the opposition proceedings only the following have played any significant role on appeal:

(D10) US-A-4 699 188

(D12) US-E-32 354

(D21) US-A-1 319 376

(D22) US Design Patent 277 255.

A little over one year after the expiry of the nine month opposition period the appellants filed evidence relating to the alleged public display of a drinking water dispensing system by the company Liqui-Box at IBWA trade show in Chicago in October 1987 (henceforth the "Liqui-Box trade show device"). The evidence comprised extracts from the transcript of a deposition made by Mr John Ulm, an employee of Liqui-Box, in the course of United States court proceedings concerning US patents related to the European patent in suit, and a number of colour photographs which were stills taken

from videos prepared by Liqui-Box for its own internal purposes.

In a communication posted on 3 June 1997 the Opposition Division informed the parties that it intended to disregard the late-filed evidence concerning the alleged public display.

At the oral proceedings before the Opposition Division, held on 9 December 1998, the appellants argued that the subject-matter of claim 1 under consideration was not entitled to the claimed priority date and submitted evidence for the alleged prior use of the claimed invention by the respondents (proprietors of the patent) in the period between the priority date and the date on which the application was filed. This evidence was also disregarded pursuant to Article 114(2) EPC.

The appellants also submitted a list summarising eleven aspects of claim 1 which they saw as constituting added subject-matter over the original disclosure. The Opposition Division drew the distinction between those objections which had arisen through amendment to the claim, which it considered, and those which applied equally to the terms of granted claim, which it disregarded as being belated.

At the end of the oral proceedings the Opposition Division announced that the patent could be maintained in amended form. The written decision with reasons was posted on 1 October 1999.

Claim 1 as agreed by the Opposition Division reads as follows:

"1. A liquid container support and hygienic delivery system for dispensing drinking water or other potable liquid from a substantially rigid-bodied inverted container (15) into the open upper end of a dispensing reservoir (12) through a discharge opening defined in a generally cylindrical depending neck (51) of the container (15), comprising a container sealing arrangement (50), mounting means (25) for embracing the depending neck (51) of the inverted container (15) over the open upper end of the reservoir (12), sealing means (41, 43) including a flexible peripheral member (43) carried on a substantially annular diaphragm element (41) for sealingly closing the open upper end of the reservoir (12) and an upstanding feed tube (45) supported so as to extend through the sealing means (41, 43) and dimensioned to penetrate into the neck (51) of the inverted container (15) through said container sealing arrangement (50) to provide a hygienic flow path for delivering liquid from the inverted container (15) into the reservoir (12) and for delivering replacement air into the container (15) from the reservoir (12), where the inverted container (15) has an inwardly and radially directed shoulder portion merging into the container neck (51) and the container sealing arrangement has a coaxial cap (50) including a lid portion (53) adapted to overlie and sealingly close the discharge opening and an annular skirt portion (55) extending axially away from the lid portion and adapted to surround and sealingly engage an outer axial portion of the container neck (51) the lid portion (53) having an axially inwardly extending recess (60) formed therein including an annular sleeve portion (62) located generally centrally in the lid portion (53) and integrally connected thereto, the recess (60) being closed and sealed by a closure (70) disposed at the

inner end of the annular sleeve portion (62), the closure (70) being adapted to be opened upon the forcible insertion of the upstanding feed tube (45) into the recess (60) to drain liquid from and admit replacement air into the substantially rigid liquid dispensing container (15), characterised in that the closure (70) includes a resealable plug portion (70) connected to the sleeve portion (62) of the coaxial cap (50), the reservoir (12) is housed within a cabinet (20), and in that the mounting means (25) is adapted to fit on an upper portion of the cabinet (20) and defining an annular ring (24) for embracingly supporting the shoulder portion of the inverted container (15) thereon, the mounting means (25) also defining a tapered entry portion (27) having an inner wall sloping downwardly and inwardly from the annular ring (24) for receiving and guiding the inverted neck (51) of the container (15) and the coaxial cap (50) towards axial alignment and engagement with the upstanding feed tube, the tapered entry portion (27) having a lower end (29) and length greater than that of the neck (51) of the container (15) and the coaxial cap (50) when the shoulder portion (27) of the inverted container (15) is supported on the annular ring (24) of the mounting means (25), the sealing means (41, 43) for sealingly closing the open upper end of the reservoir (12) and the upstanding feed tube (45) being coupled to the entry portion (27) of the mounting means (25) so that the feed tube (45) is disposed for entry into the recess (60) of the coaxial cap (50) and the upstanding feed tube has a sufficient length in relation to the length of the tapered entry portion (27) and to the combined length of the container neck (51) and the coaxial cap (50) including the resealable plug portion (70) to axially separate the resealable plug portion

(70) from the sleeve portion (62) when the container (15) is inverted and lowered onto the annular ring (24) and thereby to provide the hygienic flow path for delivering liquid from the container (15) into the reservoir (12) and for delivering replacement air into the container (15) from the reservoir (12)."

Dependent claims 2 to 11 relate to preferred embodiments of the system according to claim 1.

III. A notice of appeal against this decision was filed on 30 November 1999 and the fee for appeal paid at the same time. The statement of grounds of appeal were filed on 1 February 2000.

With this statement the appellants submitted further evidence relating to the alleged prior use of the Liqui-Box trade show device, *inter alia*:

(D25) Deposition of Mr John Ulm

(D27) Liqui-Box video on CD ROM

(D28) Drawings prepared by Mr John Ulm

They also submitted new evidence (document D30) concerning the alleged oral disclosure by Mr John Ulm to employees of the respondents of a drinking water dispensing system.

In addition they referred to a further prior art document, viz (D24) US-A-996 127, in relation to their arguments on inventive step.

IV. In a communication pursuant to Article 11(2) RPBA

posted on 7 February 2001 the Board indicated its provisional views that the late-filed evidence concerning both the alleged prior use of the Liqui-box trade show device and the alleged oral disclosure should be disregarded, as should the belatedly submitted prior art document D24.

- V. With a letter received on 14 September 2001 the appellants submitted a declaration by Mr John Ulm in which he made reference to certain pieces of evidence already on file concerning the alleged public prior use and the alleged oral disclosure.
- VI. Oral proceedings before the Board were held on 23 October 2001.

The appellants requested that the decision under appeal be set aside and the patent revoked in its entirety.

The respondents requested that the appeal be dismissed and the patent maintained in the form agreed by the Opposition Division (main request) or in the alternative that the patent be maintained on the basis of claim 1 submitted as an auxiliary request at the oral proceedings.

Claim 1 according to the auxiliary request differs from that agreed by the Opposition Division in the following respects:

It is stated that there is an "annular sleeve portion (62) located generally centrally in the lid portion (53) and integrally connected thereto **for sealing engagement with the upstanding feed tube**"; and that the "sealing means (41, 43) ... and the upstanding feed

tube (45)" are "coupled to the **lower end of the** entry portion (27) of the mounting means (25)" (the underlined words having been added).

VII. The arguments put forward by the appellants in support of their request can be summarised as follows:

In comparison with granted claim 1 the claim as accepted by the Opposition Division no longer required that the sleeve portion of the cap have a sealing function. This offended against Article 123(3) EPC. Furthermore the relationship between the feed tube, tapered entry portion and length of the container neck added to present claim 1 found no basis in the original disclosure, thus offending against Article 123(2) EPC.

The Board had the power to review the discretionary decision of the Opposition Division not to consider the objections of added subject-matter raised against the terms of the claims which applied equally to the terms of granted claim 1. Of these one was of particular importance, namely the absence of any indication as to where the sealing means for closing the upper end of the reservoir were coupled to the entry portion of the mounting means.

The respective claim 1 of both requests also offended against Article 84 in that it was unclear whether the container was comprised in the claimed subject-matter.

The priority document related to two distinct inventions both of which now featured in the subject-matter of the claims under consideration. The first of those inventions concerned the form of the cap for the container and it was one essential feature of that cap

that there be a frangible connection between the resealable plug portion and the sleeve portion. Since there was no disclosure in the priority document of a cap without such a frangible connection the absence of this feature from the present claims meant that the priority was not validly claimed. Thus the public use of the claimed subject-matter by the respondents themselves before the date of filing of the application belonged to the state of the art.

Taking account in particular of the additional evidence submitted with the statement of grounds of appeal there could now be no doubt as to either the construction of the Liqui-Box trade show device or that it had been publicly prior used. Even if it had to be conceded that the subject-matter of claim 1 of the auxiliary request was novel with respect to the prior used device the latter clearly represented the closest state of the art starting from which inventive step had to be judged and as such, despite its belated submission, the evidence relating thereto should not be disregarded.

The evidence submitted with respect to the oral disclosure by Mr Ulm to employees of the respondents of a dispensing system corresponding to that now claimed was also highly relevant and should not be disregarded. As confirmed by Mr Ulm in his declaration the meeting at which the oral disclosure took place was not subject to any conditions of confidentiality.

The closest documentary state of the art was document D10. The subject-matter of claim 1 of the auxiliary request differed from this state of the art by virtue of a variety of features which had no functional or structural interrelationship with each

other and which were all known *per se*, see for example documents D12, D21 and D22. The incorporation of these features into the system disclosed in document D10 to achieve the predictably advantages associated with them did not involve an inventive step.

VIII. The reply of the respondents was substantially the following:

The feature of granted claim 1 allegedly missing from the claim agreed by the Opposition Division was in fact implicit in the latter claim. The objection under Article 123(3) EPC was in any case overcome by the amendment made to claim 1 of the auxiliary request. This claim also dealt with the only objection of added subject-matter in granted claim 1 which the appellants had specifically referred to at the oral proceedings. The respondents remained however of the opinion that the Board should not examine these.

As for the objection of lack of clarity under Article 84 EPC it was apparent that the cap was not used in isolation and had to be present on the outer portion of the neck of the container, which was accordingly comprised in the claimed subject-matter.

A clear indication in the priority document that a frangible connection between the resealable plug portion and the sleeve portion was only a preferred embodiment was to be found in a combination of the claims 19 and 29. The present patent was therefore entitled to its claimed priority date.

The late-filed evidence with respect to both the alleged public prior use and the alleged oral

disclosure should be disregarded. With respect to the former there was still considerable doubt about the exact form of the exhibited Liqui-Box trade show device and the evidence offered in this context was in many respects internally inconsistent. As for the alleged oral disclosure, it was evident that whatever may have been discussed at the meeting it was certainly not a public disclosure.

The prior art documents which the appellants had attempted to mosaic together, albeit without success, to arrive at the claimed subject-matter were mutually incompatible and the whole operation was based solely on hindsight knowledge of the invention.

Reasons for the Decision

1. The appeal complies with the formal requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. It is therefore admissible.

2. In granted claim 1 it is stated that the cap includes a sealing arrangement "in the form of a sleeve portion". In claim 1 as agreed by the Opposition Division there is no statement as to which part of the cap seals against the feed tube, thereby covering a configuration wherein the sleeve portion does not provide thus sealing function. Furthermore, there is nothing in the claim, as suggested by the respondents, which makes this implicit. To this extent therefore the scope of claim 1 according to the main request of the respondents extends beyond that of granted claim 1 and for this reason the main request must be refused (Article 123(3) EPC).

The missing feature has been added to claim 1 of the auxiliary request, which in the opinion of the Board is now free of any objections under Articles 123(2) and (3) EPC.

In this context the appellants raised a total of eight objections of added subject-matter against the terms of claim 1 as agreed by the Opposition Division, seven of these being against aspects of the claim which were present in claim 1 as granted and had not been introduced by the amendments made in the course of the opposition procedure. At the oral proceedings before the Opposition Division the appellants had produced a similar list, although at that time with nine objections against the terms of granted claim 1, and the Opposition Division had used its discretion under Opinion G 10/91 of the Enlarged Board of Appeal (OJ EPO 1993, 420) to disregard these, dealing only with aspects of the claim that have been introduced by amendment of the granted claim. The appellants argue that the Board has the power to review that discretionary decision, which is in principle correct (see T 986/93, OJ EPO 1996, 215), although in the present case there is the additional difficulty of correlating the objections raised in the statement of grounds of appeal with those raised for the first time at the oral proceedings before the Opposition Division. In any case, the appellants although maintaining all the objections mentioned in the statement of grounds of appeal, only placed any emphasis on one of them at the oral proceedings before the Board. Since claim 1 according to the auxiliary request contains an amendment to overcome this objection, the Board does not need to go into it any further. As to the remaining six objections against the terms of granted claim 1 the

Board is satisfied that there is nothing of any real substance in them so that it is appropriate to disregard them.

The one objection in the statement of grounds of appeal to an addition of subject-matter in claim 1 as a consequence of the amendment of granted claim 1 concerns the statement towards the end of the claim which relates the respective lengths of the feed tube, tapered entry portion, and the combination of container neck and the coaxial cap. Although there is indeed no literal equivalent to this in the original application, the stated relationship is clearly a pre-requisite for the way the system is described as operating and so is implicitly disclosed there.

The last objection of a formal nature to claim 1 of the auxiliary request is the contention of the appellants that the claim is unclear since it does not specify whether the container is part of the subject-matter claimed. However, as pointed out by the respondents, it is self-evident that the interaction between the cap and the feed tube as specified in the claim is predicated upon the cap being fitted to the outer portion of the neck of the container, so that the latter belongs to what is being claimed. Furthermore, it must be borne in mind that water dispensing systems of the type involved are intended to be operated with containers of a generally standardized size and shape, so that the references in the claim to relationships between the form of the container and other components do not lead to any obscurity in determining the ambit of the claimed subject-matter.

3. With regard to the question of priority the appellants

are correct in their general observation that the priority document concerns in essence two separate inventions, the first directed to a resealable cap for a liquid dispensing container and the second to means for retrofitting existing water cooler systems with a hygienic container receiving system, and that claim 1 under consideration effectively combines the features of the two. However, the Board cannot agree with the appellants in their contention that there is no basis to be found in the priority document for any structure of cap where the resealable plug portion is not attached to the sleeve portion via a frangible connection. It is true that in the claims directed to the cap itself there is always reference to this frangible connection and no other. In the claims directed to the retrofittable system, however, the cap is first introduced into claim 29, dependent on independent claim 19, and here the reference is solely to "a sleeve portion and sealing plug portion connected thereto". In the view of the Board this gives sufficient indication to the person skilled in the art that a frangible connection is not essential and provides proper support for the equivalent feature as stated in claim 1, namely that there is "a resealable plug portion connected to the sleeve portion". The fact that claim 31 of the priority document, dependent on claim 29, refers to "said frangible connection" without any antecedent for this term, cannot detract from the above evaluation of the content of claim 29 itself, since strictly it amounts to no more than a drafting error.

Accordingly, the subject-matter of claim 1 of the auxiliary request is entitled to the claimed priority, so that activities of the respondents after this date

and before the date of filing of the application do not belong to the state of the art and can be left out of consideration.

4. There is a considerable body of case law concerning the introduction of late-filed evidence into the proceedings, and more particularly were that evidence is not merely of a pre-published documentary nature but concerns allegations of public prior use (see sections VI.F.2.1 and 8 of the compendium "Case law of the Boards of Appeal of the EPO"). A concept common to the majority of decisions quoted there is that of the "relevance" of the belatedly submitted evidence in relation to that already on file, which can be understood as meaning its potential for altering the result of the proceedings. As far as belated allegations of prior use are concerned, special attention has to be given to the extent to which that which is alleged is actually proved by the evidence adduced in support of it.

In the present case the appellants have gone to considerable lengths to demonstrate that the company Liqui-Box exhibited a drinking water dispensing device at the IBWA trade show in October 1987. However, with regard to the structure of this device they have had to rely, apart from a few seconds of video filmed at the trade show, on the memory of Mr Ulm. There exist no contemporaneous technical drawings relating to the construction of the device itself. That deficit is not, however, determinative for the decision of the Board to disregard under Article 114(2) EPC the evidence relating to the Liqui-Box trade show device. Of much greater significance is the fact that this device, even on the assumption that it complied fully with the

drawings made by Mr Ulm more than twelve years after the event (document D28), differs in so many respects from the claimed subject-matter that it is only of questionable relevance in the above sense. In particular, although it is true that the allegedly prior used device insofar as it comprises a resealable cap may come closer to the subject-matter of claim 1 than the disclosure of document D10, on which the preamble of the claim is based, such caps were already known for use in comparable circumstances (see document D12) so for the overall appreciation of inventive step little would be achieved in starting from the device rather than the combination of documents D10 and D12.

The Board also has no hesitation in disregarding pursuant to Article 114(2) EPC the evidence filed with the statement of grounds of appeal concerning the alleged oral disclosure by Mr Ulm to employees of the respondents. That evidence consists solely of internal notes and drawings made by those employees and does not allow an accurate determination of what Mr Ulm may have actually disclosed. More importantly the nature of the discussions, which apparently were concerned with the establishment of a business relationship of some description, can be assumed to have been essentially confidential.

5. In view of the above the one issue which remains to be considered is the inventive step of the subject-matter of claim 1 according to the auxiliary request in respect of the documentary prior art.

The "system" defined in the claim constitutes effectively the upper section of a device for delivering on demand drinking water to an end user. The water is supplied to the device in large containers, generally bottles, which are supported in an inverted position on the top of the device for progressive delivery of their contents into a reservoir. Once a container is empty it is replaced by a fresh one. Given that the device generally comprises refrigeration means it is commonly termed a "water cooler".

Broadly speaking the patent is concerned with improving the standard of hygiene in the operation of the device. There are two aspects to this. The first is directed to the problem of the uncontrolled release of water if a container which is not completely empty is removed from the top of the device. The second is directed to protecting the neck of the container from damage, such damage also being a potential source of leaking water. Furthermore, the system defined in claim 1, with which these aims are achieved is constructed so as to be retrofittable to existing devices.

Looking at these aspects of the claimed subject-matter in more detail, the problem of the uncontrolled release of water is overcome by providing the container with a special form of sealing cap which includes a resealable plug portion. On placement of a fresh container on the device the upstanding feed tube separates this plug portion from the sealing sleeve portion of the cap, to allow water to flow into the reservoir. On removal of the container from the device the plug portion is reconnected to the sleeve portion to seal off the container and prevent any remaining water escaping. As for protecting the neck of the container from damage

this is achieved by the form of the mounting means which define an annular ring for supporting the shoulder portion of the container and a tapered entry portion for receiving and guiding the neck of the container. The respective lengths of this entry portion and the neck are such that the neck is suspended freely and does not have to bear the weight of the container. Lastly, the retrofittability of the system is obtained by coupling the sealing means for the reservoir to the lower end of the entry portion of the mounting means, these mounting means being adapted to fit on an upper portion of the cabinet of the device.

The closest state of the art, on which the preamble of claim 1 is based, is represented by document D10. The main concern of this document is with a container cap/upstanding feed tube combination comparable to that found in the claimed invention with the exception that it does not include a resealable plug portion. The neck of the inverted container bears directly on the top plate of an arrangement which closes the open end of the reservoir within a receptacle having a cylindrical wall which closely surrounds the neck, the receptacle being mounted on this top plate. This arrangement comprises two plates with a rubber gasket located therebetween, screws being provided to squeeze the plates together and force the edge of the gasket into engagement with the interior of the reservoir. The device as disclosed does not comprise a cabinet.

Document D12 relates to a closure for the type of container comprising a flexible thin-walled receptacle within a rigid box ("bag-in-box"). As liquid is withdrawn from the receptacle it merely collapses, thus obviating the need for the entry of air to replace the

liquid, which can thus be held under sterile conditions. In order to allow sterile connection and disconnection to a delivery conduit the closure comprises a central sleeve portion in the inner end of which there is arranged a resealable plug portion. The end of the conduit is equipped with a probe for insertion into the sleeve portion of the closure against which it seals. The probe displaces the plug portion from the end of sleeve portion to establish a liquid connection between the receptacle and the conduit, the plug portion being held on the end of the probe by mechanical engagement. On withdrawal of the probe the plug portion is pulled back into the sleeve portion to reseal the receptacle. It can thus be seen that the operation of this closure is essentially equivalent to the sealing cap/upstanding feed tube arrangement defined in claim 1 under consideration.

The respondents have argued that the respective fields of application of "bag-in-box" type containers and the rigid containers conventionally used with water dispensing devices are so distinct that a person skilled in the art would not think of combining together features from the two types. The Board cannot however find this line of argument convincing and in its view the person skilled in the art would have no difficulty in recognising that the proposal of document D12 could be incorporated to good effect in the system of document D10 in order to prevent release of water from the container if this is removed from the upstanding feed tube before being completely emptied. This aspect of the subject-matter of claim 1 is not therefore capable of justifying an inventive step.

The position of the appellants with respect to the

other aspects of the claim is however more difficult. Having regard to the way the inverted container is supported on the mounting means they rely essentially on document D22. This is a US Design Patent which comprises only drawings and a very limited amount of descriptive text. It is nevertheless apparent that what is disclosed is an element for supporting an inverted container on a water dispenser and that the base of the element is equipped with blades which in use will sever a closure on the container neck to allow outflow of the water. The walls of the element taper inwardly and downwardly and are provided with four inwardly projecting ribs, presumably for guiding and supporting the neck of the container. There is thus no clear disclosure here of the features specified in claim 1 requiring that the mounting means comprise an annular ring for supporting the shoulder portion of the inverted container, with the neck of the container being spaced from the lower end of the tapered entry portion of the mounting means. In any case, as pointed out by the respondents, the element of document D22, with its blades for severing a closure on the container, is clearly incompatible with the closure arrangements disclosed in both documents D10 and D12, so that it is unlikely that the person skilled in the art would see anything in document D22 which he could advantageously transfer to the latter.

With respect to the manner in which as claimed the sealing means for the reservoir is connected to the lower end of the mounting means the appellants rely more on general considerations rather than any specific piece of prior art. They argue that the device of document D10 is only illustrated schematically there and that in practice it would always be enclosed within

a cabinet as shown for example in document D21, which is referred to in the introductory description of document D10 itself. However, even if that is accepted as the way the person skilled in the art would understand document D10, the step from what this document proposes, namely supporting the mounting means directly on the reservoir by virtue of the sealing means, to what is claimed, namely supporting the mounting means on the cabinet with the sealing means for the reservoir being coupled to the lower end of the mounting means, is not one which follows from the documented state of the art, where the claimed arrangement has no precedent, or, without the benefit of hindsight, from general considerations.

The Board therefore comes to the conclusion that the subject-matter of claim 1 according to the auxiliary request cannot be derived in an obvious manner from the state of the art and so involves an inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of the following documents:

Claim 1 (auxiliary request) filed during the oral proceedings;

Description and drawings underlying the decision under appeal.

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel