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**Datasheet for the decision  
of 21 November 2016**

**Case Number:** T 1584/15 - 3.2.06

**Application Number:** 11007797.1

**Publication Number:** 2402283

**IPC:** B66F7/24

**Language of the proceedings:** EN

**Title of invention:**

A levelling device

**Patent Proprietor:**

Milenco Limited

**Opponent:**

Kinkelín, Volker

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)

**Keyword:**

Amendments - added subject-matter (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1584/15 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 21 November 2016**

**Appellant:**  
(Patent Proprietor)

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**Respondent:**  
(Opponent)

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**Representative:**

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 1 June 2015  
revoking European patent No. 2402283 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** M. Hannam  
E. Kossonakou

## Summary of Facts and Submissions

- I. An appeal was filed by the appellant (patent proprietor) against the decision of the opposition division revoking European Patent No. 2 402 283.
- II. With its grounds of appeal, the appellant requested that the impugned decision be set aside and the patent be maintained in an amended form according to its main request (the sole request). It also requested oral proceedings.
- III. The respondent (opponent) requested that the appeal be dismissed.
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 appeared not to meet the requirement of Article 123(2) EPC.
- V. With letter of 25 October 2016 the appellant indicated that it would not attend the scheduled oral proceedings and requested a decision on the merits of the file.
- VI. With letter of 18 November 2016 the scheduled oral proceedings were cancelled.
- VII. Claim 1 of the main (sole) request reads as follows:  
  
"A levelling device (10) comprising a wedge-shaped body (12) having a lower surface (14) for contacting the ground (16) and an upper surface (18) for receiving the wheel (20) of a vehicle, characterised in that the levelling device (10) is a single piece, the upper surface (18) is substantially discontinuous comprising

a series of inter-crossing ribs (30), the ribs (30) being connected to the lower surface (14) and continuous from the lower surface (14) to the upper surface (18) and the upper surface (18) comprises a series of ridges (26) and indentations (28), each indentation (28) creating a locating position for the wheel (20), and the indentations (28) are formed at different heights from the lower surface (14)."

VIII. The appellant's arguments may be summarised as follows:

Relative to claim 1 as granted, the subject-matter of claim 1 had been amended *inter alia* with the addition of the feature 'the levelling device (10) is a single piece'. This added feature was supported by the figures of the granted patent and had been accepted by the opposition division as allowable.

IX. The respondent's arguments may be summarised as follows:

The subject-matter of claim 1 failed to meet the requirement of Article 123(2) EPC. From the description and figures it was not unambiguous that the teeth (22) were of one piece with the device; they could equally well be separate from the device and clipped thereto.

## **Reasons for the Decision**

### 1. *Procedural issues*

With the statement setting out the grounds of appeal the appellant had submitted an unconditional request for oral proceedings, which were accordingly appointed by the Board. With its latest submission the appellant then unequivocally requested a decision on the merits of the file and announced its non-attendance at the oral proceedings.

Pursuant to established case law a statement of non-attendance is to be treated as equivalent to a withdrawal of the request for oral proceedings. Similarly, a request for a decision on the merits of the file marks the appellant's interest in an immediate outcome and expresses its lack of desire to present arguments at the requested oral proceedings (cf. Case Law, 8th edition, 2016, page 562 and related decisions T3/90; T696/02; T1027/03; T1482/05 and T871/07).

Consequently the Board cancelled the oral proceedings and took the present decision based on the written submissions.

### 2. *Main request*

#### 2.1 *Article 123(2) EPC*

The subject-matter of claim 1 does not meet the requirement of Article 123(2) EPC.

2.2 With respect to claim 1 as originally filed, the subject-matter of claim 1 of the present request has had *inter alia* the feature added that 'the levelling

device (10) is a single piece'. This feature is not explicitly disclosed in the application as filed. The question to answer is thus whether this feature can be regarded as implicitly, yet directly and unambiguously, disclosed to the skilled person in the application as filed.

2.3 The appellant's argument that the 'single piece' feature can be derived from the figures is not accepted. The figures, of which only figures 2 to 16 can be considered to have any bearing on the issue, do not unambiguously show a single-piece construction of the levelling device. This is particularly apparent with respect to the teeth 22 (see figures 2 and 4) which are stated to be a part of the levelling device (see col. 3, lines 19 to 21, all references being to the A1-publication which corresponds to the application as filed) yet can, from a technical point of view, be seen as either of one piece with the levelling device or indeed simply attached thereto (for example, as suggested by the respondent, clipped to the levelling device). The figures thus are not suited to provide a clear and unambiguous basis for the claimed levelling device to be of a single piece.

2.4 Despite not having been relied upon by the appellant in support of claim 1, the Board also considered the disclosure of paragraph [0015] to see if this provided a basis for the 'single piece' feature of the levelling device. This paragraph, particularly col. 3, lines 50 to 54, states that 'the levelling device 10 is therefore relatively easy to manufacture from plastics material ... as the device can be manufactured in a single mould'. Therefore, even if the manufacture in a single mould referred to in this paragraph could be considered to encompass the entire levelling device

including teeth with the consequence that it could be considered of a single piece, this possible implicit disclosure is only in combination with the device being made from plastics material in a single mould. The omission from claim 1 of the features relating to the levelling device being manufactured from a plastics material in a single mould thus has the consequence that there is no, even implicit, direct and unambiguous basis in paragraph [0015] for the 'single piece' feature taken-up into claim 1.

- 2.5 The appellant's argument that the opposition division had accepted this amendment as meeting the requirement of Article 123(2) is not persuasive in convincing the Board of the same. In filing its appeal, the appellant was requesting the Board to review the decision taken by the opposition division. In doing so, the Board is not bound to any decision taken by the opposition division and, as indicated in points 1.3 and 1.4 above, finds that there is no basis in the application as filed, in particular the portions thereof referred to by the appellant, for the levelling device to be of a single piece.
- 2.6 Under point 1 of its preliminary opinion, the Board had specifically already referred to the matters in points 1.3 and 1.4 above, i.e. that the subject-matter of claim 1 did not meet the requirement of Article 123(2) EPC. The appellant has not presented any arguments refuting this in response to this preliminary finding and thus the Board sees no reason to alter its provisional opinion, which is confirmed herewith.
- 2.7 The Board thus finds that the subject-matter of claim 1 does not meet the requirement of Article 123(2) EPC.



The main request is therefore not allowable.

2.8 No further requests of the appellant are on file.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated