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**Datasheet for the decision
of 11 May 2017**

Case Number: T 1360/14 - 3.2.08

Application Number: 06121479.7

Publication Number: 1772206

IPC: B21D13/04, E04C2/08

Language of the proceedings: EN

Title of invention:

Thin plate, method for manufacturing a thin plate, and
apparatus for manufacturing a thin plate

Patent Proprietor:

Rautaruukki OYJ

Opponent:

Hadley Industries Overseas Holdings Limited

Headword:

Relevant legal provisions:

EPC Art. 54, 84

RPBA Art. 13(1), 13(3)

Keyword:

Late-filed auxiliary requests - admitted (no)

Claims - clarity - auxiliary requests 1,2,3,4,7 (no)

Novelty - main request & auxiliary requests 5,6 (no)

Decisions cited:

G 0003/14

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1360/14 - 3.2.08

D E C I S I O N
of Technical Board of Appeal 3.2.08
of 11 May 2017

Appellant: Rautaruukki OYJ
(Patent Proprietor) Suolakivenkatu 1
00810 Helsinki (FI)

Representative: TBK
Bavariaring 4-6
80336 München (DE)

Respondent: Hadley Industries Overseas Holdings Limited
(Opponent) PO Box 92
Dawning Street
Smethwick
Warley B66 2PA (GB)

Representative: HGF Limited
1 City Walk
Leeds LS11 9DX (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 May 2014
revoking European patent No. 1772206 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chair P. Acton
Members: M. Foulger
P. Schmitz

Summary of Facts and Submissions

- I. With the decision dated 19 May 2014 the opposition division revoked European patent no. 1 772 206 because the subject-matter of independent claims 1,11,20 and 32 was not new.
- II. The appellant (patent proprietor) filed an appeal against this decision. The appeal was filed in due form and within the given time limits.
- III. The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted, alternatively that the patent be maintained on the basis of one of auxiliary requests 1 to 7 filed with letter of 1 June 2015 or auxiliary request 5A filed during the oral proceedings before the Board. Additionally, it was requested that documents D6 (US 4,453,364 A) and D7 (US 4,675,238 A) not be admitted into the proceedings.
- IV. The respondent (opponent) requested that the appeal be dismissed and that the auxiliary requests not be admitted into the proceedings.
- V. Oral proceedings took place before the Board on 11 May 2017.
- VI. Claim 1 of the main request (patent as granted) reads:

"A thin plate (1) whose both sides are provided with protrusions while corresponding depressions are provided on a side of the thin plate (1) opposite to the protrusions, wherein the thin plate (1) comprises on its first side protrusions (2) extending continuously and uniformly in a first direction and,

characterized in that the thin plate (1) further comprises between the protrusions, separate depressions (4) in succession in the first direction."

Claim 1 of auxiliary request 1 is further restricted over the main request by the feature:

"wherein said depressions do not extend above the protrusions and do not intersect therewith".

Claim 1 of auxiliary request 2 is further restricted over claim 1 of auxiliary request 1 by the features:

"said thin plate being obtainable by a pair of rolls whose outer surface is provided with teeth and which are arranged to rotate in different directions with respect to one another around parallel axes and to be spaced apart from one another such that during operation, the teeth of a first/ second roll extend to cavities provided in a second/ first roll, whereby the thin plate is provided with protrusions/ depressions as it travels between the rolls, wherein the teeth of the first roll provide a first side of the thin plate (1) with said protrusions (2) and the teeth of the second roll provide the first side of the thin plate (1), between the protrusions (2), with said separate depressions (4)".

Claim 1 of auxiliary request 3 is further restricted over claim 1 of auxiliary request 1 by the feature:

"wherein said depressions are line-shaped, extend at an acute angle with respect to the protrusions (2)".

Claim 1 of auxiliary request 4 is further restricted over claim 1 of auxiliary request 3 by the insertion of

the following feature:

"and form a line (12) which extend at an angle with respect to the protrusions (2) extending in the first direction".

Claim 1 of auxiliary request 5 is further restricted over claim 1 of the main request by:

"wherein the adjacent separate depressions (4) residing between the protrusions (2) extending in the first direction in adjacent spaces provided by the protrusions (2) form a line (12) which extends at an acute angle with respect to the protrusions (2) extending in the first direction."

Claim 1 of auxiliary request 5A is further restricted over claim 1 of auxiliary request 5 by the features identified above for auxiliary request 2.

Claim 1 of auxiliary request 6 is further restricted over auxiliary request 5 by the features:

"the separate depressions (4) are line-shaped and extend at an acute angle with respect to the protrusions (2) on the first side of the thin plate (1)".

Claim 1 of auxiliary request 7 is further restricted over claim 1 of auxiliary request 6 by the features:

"wherein the ends of adjacent separate depressions of said line of successive separate depressions (4) are interconnected by shape lines (6) which are not part of the depressions and are formed when producing the separate depressions.; (sic)

- said separate depressions (4) do not extend above the protrusions (2) and do not intersect therewith".

VII. The following documents are referred to in this decision:

D1: US 3,273,976 A

D6: US 4,453,364 A

D7: US 4,675,238 A

VIII. The appellant argued essentially as follows:

a) Main request - novelty of the subject-matter of claim 1

The claims should not be read in isolation but in the context of the patent as a whole. In this context, it was clear that the claim required a repeating pattern with a depression between each protrusion whereby the pattern extended over the entire plate. This requirement was clearly not fulfilled by the cited prior art. Hence the subject-matter of claim 1 was new.

b) Admission of auxiliary requests 1-7 and documents D6 and D7

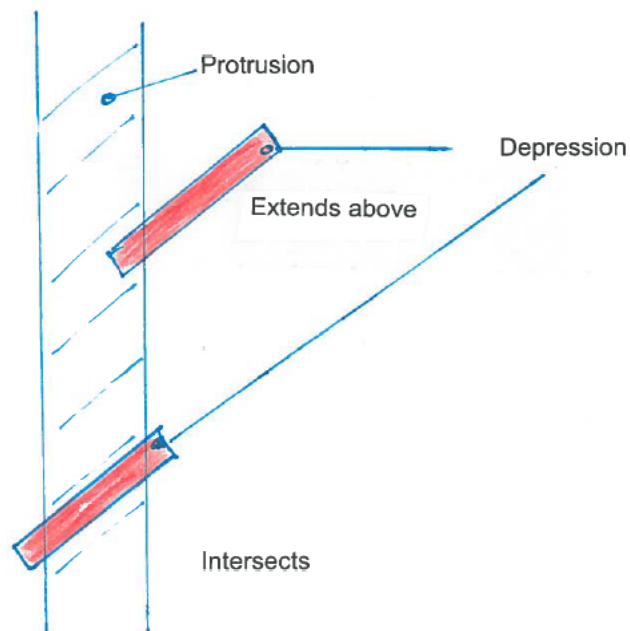
Auxiliary requests 1-4 were filed as a reaction to the the decision of the opposition division. Moreover they were filed at the earliest possible opportunity during the appeal proceedings. Auxiliary requests 5-7 were filed as a response to the filing of documents D6 and D7 by the respondent.

Documents D6 and D7 should have been filed during the proceedings before the opposition division. These documents were therefore late-filed and consequently

should not be admitted into the proceedings.

c) Auxiliary requests 1,2,3,4,7 - clarity

Claim 1 of these requests included the feature whereby "said depressions do not extend above the protrusions and do not intersect therewith". The two parts of this feature complemented each other. The second part whereby the depressions did not intersect with the protrusions meant clearly that the depressions did not cut through the protrusions to the other side of the protrusions - an example of "intersecting" is illustrated in the lower part of the sketch below as presented during the oral proceedings before the Board. The depressions not extending above the protrusions, in this context, clearly meant that the depressions did not touch the protrusions - an example of "extending above" is illustrated in the upper part of the sketch below.



PLAN VIEW ON PLATE

Thus, claim 1 of auxiliary requests 1,2,3,4,7 was clear.

d) Auxiliary request 5 - Novelty

D6 did not disclose a thin plate but rather a corrugated sheet which was not flat. Moreover, D6 did not disclose that adjacent separate depressions resided between the protrusions extending in the first direction in adjacent spaces provided by the protrusions forming a line which extended at an acute angle with respect to the protrusions extending in the first direction. In particular, the adjacent separate depressions did not reside in adjacent spaces between the protrusions.

The subject-matter of claim 1 was therefore new over the disclosure of D6.

e) Auxiliary request 5a - Admission into the proceedings

This request was presented as a reaction to the course of the oral proceedings. It included features which were already on file and thus did not present any difficulty for the Board or the respondent. The request should therefore be admitted into the proceedings.

f) Auxiliary request 6 - Novelty

In addition to the features identified above for auxiliary request 5, D6 did not disclose line shaped depressions arranged at an acute angle to the protrusions.

IX. The respondent argued essentially as follows:

a) Main request

The subject-matter of claim 1 was not new with respect to D1. D1 disclosed a thin plate with protrusions 6,7 and between two protrusions a series of depressions 8 - see Fig. 9.

The language of the claim required neither a repeating pattern nor that there was a depression between each protrusion. The language of the claim was in itself clear and did not require any interpretation by the description.

Hence, the subject-matter of claim 1 was not new with respect to D1.

b) Admission of auxiliary request 1-7 and documents D6 and D7

Auxiliary requests 1-7 should have been filed during the proceedings before the opposition division. The appellant had provided no reasons why these requests should be allowable. Thus these requests should not be admitted into the proceedings.

Documents D6 and D7 had been filed as a reaction to the filing of auxiliary requests in appeal proceedings by the appellant. As the auxiliary requests included features taken from the description, it was not possible to have filed these documents earlier during opposition proceedings. These documents should therefore be admitted into the proceedings.

c) Auxiliary requests 1,2,3,4,7

Claim 1 of all these requests included the feature "said depressions do not extend above the protrusions". It was not clear in what direction the depressions should not extend above the protrusions. This feature was therefore not clear (Article 84 EPC).

d) Auxiliary request 5 - Novelty

The subject-matter of claim 1 of this request was not new with respect to D6. D6 disclosed a thin plate which admittedly was not flat. Since the plate defined in the claim had protrusions and depressions which were not limited in their size, the plate according to D6 could be regarded as a thin plate.

D6 disclosed protrusions 25 which extended in a first direction and between the protrusions, separate depressions 28 in succession in the first direction. Therefore the subject-matter of claim 1 was not new with respect to D6.

e) Auxiliary request 5A

This request was filed during the oral proceedings and presented new issues which the respondent could not deal with without a postponement of the oral proceedings. This was particularly so because the appellant had not provided any argumentation supporting the auxiliary requests filed with the statement setting out the grounds of appeal.

f) Auxiliary request 6

The further features of claim 1 of this request were

also known from D6. The patent description (col. 4, l. 14-17) allowed a wide range of interpretation of the term line shaped which included oval depressions. The "finger shaped" depressions of D6 were oval and thus to be regarded as line shaped in the sense of the patent.

Claim 1 of this request was therefore not new with respect to D6.

Reasons for the Decision

1. Admissibility of the appeal

The appeal is admissible. In the notice of appeal, the appellant had not indicated their address as required by Rule 99(1) EPC. The appellant remedied this deficiency during the oral proceedings.

2.

Main request - novelty

It is common ground that D1, Fig. 9 discloses the features of the preamble of claim 1:

A thin plate whose both sides are provided with protrusions (6,7) while corresponding depressions are provided on a side of the thin plate opposite to the protrusions (see Fig. 9), wherein the thin plate comprises on its first side protrusions (6,7) extending continuously and uniformly in a first direction (see Fig. 9).

Moreover, D1 discloses the features of the characterising part of claim 1 wherein the thin plate further comprises between the protrusions, separate depressions in succession in the first direction. As can be seen from Fig. 9, the thin plate of D1 comprises

depressions 8 which are arranged in succession in the same direction as the protrusions 6,7. The depressions are arranged between the rightmost of the protrusions 6 and the leftmost of the protrusions 7 as shown in the figure. Hence the depressions are between the protrusions as required by the claim.

The appellant argued that this feature was not known from D1 because claim 1 required that between two protrusions there were always separate depressions in succession in the first direction. The appellant argued that the description and Fig. 1 of the patent supported this view. The appellant also considered that claim 1 as interpreted in the light of the description required that the entire plate was covered by a repeating pattern of protrusions and depressions.

The Board does not find these arguments persuasive and considers that in cases, such as the present, where the language of the claim is clear and needs no further interpretation, there is no justification for limiting the scope of the claim based on the description or the figures. The claim should therefore be given the broadest interpretation of which it is reasonably susceptible. The claim neither states how many protrusions there should be - other than the requirement that there is a plurality, i.e. two or more - nor that the entire surface of the thin plate should be covered by the protrusions and depressions, nor that the pattern repeats. Hence these aspects cannot be taken into account when assessing the novelty of the subject-matter of the claim.

Thus, the subject-matter of claim 1 is not new (Article 54(1) and (2) EPC).

3. Admission of auxiliary requests 1-7 and documents D6 and D7 into the proceedings
 - 3.1 Auxiliary requests 1-4 were originally filed with the statement setting out the grounds of appeal. They were thus filed at the earliest possible moment in appeal proceedings and this could be regarded as an attempt by the losing party to overcome the decision under appeal. Moreover auxiliary requests 5-7 were filed in response to the documents D6 and D7 filed by the respondent. Auxiliary requests 1-7 were therefore admitted into the proceedings.
 - 3.2 As set out above, auxiliary requests 1-4 were filed for the first time in appeal proceedings with the statement setting out the grounds of appeal. The claims of these requests comprised features taken from the description which the respondent (opponent) could not have been expected to have searched during the nine month opposition period. The filing of D6 and D7 could be thus seen as a reaction to the filing of these requests and these documents were therefore admitted into the proceedings.
4. Auxiliary requests 1,2,3,4,7 - clarity

The feature "wherein said depressions do not extend above the protrusions and do not intersect therewith" has been added to claim 1 of these requests. This feature was not to be found in the granted claims but has rather been taken from the description. It may therefore be examined for clarity under Article 84 EPC (G3/14, Order, OJ EPO 2015, A102).

The meaning of the phrase "extend above the protrusions" is unclear because the direction of the

extension is not defined. The claim relates to a thin plate which may be positioned in any desired orientation, thus the term "above" does not in itself define in which direction the depressions should not extend. Without any point of reference the phrase "extend above" is ambiguous and lacks clarity.

Therefore claim 1 of auxiliary requests 1,2,3,4,7 is not clear (Article 84 EPC).

5. Auxiliary request 5 - Novelty D6

D6 discloses a decking made of an indisputably thin sheet of material with protrusions and depressions.

The appellant disputed that D6 disclosed a "thin plate" as required by the claim.

The claim does not, however, provide any thickness constraints as to what could be regarded as a thin plate. Moreover, the claim does not specify the size of the protrusions or depressions and so it may be excluded that claim 1 requires the "thin plate" to be a "flat" plate.

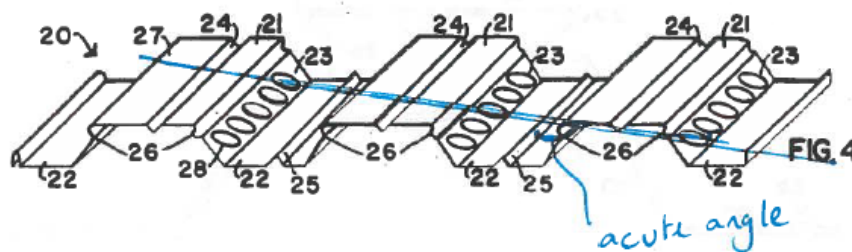
Since a clear definition of what constitutes a "thin plate" is missing in the claim, the plate disclosed in D6 can be considered to represent a "thin plate".

It is common ground between the parties that D6 discloses protrusions 25 extending in a first direction. Moreover, that D6 discloses depressions 28 in succession in the first direction is not disputed.

In dispute, however, is whether D6 discloses the feature whereby "adjacent separate depressions residing

between the protrusions extending in the first direction in adjacent spaces provided by the protrusions form a line which extends at an acute angle with respect to the protrusions extending in the first direction".

Between the protrusions there are spaces formed by the crest surfaces 21, valley surfaces 22 and sloping web surfaces 23. These spaces are adjacent to the protrusions 25. The sloping webs are, moreover, provided with multiple depressions 28 which are in the form of finger shaped indentations (see Fig. 4 and col. 4, 1. 3-8). It is, moreover, not in dispute that the adjacent spaces provided by the protrusions could comprise further features not mentioned in the claim. Thus the adjacent separate depressions 28 reside in adjacent spaces as required by the claim.



When a line is drawn between depressions in adjacent spaces then this line forms an acute angle with the protrusions in the first direction, see marked-up Fig. 4 above.

Thus all features of claim 1 are known from D6.

6. Auxiliary request 5a - Admission

This request was filed during the oral proceedings

before the Board. Its admission is therefore at the Board's discretion (Article 13(1) RPBA). Independent claim 1 of this request comprises a combination of the features of claim 1 according to auxiliary request 2 and 5.

It is true that the respondent had opportunity during the written procedure to study the above features in isolation. However the new request presents a combination of features which has not been discussed at all so far during the proceedings. The Board notes moreover that during written appeal proceedings no reasoning had been provided as to why these features were new and inventive over the prior art. Thus the respondent and the Board were presented with completely new arguments that had not been the subject of the proceedings leading up to the oral proceedings.

Neither the Board nor the respondent could reasonably be expected to deal with these issues during the oral proceedings. The request was therefore not admitted into the proceedings (Article 13(3) RPBA).

7. Auxiliary request 6 - Novelty

Claim 1 of this request is further restricted over auxiliary request 5 in that the separate depressions are line-shaped and extend at an acute angle with respect to the protrusions on the first side of the thin plate.

The depressions 28 shown in Fig. 4 of D6 are described in D4 as being "finger-shaped" and are shown in the figure as extending at an acute angle with respect to the protrusions. According to the patent, col. 4, l. 14-18, line-shaped may be square, oval or a line in

general. Thus, in the sense of the patent, the depressions 28 are also to be regarded as being "line-shaped".

Thus, the further features of claim 1 of auxiliary request 6 are known from D6 and, consequently, the subject-matter of this claim is also not new

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



C. Moser

P. Acton

Decision electronically authenticated