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**Datasheet for the decision  
of 20 November 2014**

**Case Number:** T 1198/12 - 3.2.03

**Application Number:** 03001318.9

**Publication Number:** 1304427

**IPC:** E04F15/02, E04F15/04

**Language of the proceedings:** EN

**Title of invention:**

Flooring material, comprising board shaped floor elements which are intended to be joined vertically

**Patent Proprietor:**

Pergo (Europe) AB

**Opponents:**

Spanolux N.V.- DIV. Balterio  
Berry Finance N.V.

**Headword:**

**Relevant legal provisions:**

EPÜ Art. 76(1)  
EPC Art. 123(2), 84, 56  
RPBA Art. 13(3)

**Keyword:**

Request filed during oral proceedings: admitted, allowable

**Decisions cited:**

**Catchword:**



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Case Number: T 1198/12 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 20 November 2014**

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
3 April 2012 concerning maintenance of the  
European Patent No. 1304427 in amended form.**

**Composition of the Board:**

<b>Chairman</b>	G. Ashley
<b>Members:</b>	Y. Jest
	M. Blasi

## Summary of Facts and Submissions

I. By its decision dated 3 April 2012 the opposition division decided that European patent No. 1 304 427 could be maintained in amended form on the basis of an amended claim 1 of an auxiliary request filed during oral proceedings. European patent No. 1 304 427 is based on a divisional application of earlier application EP 99 952 871.4, which was filed as international application PCT/SE99/01700 and published as WO-A- 00/047841 (D0).

In its interlocutory decision, the opposition division considered that the amended documents of the auxiliary request did not contravene the requirements of Articles 76(1), 123(2), 123(3), 84, and that the subject-matter of its claim 1 was novel as compared to documents D1, D2 and D6 (and its parent document D6a) and involved an inventive step because it was not obviously derivable starting from D6/D6a or D7 and applying general knowledge or the teaching of document D3; the relevant prior art being as follows:

D1	DE-A- 25 02 992
D2	DE-U- 296 14 086
D3	WO-A- 97/047834
D6	CH-A- 345 451
D6a	BE-A- 557 844
D7	DE-A- 197 18 319

II. Appeals were lodged against this decision by the proprietor of the patent and by opponents I and II.

The parties to the appeal proceedings and the corresponding relevant dates are:

a) Appellant I - Proprietor:

Appeal filed on 24 May 2012, appeal fee paid on the same day and the statement of the grounds of appeal received on 7 August 2012;

b) Appellant II - Opponent I:

Appeal filed on 4 June 2012, appeal fee paid on the same day and the statement of the grounds of appeal received on 13 August 2012;

c) Appellant III - Opponent II:

Appeal filed on 8 June 2012, appeal fee paid on the same day and the statement of the grounds of appeal received on 10 August 2012

III. During the oral proceedings on 20 November 2014, the following requests were made:

Appellant I (proprietor) requested that the decision under appeal be set aside and the patent be maintained on the basis of the amended set of claims filed as auxiliary request 1 during the oral proceedings.

Appellants II and III (opponents I and II) requested that the decision under appeal be set aside and the patent be revoked.

IV. The wording of claim 1 of the request is the following:

"Flooring material comprising essentially square, rectangular or rhomboidally shaped floor boards (1) each being provided with lower joining lips (10) at two adjacent edges while the two remaining edges (2) are

provided with upper joining lips (20), a horizontal lower side (5), a horizontal upper decorative surface (3) and being intended to be joined vertically,

**characterised in that**

a joint between two floor boards (1) comprises fitting surfaces including somewhat inclined vertical locking surfaces on at least one recess (32) and opposite edge heel (31) respectively, essentially vertical lower and upper lip surfaces (11,21) and upper fitting surfaces (3'),

that the joint between two floor boards (1) joined together further includes cavities (6),

that the lower joining lips (10) are provided with the essentially vertical lower lip surface (11) arranged parallel to the closest edge (2), which lower lip surface (11) on one board is intended to interact with the essentially vertical upper lip surfaces (21) arranged on the opposite edge upper joining lip (20) of the adjacent board so that two joined adjacent floor boards (1) are locked together in a horizontal direction,

that the upper joining lips (20) are provided with at least one heel (31) intended to snap join with the at least one recess (32) by means of the somewhat inclined vertical locking surfaces, whereby the vertical movement between two joined adjacent floor boards (1) is limited, wherein the lower joining lips (10) are provided with the at least one recess (32),

that the vertical locking surface of the at least one heel (31) is somewhat downwardly outwardly inclined and the vertical locking surface of the at least one recess (32) is somewhat upwardly outwardly inclined, allowing the geometry of the joint to be manufactured by the traditional method of milling and

that the floor boards include a core which consists of wood fibres or wood particles bonded together with glue or resin, and the joint is wholly made in the core."

V. The arguments presented by appellant I (proprietor) can be summarised as follows:

a) Admissibility of the amended set of claims

Claim 1 was based on claim 1 as found allowable by the opposition division in its interlocutory decision, and differed therefrom only by the deletion of a feature. The deletion of this feature, which related to facing surfaces, was a reasonable reaction to the objection pursuant to Article 123(2) EPC raised by the board its provisional opinion.

b) Articles 76(1), 123(2) and 84 EPC

Contrary to the findings of the opposition division, there was no requirement for incorporating into claim 1 all the features (listed as features b to c in paragraph 6.5 of the contested decision) of the embodiment shown in figure 4. The slight inclination of the vertical locking surfaces was not inextricably linked to all the other features describing the embodiment of figure 4. Claim 1 was thus not based on an undisclosed intermediate generalisation.

Furthermore the feature relating to the provision of "at least" one heel/recess was disclosed in claim 1 ("one or more") of the application D0 as originally filed, as well as by claim 1 of the earlier application D0a.

The "more open geometry", which allows the joint to be manufactured by traditional milling as defined in the last sentence of the aforementioned paragraph, was



already achieved by defining the vertical locking surfaces as having a slight inclination, so that claim 1 was clear.

c) Inventive step

The floor panels of D6 (D6a) were made by casting or moulding rubber or any material having similar properties. The claimed subject-matter essentially differed from D6 by the last two characterising features, namely a core made of wood fibres/particles in which the joint was wholly made, and the somewhat inclined vertical locking surfaces of the heel and recess, which allow the geometry of the joint to be manufactured by a traditional milling method. Even if D6 were to be taken as a starting point, the skilled person would find no incentive in the cited prior art for departing from rubber or rubber-like materials used for the panels of D6 because the mechanical properties of rubber were mandatory for assembling the joint elements of figure 12. The skilled person would not have combined D6 with D3 with the purpose of using wooden materials for manufacturing the panels of D6 while maintaining their joint structure unchanged.

Starting from the panels of D7, which are glued to the floor, and faced with the problem of trying to avoid gluing of flooring panels, the skilled person would not select just some constructional features of the flooring panels of D3 and apply them to the joint structure of the panels of D6, but would simply adopt the complete product of D3 which provides a satisfactory alternative. Nor would it be obvious to replace the joint structure of the wooden panels of D3, which were assembled by horizontal snapping-in or

downward angling-in, by the rubber joint elements of D6 which are to be assembled by vertical snapping.

VI. Appellants II and III submitted essentially the following arguments:

a) Admissibility

The late-filed request was not to be admitted to the appeal proceedings because its claim 1 was not clearly allowable. By deleting the feature, according to which the locking surface of the at least one recess and the vertical lower lip surface faced each other, the claim comprised a new combination of features, such that the scope of the subject-matter was broader as compared with the product of the claim 1 found allowable by the opposition division. The request thus introduced a fresh case and infringed the requirement of Article 123(2) EPC.

b) Articles 76(1), 123(2) and 84 EPC

As decided by the opposition division, claim 1 without the features listed as features b to c in paragraph 6.5 of the interlocutory decision defined an intermediate generalisation which was disclosed neither in the application as filed (D0) nor in the earlier application (D0a).

The slight inclination of the vertical locking surfaces was inextricably linked to all the other features given in the detailed description of the embodiment of figure 4, all of which are essential for defining an open geometry which would allow manufacturing by milling. Claim 1 therefore infringed the requirements of Articles 123(2), 76(1) and 84 EPC.

c) Inventive step

The claimed subject-matter was obviously derivable from several combinations of documents and therefore lacked inventive step.

Starting from D6 the objective problem could be seen in providing floor panels made of a material allowing milling of the joints. The general disclosure of D6 (D6a) contained an indication for the skilled person that the joint elements were not only to be made of a specific rubber, but could be of any colour and made of materials other than rubber (third paragraph and last five lines of page 3 of D6a). Both D3 and WO-A96/27721 (D4) disclosed flooring panels having joints integrally formed with a core made of wooden material, i.e. a material allowing milling.

Alternatively the skilled person would have arrived at the claimed product when starting from D3 or D4 and applying the teaching of D6, in terms of providing joint elements enabling a vertical snap-in assembling. The combination of D6 and D3 or D4 would thus lead to a flooring panel having all the features of claim 1.

The claimed subject-matter was also obviously derivable from the combination D7 with D3. If the skilled person was not satisfied with the need to apply a layer of glue for fixing the wooden flooring panels, as shown in figures 14 and 15 of D7, he/she could have found a teaching in D3 for the avoidance of glue by creating more tension between the panels in the area of their joint elements (D3: page 1, lines 19 to 23 and page 22, from line 5 onwards).

VII. At the end of the oral proceedings the Board announced its decision.

## **Reasons for the Decision**

1. The appeals are admissible.
2. Admissibility of the amended set of claims
  - 2.1 The set of claims filed during oral proceedings is based on the claims found allowable by the opposition division. This set of claims substantially formed the basis of one of the requests filed during the appeal proceedings, i.e. the request presented as the fourth auxiliary request filed with the grounds of appeal on 7 August 2012, the ninth auxiliary request filed per telefax on 27 February 2013, or the first auxiliary request filed per telefax on 13 October 2014.
  - 2.2 Apart from some minor linguistic amendments, claim 1 differs from claim 1 to be maintained by the interlocutory decision in that the following feature introduced during the opposition procedure has been deleted: "the locking surface of the at least one recess and the vertical lower lip surface face each other". This feature was deleted by appellant I in reaction to the provisional opinion of the board set out in the communication annexed to the summons, wherein the board considered that said feature was neither explicitly disclosed in the application as originally filed nor implicitly derivable from figure 4, and that it lacked a clear and unambiguous meaning when considered in combination with the remaining features of claim 1.
  - 2.3 Furthermore, and contrary to the views of appellants II and III, claim 1 of the request filed during oral

proceedings did not appear to be *prima facie* unallowable.

The deletion in claim 1, as maintained by the contested decision, of a feature, which had been introduced during the opposition proceedings and objected to by the board in its provisional opinion, cannot create a fresh case.

In addition, there is no obvious infringement of the requirements of Article 123 EPC. The combination of the features of claim 1 is clearly supported by the original disclosure of the application and concerns essentially the same subject-matter as the claim decided upon by the opposition division. Although the scope of the claim is now somewhat broader as compared to that of claim 1 found allowable by the opposition division, there is no infringement of Article 123(3) EPC which relates to the granted claims.

- 2.4 In light of these considerations, the board has no reason for not admitting the set of claims into the appeal proceedings when exercising its discretion pursuant to Article 13(1), (3) RPBA.
3. Articles 123(2), 76(1) and 84 EPC.
  - 3.1 The "somewhat inclined" configuration of the vertical locking surfaces is disclosed by the embodiment shown in figure 4 of both the application as originally filed D0a and the earlier application D0. The slight vertical inclination of the surfaces limiting vertical movement is explicitly disclosed in paragraph [0014] of D0a and page 7, last line of D0. The embodiment of figure 4 defines a particular mode of realisation of the corresponding broader definition in original claim 1, which refers to "essentially horizontal locking surfaces".

3.2 The fact that the joint elements shown in figure 4 comprise a single heel and a single recess is not in contradiction with the corresponding feature in claim 1 of at least one recess and at least one heel. The possibility of having more than one heel/recess assembly was already part of originally filed claim 1 of application D0a and of earlier application D0, as these claims defined "one or more" heels and recesses. The skilled reader would therefore have considered that both the singular and plural forms of these features applied to each of the embodiments shown in figures 1 to 5, even though only a single heel/recess arrangement was represented therein; this also applies to the joint elements of figure 4, which is the sole illustrated embodiment covered by claim 1 of the request.

3.3 Furthermore the subject-matter of claim 1 does not amount to an undisclosed intermediate generalisation of the embodiment described in paragraph [0014] of D0a or in paragraph bridging pages 7 and 8 of D0.

In the board's view, the additional details given in the description of the embodiment shown in figure 4, namely that cavity 6' has an increased height and a reduced depth and that the height of the upper and lower vertical lip surfaces 11, 21 is reduced, are not inextricably linked to the feature defining the slight inclination of the vertical locking surfaces. The last sentence of the relevant paragraph cited above teaches the skilled person that the joint can be manufactured by traditional methods, like milling, if the geometry of the joint is relatively open. In other words, the listed geometrical characteristics of the joint shown in figure 4, i.e. inclined surfaces of heel/recess, increased height and reduced depth of cavity 6' etc.,

do not define in advance the requirements of the joint, but are merely the shape resulting from milling. There is thus no need to introduce all the details of the joint geometry shown in figure 4 and listed in the description.

In this respect it is worth considering that a more open geometry is already achieved by the slight inclination of the vertical locking surfaces of heel/recess as claimed. The general concept disclosed in the aforementioned paragraph is expressed in claim 1 in terms of the somewhat inclined vertical locking surfaces "allowing the geometry of the joint to be manufactured by the traditional method of milling".

In conclusion, the board does not share the argument put forward by appellants II and III, that the claimed subject-matter was based on an unduly generalised definition of the particular embodiment of figure 4.

3.4 In summary, claim 1 is clear within the meaning of Article 84 EPC and fulfills the requirements of Articles 123(2) and 76(1) EPC.

4. Inventive step

4.1 Combination of D6 and D3

The floor panels of D6 (D6a) are made by casting or moulding rubber or of any material having similar properties. The joint elements of the embodiment shown in figure 12 comprise a tenon 18 which extends vertically upwardly from the lower lip of a first panel and is inserted vertically into a mortise (recess) provided in the upper lip of a second panel. These

joint elements provide a limitation of relative movement in both vertical and horizontal directions. The rubber properties of the material used for the panels and thus their joint elements, especially in terms of elasticity and compressibility, are essential for enabling engagement of the tenon into the mortise.

The person skilled in the art would not consider replacing the rubber or rubber-like material having the mechanical properties specifically required in the context of D6 by a material composed of wood fibres/particles bonded together with glue or resin, simply because the degree of elasticity and compressibility inherent in the latter materials is clearly below that required by the tenon-mortise joint structure of the flooring panels shown in figure 12 of D6. Hence the board is of the view that the skilled person would not even have consulted prior art documents disclosing wooden (HDF, MDF) panels, as for instance disclosed in D3.

The claimed flooring material is thus not obviously derivable for the skilled person when starting from the embodiment of figure 12 of D6.

#### 4.2 Combination D7 and D3

4.2.1 The flooring panels of D7 are made of wood and need to be fixed onto the floor by a layer of glue (column 1, lines 13 to 16). The joint structure at the edges of the panels, as shown in figures 6 to 10 and 13 to 17, comprises protrusions (20, 24; 52, 56) formed so as to be inserted by an essentially vertical movement into recesses (22, 26; 54, 58) having a corresponding shape. The protrusions and recesses are manufactured by milling (claim 7). The joint elements are not engaged by force fit ("*Kraftschluss*") but by form fit



("Formschluss") and essentially maintain the joint panels in the correct position prior to gluing onto the underlying floor.

The joint structure of D7 cannot provide by itself the required stability for the assembly of floor panels, which therefore have to be glued to the floor.

4.2.2 Prior art document D3 concerns floor covering panels with coupling parts having locking means, which exert a tension force upon each other so as to counteract the formation of gaps in the joints. The locking means are engaged with each other exclusively by a horizontal snapping action (see figures 5 to 10 and 22 to 25) and/or by turning (see figures 2 to 4, 11 and 22 to 25). The panels of D3 may be assembled without the need to apply a layer of glue at the joints of the panels and/or on the underlying floor.

4.2.3 If, starting from D7, the objective problem was to avoid gluing the panels on the underlying floor, the person skilled in the art could have considered the teaching of D3. By doing so he/she would however not have selected just a few constructional features of the flooring panels disclosed in D3 for integration into the joint structure according to D6, but would have directly switched over to the solution suggested by D3, which is an alternative type of flooring product. The floor panels resulting from such an approach would then still differ from those claimed.

The arguments presented by appellants II and III, which assume that the skilled person would have considered some kind of mixed arrangement of constructional features extracted from D7 and D3, does not follow the problem-solution approach, which is to be applied in assessing inventive step, but amounts to an ex post

- facto analysis, which can only be carried out with the knowledge of the claimed invention.
- 4.2.4 For similar reasons, the skilled person would not have replaced the joint structure of the wooden panels disclosed in D3, which allow assembly either by horizontal snapping-in or by downward angling-in the tongue into the recess, by the alternative protrusion-recess structure disclosed in D7, which merely allows an horizontal engagement without a snapping function and thus without a tension force.
- 4.2.5 The disclosure of D4, which had been cited only during oral proceedings, is similar to the one of D3. D4 is therefore no more relevant than D3 with regards to the issue of inventive step of the claimed subject-matter.
- 4.3 The board arrives at the conclusion that the flooring panels according to claim 1 involve an inventive step pursuant to Article 56 EPC.
5. The set of claims filed by appellant I during oral proceedings thus meets the requirements of the EPC.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of claims 1 to 5 of the request filed as auxiliary request 1 during the oral proceedings and a description and drawings to be adapted thereto.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated