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**Datasheet for the decision
of 24 January 2008**

Case Number: T 0712/05 - 3.2.03

Application Number: 95903719.3

Publication Number: 0734478

IPC: E03F 5/10

Language of the proceedings: EN

Title of invention:
Underground drainage system

Patentee:
Urriola, Humberto

Opponent:
Funke Kunststoffe GmbH
WAVIN B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 54, 56

Keyword:
"Added subject-matter - yes (main request)"
"Novelty - no (first auxiliary request)"
"Inventive step - no (second auxiliary request)"
"Admittance of first and second auxiliary requests filed during oral proceedings"

Decisions cited:
-

Catchword:
-



Case Number: T 0712/05 - 3.2.03

D E C I S I O N
of the Technical Board of Appeal 3.2.03
of 24 January 2008

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 April 2005
rejecting the opposition filed against European
patent No. 0734478 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: U. Krause
Members: E. Frank
K. Garnett

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Opposition Division dated 20 January 2005 and posted on 11 April 2005, to reject the oppositions and maintain the European patent No. 0 734 478 in unamended form.
- II. The Appellant (Opponent II) filed a notice of Appeal on 25 May 2005, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 8 August 2005.
- III. A communication pursuant to Article 11(1) RPBA was issued together with a summons to attend oral proceedings, which were duly held on 24 January 2008. The Opponent I, who had not lodged an appeal, was also represented in the oral proceedings as party as of right.
- IV. The Appellant requested that the decision under appeal be set aside and that the patent be revoked. The Appellant further requested that the first and second auxiliary requests as filed during the oral proceedings should not be admitted.

The Respondent (Proprietor) requested that the appeal be dismissed. Alternatively, the Respondent requested that the decision under appeal be set aside and the patent be maintained either on the basis of the set of claims according to the first auxiliary request, or on the basis of the set of claims according to the second auxiliary request, as filed during the oral proceedings.

V. The wording of claim 1 reads as follows:

main request:

"1. An underground drainage system defining water storage and/or water piping comprising a structure which is wrapped in water permeable, geotextile material (9) and in which water can be contained and from and into which water can flow into and from the surrounding ground, characterised in that said structure (4) comprises a plurality of adjacently arranged, load bearing box like modules (4) each having wall panels (1, 8) with perforations therethrough, such that water can flow into and out of the storage and/or piping through the wall panels, said storage and/or piping being made of porous materials to allow water to flow in all directions through the materials, such that in use water permeates from said storage and/or piping into the surrounding earth."

first auxiliary request:

"1. An underground drainage system defining water storage and/or water piping comprising a structure which is wrapped in water permeable, geotextile material (9) and in which water can be contained and from and into which water can flow into and from the surrounding ground, characterised in that said structure (4) comprises a plurality of adjacently arranged, load bearing box like modules (4), wall panels (1, 8) are assembled to form each module, said wall panels with perforations

therethrough, such that water can flow into and out of the storage and/or piping through the wall panels, said storage and/or piping being made of porous materials to allow water to flow in all directions through the materials, such that in use water permeates from said storage and/or piping into the surrounding earth."

second auxiliary request:

Claim 1 of the second auxiliary request adds to the subject-matter of the first auxiliary request the following features:

" ... characterised in that a module comprises two opposed perforated outer wall panels (8), with at least two perforated wall panels (1) extending transversely therebetween, and connection means in the form of recesses (3) and mating pins (2) located on adjacent wall panels (8) to secure adjacent panels together."

VI. The most relevant prior art documents for the present decision are:

E1 = DE-A-37 41 001

D13= JP-B2-04 026 648 (including translation provided by the Opponent I)

VII. The parties submitted essentially the following arguments:

The Appellant argued that the added bulk material property "porous material" in claim 1 as granted was

not derivable from the application as filed, since according to the description, "porous" was merely to be understood as a wall perforation. Moreover, no basis could be found in the original disclosure that a module might be formed of one piece, and hence had integrally formed walls instead of assembled ones. Therefore claim 1 of the main request extended beyond the application as filed. Furthermore, the Appellant submitted that both the first and second auxiliary requests, filed during the oral proceedings, should not be admitted. In particular, the problem of there being no clear basis for modules which are formed by other than "assembled" wall panels had already been addressed in writing. Thus, the Respondent could have formulated corresponding auxiliary requests in time. As regards the first auxiliary request, claim 1 was not new over prior art document E1. The structure of E1 was made up of a plurality of blocks "8" and wrapped in a geotextile. Moreover, E1 described the porous material of the blocks "8" and the perforations in their side surfaces. Claim 1 of the second auxiliary request lacked inventive step in the light of E1 and the general knowledge of the skilled person, who would be familiar with all sorts of pin connections for panels. Opponent I argued that, starting from E1, the document D13 hinted at a connection of two adjacent wall panels of two neighbouring modules by means of pins and holes.

The Respondent argued that the term "porous material" was explicitly described on page 3 (as published) of the original description. Moreover, it was clear from claim 5 as filed that modular wall panels were addressed in original claim 1. These modular units, and not the assembly of respective wall panels, formed a

pipe. Thus, a module was a construction unit having either integral or separate wall panels. The subject-matter of claim 1 of the main request was, therefore, derivable from the application as originally filed. Moreover, claim 1 of the first auxiliary request was novel with regards to the disclosure of E1. E1 did not describe a structure being entirely wrapped in geotextile, since only the side surfaces of each block "8" were covered with filter cloth. Apart from that, the blocks "8" of E1 were prefabricated elements, and therefore not assembled from wall panels. Furthermore, E1 described water drainage blocks and thus water could not flow out through the wall panels "10" back into the surrounding earth. Therefore no perforations in terms of the subject-matter of claim 1 were derivable from E1. As regards the second auxiliary request, starting from E1, it was not obvious to connect the adjacent wall panels by recesses and mating pins, because E1 already suggested a connection by means of straps. Document D13 only hinted at connections to staple the modules "4".

Reasons for the Decision

1. The appeal complies with the provisions of Articles 106 to 108 EPC and of Rule 99 EPC and is, therefore, admissible.

2. *Amendments of claim 1 of the main request (Article 100 c) EPC, see Article 123(2) EPC)*

First, compared to the application as originally filed, claim 1 of the patent as granted contains the

additional feature "...said storage and/or piping being made of porous materials to allow water to flow in all directions through the materials, such that in use water permeates from said storage and/or piping into the surrounding earth."

The Appellant argued the "porous" property of the "storage and/or piping" could merely be seen to be the result of the perforations through the wall panels and that "porous" as a bulk material property was not derivable from the original application. Since the normal technical meaning of "porous" implied a material being as such pervious to water, the subject-matter of claim 1 of the main request had thus been broadened beyond the disclosure as originally filed. However, the Board notes that the newly added feature is explicitly described on page 3, third paragraph of the application as published. Therefore the Board agrees with the Respondent that, apart from lack of a clear meaning of "porous" throughout the description of the application, the above added feature, in particular the wording "...made of porous materials..." is described in the original disclosure and thus complies with Article 123(2) EPC.

Second, the feature "... module wall panels ... wherein, in use, the panels are assembled to form the storage and/or piping, ..." of original claim 1 has been replaced in claim 1 as granted by the feature "... modules, each having wall panels".

The Respondent argued that claim 5 as originally filed, which referred back to original claim 1, described a "modular" wall panel comprising a length of piping.

Thus, claim 1 addressed modular units to form the pipe, but the wall panels as such, on the other hand, were not themselves assembled for the purpose of forming a pipe. Therefore the term "module" in the application as originally filed was to be understood as a construction unit which had either integral or separate wall panels. However, although claim 5 as originally filed used the vague wording "modular" wall panels, in view of the Board there is no basis in the application as originally filed for saying that the wall panels themselves had to be made up of modular elements and hence would not themselves be assembled to form the pipe (or storage). The only hint at a "modular" wall panel is possibly to be found in the description of the embodiment of figure 4 (cf. page 7, second main paragraph as published), where "wall modules (8)" are mentioned. In the opinion of the Board, however, the skilled person would glean from figure 4 that the term "wall modules (8)" had to be understood as "wall panels" which in turn are assembled by means of recesses and mating pins in order to form a box-like part of the piping (or storage). This is also in accordance with the wording of original claim 2, which addresses "wall panels" of the embodiment of figure 4, and refers back to the assembled wall panels of claim 1. Moreover, with reference to the embodiments of figures 1 to 3 and 5 to 7, it is noted that only discrete planar drainage cell panels are depicted therein, and the corresponding description is silent about any details of the wall panel connections. The embodiments of figures 8a, 8b and 8c show some shapes of tanks or channels and possible arrangements of modules, also without any further details as to the wall connections. Finally, figures 9 to 11 show methods

of collecting rainwater only. Since in the original application a consistent basis can only be found for wall panels formed of discrete elements, the assembly of the latter also appears not to be an advantageous embodiment, but an essential feature of the invention, according to the subject-matter of claim 1 as originally filed.

Summing up, the Board concludes that there is no disclosure throughout the application as filed, either expressis verbis or implicit, that the skilled person would directly and unambiguously recognize that a module was made up of other than assembled wall panels. Therefore the subject-matter of claim 1 of the main request extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

3. *Admittance of first and second auxiliary requests*

During the oral proceedings the Respondent withdrew its then existing first and second auxiliary requests, which had been filed in time with the Respondent's letter of 19 December 2007. In its place a new main and auxiliary request were submitted in order to overcome the objection of extension beyond the content of the application as filed, cf. point 2 of this decision. The Appellant argued that the problem of no clear basis for modules which are formed of other than "assembled" wall panels had already been addressed in writing. The Respondent was thus aware well before the oral proceedings that further requests might be necessary. However, in the opinion of the Board, the newly filed set of claims of the first and second auxiliary

requests is clearly based, particularly with regards to the wording of claim 1, on the original content of the application. Moreover, the new requests also do not differ substantially from the main, first and second auxiliary requests filed prior to the oral proceedings.

Thus, the Appellant could reasonably respond to the new requests, and hence the Board exercises its discretion to admit the first and second auxiliary requests of the Respondent, Article 13 RPBA.

4. *Amendments of claim 1 of first and second auxiliary requests*
(Article 100 c) EPC, see Article 123(2) EPC)

In newly filed claim 1 of the first and second auxiliary requests the following wording has been added to claim 1 of the main request: "... are assembled to form each module, said wall panels ...". This is derivable from claim 1 as published. Moreover, the newly added features in claim 1 of the second auxiliary request, viz: "... a module comprises two opposed perforated outer wall panels (8), with at least two perforated wall panels (1) extending transversely therebetween, and connection means in the form of recesses (3) and mating pins (2) located on adjacent wall panels (8) to secure adjacent panels together." correspond to claim 2 as published. Claim 1 of the first and second auxiliary requests complies, therefore, with Article 123(2) EPC.

5. *First Auxiliary request - Novelty*
(Article 100a) EPC, see Article 54 EPC)

The document E1 describes an underground drainage system defining water piping, which comprises adjacently arranged load bearing box-like blocks "8", i.e. modules, thus making up a structure. Figures 1 and 3 of E1 show a stacked arrangement of the adjacent blocks "8" along the sloping ground "7". The open ends of the blocks "8" are brought together in order to form a pipe which drains water. Moreover, wall panels are described, viz. "blattartige Elemente 10" (figure 2), "Seitenplatten 26" (figure 4) and "obere und untere Platten 13", which are assembled to form a module, viz. "Block 8", and which are wrapped in geotextile (cf. E1; col. 5, lines 4-30 ; col. 7, lines 12-30 and 54-58; figures). In column 8, lines 20 to 22 of E1 it is pointed out that the sheet-like panels "10" of the blocks "8" are made of porous material to allow water flow also in the transverse direction of a block. According to E1, the surfaces along the perimeter of the block "8" are to be understood as side surfaces: cf. column 5, lines 27 to 29 and column 7, lines 28, 29. These side surfaces are at least partly provided with perforations: cf. E1, column 3, lines 64 to 66.

The Respondent argued that firstly the subject-matter of claim 1 according to the first auxiliary request differed from the disclosure of E1 in that the structure was entirely wrapped in geotextile. The blocks "8" of E1 had open ends and thus only their side surfaces were covered with the filter cloth "15", cf. column 7, lines 25-29 and figures 2 and 4. Secondly, as was derivable from column 5, lines 4 and 5 of E1, the

blocks "8" were prefabricated and therefore could not have been formed by assembled wall panels. Thirdly, the patent in suit concerned a water retaining system, which was designed to return water to the environment. To the contrary, the adjacent blocks "8" of E1 were designed as a water collecting and draining system, and hence the wall panels of the blocks "8" were not provided with perforations enabling the water to flow out through the wall panels in order to return water to the environment. The porous material of the blocks "8" of E1 thus likewise would not allow the water permeating from the blocks into the surrounding earth.

These arguments, however, cannot be accepted by the Board. The respective open ends of the blocks "8" are put together, thus forming an elongated structure wrapped in geotextile. Even if it is the case that the blocks "8" are usually arranged in a stacked relationship, with open ends being offset to each other due to the sloping ground, and that the first and last ends of this pipe formed by the adjacent blocks might be open, such an arrangement is also addressed by claim 1 of the main request. The subject-matter of claim 1 is not limited to a structure which has to be wrapped in its entirety. Moreover, since claim 1 does not describe an assembly of the modules in situ, the modules may also be prefabricated by assembling the wall panels elsewhere. With respect to the water retaining properties of the drainage system of the patent in suit it is noted that claim 1 is not limited to a system which necessarily defines a water storage system due to the wording "... water storage and/or water piping ...". Therefore the drainage system of the patent in suit also encompasses a water piping system

only, which apparently does not need to have any substantial capacity to store or retain water. As regards the function and dimension of the perforations in the side surfaces of the blocks "8" of E1, and the porosity of their sheet-like panels "10", the Board is of the opinion that, if water flow into or within the wall panels is achieved through these perforations or pores, it would be implicit for the skilled person that water may also flow or permeate outwards from the blocks "8", back into the surrounding earth. Thus, the underground drainage system of E1 is also suitable for returning water to the environment, simply depending on how much water is actually drained or kept back in the water piping made up by the blocks "8" of E1.

Therefore the subject-matter of claim 1 of the first auxiliary request does not meet the requirements of novelty.

6. *Second auxiliary request - Inventive step*
(Article 100a) EPC, see Article 56 EPC)

During the oral proceedings before the Board, document E1 was considered as closest prior art. With reference to aforesaid point 5 of this decision, E1 discloses the preamble of claim 1 of the auxiliary request. It follows from figure 2 of E1 and the associated description in combination with column 3, lines 64 to 66 and column 7, lines 29 to 31, that a block "8", i.e. a module, comprises two opposed perforated outer wall panels ("obere und untere Platte 13") with at least two perforated wall panels ("blattartige Elemente 10") extending transversely therebetween. Thus, the subject-matter of claim 1 of this auxiliary request differs

from the disclosure of document E1 in that a module further comprises connection means in the form of recesses and mating pins located on adjacent wall panels to secure adjacent panels together.

The Respondent argued that the document D13 taught pins and holes in order to staple the modules "4" shown in figures 2 and 3, but did not address a connection between individual wall panels. The Board agrees with the Respondent on this point, since in fact the pins "8" and holes "7" of D13 are only foreseen in the outer reinforced rims of the modules "4" (cf. page 3, paragraph 6 of D13). And even if D13 was taken into consideration to make connections between adjacent outer wall panels of two modules as argued by the Opponent I, D13 would not seem to prompt the skilled person to connect the blocks "8" of E1, which are laid with adjacent open ends slightly offset in a drainage trench, with pins and holes, especially not in vertical direction (as in use).

Moreover, the Respondent argued that it was not obvious to connect the adjacent wall panels by recesses and mating pins, since document E1 taught the use of the straps "14" as a connection means, and no further strengthening requirements were hinted at in E1. However, in view of the Board, the skilled person would be well aware of the load requirements of the wall panels, which form the heavily loaded box-like blocks "8" of E1. These wall panels are only wrapped around their outer surfaces by the straps "14", which may be made merely of filter cloth. Due to lack of any secure connection between the panels as such, a displacement or rotation of the respective adjacent panels and

consequent buckling or tilting of these panels could occur. Thus, the objective problem solved by the additional features of claim 1 of the second auxiliary request can be seen in the prevention of displacements or rotations between the top and bottom plates "13" and the respective side plates "10" in figure 2 of E1. Therefore it would be obvious to the skilled person, based on his mere common technical knowledge, to foresee a pin - recess fixing means located on adjacent wall panels, either in addition to or as a replacement of the straps of E1, as one of the most used and stable connection means between panels known in the art, and to arrive thus at the subject-matter of claim 1 of the auxiliary request.

Therefore, the subject-matter of claim 1 of the second auxiliary request does not involve an inventive step.

7. *Conclusion*

In summary, the independent claim 1 of the main, first, and second auxiliary requests is not allowable and, therefore, the grounds of opposition under Article 100 a) and Article 100 c) relied on by the Appellant prejudice the maintenance of the patent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar

The Chairman

A. Counillon

U. Krause