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**Datasheet for the decision
of 20 September 2013**

Case Number: T 1283/12 - 3.2.03

Application Number: 07075743.0

Publication Number: 1854928

IPC: E03F 1/00

Language of the proceedings: EN

Title of invention:

Infiltration block

Patent Proprietor:

Wavin B.V.

Opponent:

Hewitech GmbH & Co. KG

Headword:

-

Relevant legal provisions:

EPC Art. 100(c)

Keyword:

"Extension beyond the content of the earlier application as
filed (yes)"

Decisions cited:

T 0687/05, T 2175/09, T 0549/09

Catchword:

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Case Number: T 1283/12 - 3.2.03

D E C I S I O N
of the Technical Board of Appeal 3.2.03
of 20 September 2013

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 26 March 2012
revoking European patent No. 1854928 pursuant
to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman: U. Krause
Members: V. Bouyssy
K. Garnett

Summary of Facts and Submissions

- I. European patent No. 1 854 928 (in the following: "the patent") was granted on a divisional application of the European application No. 05 075 605.5 (in the following: "the earlier application").
- II. The patent as a whole was opposed on the grounds of Article 100(c) EPC and Article 100(a) EPC for lack of novelty and inventive step. The opposition division revoked the patent on the ground of Article 100(c) EPC in combination with Article 76(1) EPC. The decision was posted on 26 March 2012.
- III. The proprietor (here the appellant) lodged an appeal against this decision on 31 May 2012, paying the fee for appeal on the same day. The statement setting out the grounds of appeal was received on 1 August 2012.
- IV. In a communication accompanying a summons to oral proceedings to be held on 20 September 2013, the board gave its preliminary opinion.
- V. In response to this preliminary opinion of the board, with letter of 31 May 2013 the appellant filed a set of amended claims as auxiliary request.
- VI. Oral proceedings before the board were held on 20 September 2013.

VII. Requests

The appellant requested that:

- the decision under appeal be set aside and the patent be maintained as granted, alternatively on the basis of the auxiliary request filed with the letter dated 31 May 2013; and
- the appeal fee be reimbursed.

The respondent (the opponent) requested that the appeal be dismissed.

VIII. Claims

- (a) Claim 1 of the main request, i.e. as granted, is directed to the following subject-matter (compared with claim 1 of the earlier application as originally filed, added features are in indicated bold, deleted features in strike-through):

"Plastics infiltration block (1, 100, 31, 32, 51a, 51b, 51c, 51d, 61a, 61b, 61c, 61d) and at least one special element therefor,

wherein the infiltration block is adapted for combining multiple plastics infiltration blocks into an underground construction (2, **41, 51, 61**) for infiltration or attenuation purposes,
- which infiltration block has an essentially rectangular parallelepipedal body having pairs of opposed first, second and third faces (**A, B, C**),
- through which infiltration block at least one inspection channel (3a, **3b, 30a, 30b, 11, 12, 13, 14, 15a, 15b, 15c, 15d, 16a, 16b, 33, 47, 64a, 64b**) extends, with inspection channel openings (4, **40,**

36, 37) positioned in opposed third faces (**5, C**) of the infiltration block, whereby the area of each inspection channel opening is at least 10% of the size of the area of the third face in which it is positioned,

- which infiltration block comprises a single infiltration block element or multiple coupled infiltration block elements (**100a, 100b, 10, 41a, 41b, 41c, 41d, 41e**), wherein one or more inspection channel sections of the one or more inspection channels are delimited by a single or multiple coupled infiltration block elements,

- wherein ~~at least one infiltration block element~~ **the infiltration block** is of a ~~one-part~~ plastic construction having an essentially rectangular parallelepipedal body with side body parts (**7a, 7b, 7c**) essentially on opposite sides of the one or more inspection channel sections, and with at least one intermediate body part (**8a, 8b**) situated between the side body parts, wherein the first faces (**A**) of the infiltration block are formed by side body parts and second faces (**B**) of the infiltration block are formed by intermediate body parts,

characterised in that

the side body parts and one or more intermediate body parts of said ~~one-part~~ plastic ~~construction~~ infiltration block ~~element~~ are essentially formed by a grid of duct walls, which duct walls form essentially parallel ducts (**17a, 17b**) ~~extending~~ **expanding** (*sic!*) between each first face (**A**) and the one or more inspection channels of the infiltration block element, and between each second face (**B**) and the one or more inspection

channels of the infiltration block element, and in that the total area covered by the one or more inspection channel openings is at least half of the size of the area of the third face of the infiltration block in which this one or more inspection channel openings are positioned, **and in that each of the at least one special element is selected from the group of filter elements, conical adapter elements (44), closures, covers (54), reinforcement elements (38, 42, 52), connection elements (43, 53, 55, 63, 81) and inlets.**

- (b) Claim 1 of the auxiliary request differs from claim 1 as granted only in that the last feature thereof has been amended as follows:

"... in that each of the at least one special element is selected from the group of filter elements, conical adapter elements (44), ~~closures,~~ covers (54), ~~reinforcement elements (38, 42, 52),~~ connection elements (43, 53, 55, 63, 81) and inlets. "

IX. The following documents were relied on by the parties in the proceedings:

D5: EP 1 607 535 A1

D7: WO 95/16833 A1

D8: EP 1 205 391 A1

D5 is the publication of the earlier application as filed.

X. The arguments of the parties in the written and oral proceedings can be summarised as follows:

(a) Main request - Article 100(c) EPC

The appellant's case:

In its decision, the opposition division held that claim 1 as granted extended beyond the content of the earlier application as filed because it lacked the feature that at least one of the infiltration block elements is of a one-part plastic construction (in the following: the "one-part construction" feature). The opposition division reached this decision by applying a wrong test. In fact, it followed from the established case law that the correct test for deciding whether or not the omission of this "one-part construction" feature from claim 1 contravened Article 76(1) EPC was the so-called "essentiality test" as formulated in decision T 331/87 and in the EPO Guidelines for Examination, C-VI, 5.3.10 (resp. H-V, 3.1 in the edition of June 2012). The omission of the "one-part construction" feature from claim 1 fulfilled all three criteria of the essentiality test. Firstly, in the earlier application, this feature was not explained as essential in the disclosure of the invention. In particular, the two sentences toward the end of paragraph [0017] of D5 clearly disclosed that, in the infiltration block according to the invention, one infiltration block element could be composed of a number of other smaller pieces. Secondly, a skilled person would directly and unambiguously recognize that the "one-part construction" feature was indeed not indispensable for the function of the invention in the

light of the technical problem it served to solve, see paragraphs [0006] to [0008] of D5. Thirdly, the omission of this feature required no real modification of other features to compensate for the omission. Hence, the requirements of Article 76(1) EPC were met.

The last feature of claim 1, objected to by the respondent under Article 76(1) EPC, i.e. "that each ... special element is selected from the group of filter elements, conical adapter elements, closures, covers, reinforcement elements, connection elements and inlets", could be derived from claim 21 of the earlier application as filed, in particular when this claim was read in combination with claims 9 and 15. Moreover, in claim 21, the terms "such as" and "etc" made it clear that the wording "one or more special elements" referred to any special element as disclosed in the earlier application as filed, and thus also to the "closures" and the "reinforcement elements".

The respondent's case:

A skilled person could not derive from the earlier application as filed that the "one-part construction" feature could be omitted. In fact, throughout the earlier application as filed, this feature was consistently presented as being an essential feature to solve the technical problem underlying the invention. The two sentences toward the end of paragraph [0017] of D5, as relied on by the appellant, did not disclose that this feature was dispensable but only that it was preferred to use identical infiltration block elements.

The last feature of claim 1 could not be derived from the earlier application as filed. In particular, claim 21 provided support only for special elements consisting of filter elements, conical adapter elements, covers, connection elements and inlets, and only in combination with multiple connected blocks. Thus, the last feature of claim 1 constituted a non-allowable intermediate generalisation of the original teaching.

(b) Auxiliary request - Article 100(c) EPC

The above arguments applied mutatis mutandis to the auxiliary request.

Reasons for the Decision

1. The appeal is admissible.
2. Main request - Article 100(c) EPC
 - 2.1 According to the established case law, in order to meet the requirements of Article 100(c) EPC, it is a necessary and sufficient condition that anything disclosed in a patent granted in respect of a divisional application must be directly and unambiguously derivable from not only the application on which the patent has been granted but also from what is disclosed in each of the earlier applications as filed (e.g. see T 687/05, T 2175/09, T 549/09).
 - 2.2 Claim 1 as granted defines a plastics infiltration block having an essentially rectangular parallelepipedal body having pairs of opposed first, second and third faces and comprising, inter alia: at least one inspection channel extending therethrough with openings positioned in the opposed third faces; a single infiltration block element or multiple coupled infiltration block elements delimiting at least one section of the inspection channel(s); and essentially parallel ducts extending between each of the first and second faces and the inspection channel(s) of the infiltration block element.

From this it follows that, in the infiltration block as defined in claim 1, each infiltration block element delimits at least one section of the inspection channel(s) and comprises ducts extending from the outside to the inspection channel(s).

2.3 Claim 1 does not specify that at least one of the infiltration block element(s) is of a one-part plastic construction, i.e. claim 1 lacks the "one-part construction" feature. Thus, claim 1 covers embodiments wherein, to use the words of the appealed decision, no infiltration block element is of a one-part construction or all infiltration block elements are of a multi-part construction.

2.4 Since claim 1 lacks the "one-part construction" feature, a skilled reader of claim 1 is presented with technical information that extends beyond the content of the earlier application as filed, for the following reasons.

2.5 Firstly, in the earlier application as filed, the "one-part construction" feature is consistently mentioned as being present in the infiltration block according to the invention (in D5, see the definition of the invention in independent claim 1, in particular col. 11, lines 7-8 and 21-22, and in paragraphs [0009] and [0010], in particular col. 2, lines 9-10, "At least one infiltration block element is of a one-part plastic construction ... " and col. 2, lines 19-20 referring to "the one-part plastic infiltration block element"; see independent claim 22, in particular col. 13, lines 38-42; see paragraph [0019], in particular col. 4, lines 7-8 referring to "the one-part block elements"; see the monolithic block consisting of a single infiltration block element of a one-part construction in Figure 1 and paragraphs [0029] to [0031]; see the block consisting of two infiltration block elements of a one-part construction in Figure 3 and paragraphs [0041] to [0043]).

2.6 Secondly, a skilled reader of the earlier application as filed would not consider the "one-part construction" to be merely optional and therefore irrelevant for the invention. On the contrary, it is the entire thrust of the earlier application that the technical problem underlying the invention, namely to provide a sufficiently strong and stable infiltration block having a sufficiently open structure to prevent the occurrence of clogging by dirt and to ease cleaning (in D5 see paragraphs [0006] to [0008]), is solved when, inter alia, the one or more infiltration block elements comprise the features as recited above in section 2.2, whereby at least one, and preferably all, of the infiltration block elements is of a one-part plastic construction (in D5 see paragraph [0010] and independent claim 1, in particular col. 11, lines 6-7 and 21-22; see also independent claim 22 which requires that "said infiltration block is composed of one or more one-part plastic infiltration block elements"). Thus, the "one-part construction" feature is clearly presented as being necessary for solving the technical problem underlying the invention. Moreover, it is also clear that this feature does contribute to solving this problem, in particular to obtain the desired strength and stability of the block.

2.7 The board was unable to find, and the appellant was unable to show, any disclosure in the earlier application as filed of an infiltration block comprising no one-part infiltration block element or consisting only of infiltration block elements of a multi-part construction. The appellant contended that it followed from the two sentences at the end of

paragraph [0017] of D5 that one infiltration block element could be composed of a number of other smaller pieces, so that the infiltration block elements did not need to be of a one-part construction. However, the cited sentences only teach that the infiltration block "is preferably made of as few infiltration block elements as possible" and that "a combination of identical infiltration block elements to form an infiltration block is mostly preferred". It cannot be derived from these sentences that, in the infiltration block according to the invention, all infiltration block elements could be made of multiple pieces.

2.8 The appellant contended also that a skilled reader of D5 would recognize that only the combination of features of claim 1 as granted was really essential for solving the technical problem as formulated in paragraphs [0006] to [0008] of D5. The "one-part construction" feature was clearly irrelevant for solving this problem, in particular to obtain the desired strength and stability of the infiltration block. In fact, the skilled reader would know that infiltration blocks were already known in the art which were sufficiently strong and stable to withstand soil and possibly traffic loads (see paragraph [0002] of D5) even though these blocks could be of a multi-part construction, e.g. see the infiltration block made of four elements in Figures 4 of D7 and D8.

However, in the present case, the question at stake is whether it is directly and unambiguously derivable from the earlier application as filed, not from the prior art, that the "one-part construction" feature is dispensable. As reasoned above, the answer to this

question is negative because the only information which can be gleaned from the earlier application as filed is that, in the disclosed invention, at least one infiltration block element of the infiltration block should be of a one-part construction.

2.9 It follows from the above that the subject-matter of claim 1 as granted extends beyond the content of the earlier application as filed. Therefore, the ground of opposition under Article 100(c) EPC prejudices the maintenance of the patent as granted.

2.10 Hence, the appealed decision is confirmed and the appellant's main request cannot be allowed.

2.11 In these circumstances, it is not necessary to discuss either the relevance of the so-called essentiality test relied on by the appellant, or the possible outcome of the application of this test.

2.12 There is also no need for the board to decide whether or not the last feature of claim 1 is derivable from the earlier application as filed.

3. Auxiliary request - Article 100(c) EPC

3.1 Claim 1 of the auxiliary request differs from claim 1 as granted only in that the terms "closures" and "reinforcement elements" have been deleted from the group from which the special elements are selected. Hence, claim 1 of the auxiliary request also lacks the "one-part construction" feature.

3.2 For the reasons set out above with respect to the main request, the subject-matter of claim 1 of the auxiliary request also extends beyond the content of the earlier application as filed. Therefore, the ground of opposition under Article 100(c) EPC prejudices the maintenance of the patent on the basis of the auxiliary request.

3.3 Hence, the appellant's auxiliary request cannot be allowed.

4. Reimbursement of the appeal fee - Rule 103 EPC

4.1 For the reasons set out above, none of the appellant's requests can be allowed and the appeal is to be dismissed.

4.2 In these circumstances, the board has no power to order reimbursement of the appeal fee and the request for reimbursement of the appeal fee has to be refused, see Rule 103 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The request for reimbursement of the appeal fee is refused.

The Registrar

The Chairman

C. Spira

U. Krause