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**Datasheet for the decision
of 19 January 2007**

Case Number: T 0485/04 - 3.2.03

Application Number: 98202456.4

Publication Number: 0893539

IPC: E01C 19/40

Language of the proceedings: EN

Title of invention:
Concrete paving machine

Applicant:
Drion Constructie, BVBA

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
"Amendments - broadening of claims (yes)"

Decisions cited:
G 0003/89

Catchword:
-



Case Number: T 0485/04 - 3.2.03

D E C I S I O N
of the Technical Board of Appeal 3.2.03
of 19 January 2007

Appellant: Drion Constructie, BVBA
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 21 November 2003
refusing European application No. 98202456.4
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: U. Krause
Members: G. Ashley
K. Garnett

Summary of Facts and Submissions

I. This appeal lies from the decision of the examining division to refuse European patent application No. 98202456.4.

II.

(a) On 11 August 2003 the appellant (applicant) filed an amended set of claims for consideration by the examining division, claim 1 of which reads as follows:

"1. Concrete paving machine, more particularly a machine for levelling concrete, of the type whereby poured concrete is spread over a predetermined width and this is equalled at a well-defined thickness, characterized in that the concrete paving machine (1) consists of at least a frame (4) comprising various parts (30-31-32-33) which can be mutually shifted in a direction (D2) perpendicular to the working width (W) and arms (13-14-15-16) which are pivotably mounted on the frame (4) by means of axes (17-18-19-20) and which arms (13-14-15-16) are provided with support elements (5-6-7-8) whereto tracks (12) or the like are mounted at a distance of said axes (17-18-19-20), whereby the tracks can be positioned between a working position in a direction (D2) perpendicular to the working width (W) and a transport position in a direction (D1) parallel to the working width (W), whereby the support elements (5-6-7-8) can be positioned within the width (A) of the frame (4)."

The dependent claims are as follows:

"2. Concrete paving machine according to claim 1, characterized in that the pivotable arms (13-14-15-16) are partially bended.

3. Concrete paving machine according to claim 1, characterized in that is (*sic*) further consists of second various parts (25-26-27-28-29) that can be mutually shifted in a direction (D1) parallel to the working width.

4. Concrete paving machine according to claim 3, characterized in that the various parts (25-26-27-28-29) consist of at least three distinct elements that can be mutually shifted.

5. Concrete paving machine according to claim 4, characterized in that the various parts (25-26-27-28-29) consist of five distinct elements that can be mutually shifted."

Dependent claims 6 to 13 describe further preferred embodiments.

(b) With regard to the claims of the patent application as originally filed, only dependent claim 12 is relevant for this decision:

"12. Concrete paving machine according to claim 11, characterized in that the support elements (5-6-7-8) are attached at pivotable arms (13-14-15-16), whereby they are movable between a transport position in which the support elements (5-6-7-8) are situated within the

minimum dimension (A) of the remaining parts of the concrete paving machine (1), and a working position in which the support elements (5-6-7-8), so to speak, are swung out."

- III. The examining division held that the concrete paving machine of amended claim 1 lacked inventive step (Article 56 EPC), and on this basis took the decision to refuse the application. The decision also mentions *obiter* that the examining division was also of the view that the subject-matter of dependent claims 2 to 5 was not disclosed in the application as originally filed, and hence the content of the application had been extended contrary to Article 123(2) EPC.
- IV. The decision of the examining division was posted on 21 November 2003, and notice of appeal against the decision was filed, together with the appeal fee, by the appellant on 21 January 2004; a statement containing the grounds of appeal was filed on 16 March 2004.
- V. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims filed with the letter of 11 August 2003.
- VI. The appellant had not requested oral proceedings, but in order to expedite matters, the Board of its own volition appointed oral proceedings in accordance with Article 116(1) EPC. A communication pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal was issued, together with a summons to attend oral proceedings on 19 January 2007. The communication set out the provisional view of the Board on added

subject-matter, novelty and inventive step (Articles 123(2), 54 and 56 EPC respectively).

Oral proceedings were duly held on 19 January 2007, but no one appeared on behalf of the appellant. Since the Board had received no communication from the appellant to the effect that he would not attend, the Board telephoned the appellant's representative, who then confirmed that no one would be attending. Consequently the oral proceedings were conducted in the absence of the appellant and his representative.

VII. With regard to the issue of added subject-matter, the appellant submitted in writing that, although not expressly mentioned in the application as originally filed, the amended subject-matter was implicitly disclosed, particularly taking into account the decision of the Enlarged Board of Appeal G 3/89, which states that the "content of the application" referred to in Article 123(2) EPC relates to the parts of a European application which determine the disclosure of the invention, namely the description, claims and drawings.

Therefore, the feature that the pivotable arms (13-14-15-16) are partially bended in dependent claim 2 can be derived from the figures of the original application and is also implicitly disclosed in the description and claims, for example in the original claim 12, where it is disclosed that the pivotable arms (13-16) can be moved into a transport position in which the support elements (5-8) are situated within the transport width (A) of the concrete paving machine.

Regarding support for the subject-matter of amended dependent claims 4 and 5, the appellant argued that numerals 25, 26, 27, 28 and 29 were used in the original application to identify the various parts that are mutually extensible in the (D1) direction parallel to the working width. Therefore up to five distinct elements was disclosed in the original application.

Reasons for the Decision

1. The appeal is admissible.
2. *Article 123(2) EPC*
 - 2.1 Dependent claim 2 of the amended set of claims filed on 11 August 2003 introduces the feature that the "pivotable arms (13-14-15-16) are partially bended".

The appellant argues that, although not explicitly mentioned, this feature can nevertheless be derived from the figures and claim 12 of the application as originally filed.

The description (column 5, lines 17 to 29 of the published application) and claim 12 as originally filed disclose arms (13 to 16) that pivot around axes (17 to 20) such that when in the transport position, the support elements (5 to 8), which are attached to the arms, are situated within the minimum distance A of the frame 4. This can be seen as a functional definition, and neither the description nor claim 12 provide further indication of how the pivotable arms are shaped to enable this result to be achieved. Present claim 2

defines the arms as being "partially bended", and hence the claim encompasses a range of bending arrangements involving different angles, bending points and axes, all of which would lead to the support elements being located within the transport width.

Although figures 1, 3, 4 and 5 show schematically that arms (13 to 16) are bent in one particular way, there is no disclosure in the application as filed of any other suitable bending arrangement. The generalisation of the particular bending arrangement shown in the figures to any partial bending arrangement thus leads to a broadening of subject-matter beyond the disclosure as originally filed.

- 2.2 According to dependent claim 4, the various parts (25-26-27-28-29) of the concrete paving machine of claim 3 consist of "at least three distinct elements that can be mutually shifted".

The appellant submits that up to five distinct elements can be derived from the numerals used to identify these features in the figures, namely 25, 26, 27, 28 and 29, and thus three elements are implicitly disclosed.

It is clear that the originally filed description (see column 5, lines 47 to 55) and Figures (see Figure 4) disclose five elements (25 to 29) that can be mutually shifted to adjust the working width (W) in the D1 direction. Element 27 moves into element 26, which in turn moves into central element 25; likewise, on the other side of the machine, element 29 moves into element 28, which again moves into element 25. These five elements mean that the width is four times

adjustable, there being two possibilities on each side, as defined in the original claim 4. In addition, claim 3 of the original application requires that the working width (W) is at least three times adjustable, for which four elements must be present.

Thus, four elements and five elements are disclosed in the original application, but nowhere is either three elements or "two times adjustable" (which would require three elements) mentioned. There is also no indication that the concrete paving machine could be constructed with less than four elements, thus the Board does not agree with the argument of the appellant that three elements are implicitly disclosed.

Since the application as originally filed fails to disclose the lower limit in claim 4 of three distinct elements that can be mutually shifted, the requirements of Article 123(2) EPC are not met.

2.3 The Board agrees with the appellant that, in accordance with G 3/89, the description, claims and drawings are all relevant for the assessment of the disclosure for the purposes of Article 123(2) EPC. However, even taking this into consideration, both amended dependent claims 2 and 4 contain subject-matter that was not originally disclosed. Since the requirements of Article 123(2) EPC are not met, the patent application must be refused on this basis.

3. In light of this conclusion, it is not necessary for the Board to consider the issues of novelty and inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

A. Counillon

U. Krause