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D E C I S I O N
of 7 September 2000

Case Number: T 0378/96 - 3.2.6

Application Number: 88200078.9

Publication Number: 0276882

IPC: B28C 7/04

Language of the proceedings: EN

Title of invention:

Method and apparatus for preparing concrete mortar

Patentee:

Deltracon Deventer B.V.

Opponents:

- 01: Elba-Werk Maschinen-Gesellschaft mbH
02: Readymix Kies & Beton AG
03: Vereniging van Betonmortelfabrikanten in Nederland

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Amendments - added subject-matter (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 0378/96 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 7 September 2000

Appellant: Deltracon Deventer B.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 5 March 1996
revoking European patent No. 0 276 882 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Alting van Geusau

Members: M. Bidet

C. Holtz

Summary of Facts and Submissions

- I. The appellants are proprietors of European patent No. 0 276 882.
- II. The patent was opposed by the respondents under Article 100(a) EPC on the grounds that the subject-matter of claim 1 was not novel and lacked an inventive step (Opponents 01 to 03) or was not to be regarded as an invention under Article 52(2)(c) EPC (Opponent 02) and under Article 100(b) on the grounds that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Opponents 02 and 03).

In respect of the alleged lack of novelty and inventive step the following state of the art was essentially relied upon:

- C : "Construieren in Gewapend Beton" from G.H. van Boom and others, Delta press BV, Oudewater (NL), 1983, pages 245 to 247, with a translation into English of the relevant passages in the notice of opposition of Opponent 03, page 4, line 19 to page 5, line 16.
- D5 : "Handbuch der Betonprüfung", from Hans W. Iken and others, (Verein deutscher Zementwerke e.V., Düsseldorf) Beton-Verlag GmbH, 1972, Sections 14,15,16 and 17.
- E4 : "Guter Beton, Ratschlage für die richtige Betonherstellung", Robert Weber and others, Beton-Verlag GmbH, Düsseldorf, 6th edition, 1971, pages 24 to 27 and 80 to 83.

III. In its decision posted on 5 March 1996, the Opposition Division revoked the patent.

The Opposition Division took the view that the amended independent claims 1 and 10 of a main and an auxiliary request were clear (Article 84) and complied with the requirements of Article 123(2) EPC. However, although the subject-matter of these claims was novel, it did not involve an inventive step as required by Article 56 EPC, essentially in view of document "C".

IV. Against this decision, the appellants (patentees) lodged an appeal on 26 April 1996 and paid the appeal fee the same day. Together with the statement of grounds filed on 24 June 1996 the appellants filed new independent claims 1 and 10.

V. In a communication issued on 18 May 2000 with summons to oral proceedings, the Board expressed the provisional opinion that the new independent claims 1 and 10 lacked clarity and support by the description (Article 84 EPC) and that claim 10 appeared to comprise added subject-matter (Article 123(2) EPC).

When compared to the prior art method disclosed on pages 245 to 247 of the book according to document C, it would appear that use of the wet and dry weighing method (Darr-method) to compensate for the sand moisture content and its variations when dosing the water constituents for the mortar charge in a series on production scale was a novel feature of the claimed method.

As regards the issue of inventive step, attention was drawn to the fact, that even though the skilled person was aware from further documents of the prior art that carrying out the Darr-method was time consuming, this method was still used in the method disclosed in document C as late as 1983 in spite of further information according to which a more speedy result could have been achieved when drying of the wet sand sample had been stimulated.

VI. Oral proceedings before the Board took place on 7 September 2000 during which the appellants filed a new main request and one auxiliary request, relating to amended independent claims 1 and 10.

Claim 1 according to main request reads as follows:

"Method for preparation in series on production scale in at least one production concrete mixer of one concrete mixer charge of concrete mortar at a time, whereby a mixture comprising a dosed constituent of sand, a dosed constituent of binding agent and a dosed constituent of water is mixed,

- wherein a series of concrete charges are prepared from a plurality of sand charges to be supplied to said concrete mixer originating from a same sand bunker and intended for different concrete mortar charges,

- whereby moisture measurement values concerning the sand relatable to relevant sand charges are recorded,

- and whereby said constituent of water is dosed depending on said recorded moisture measurement values

related to said relevant sand charges

characterised in that

- **a sand sample is taken by sand sample taking means from the sand destined for a series production of concrete mixer charges of concrete mortar such that said sample can be related to said relevant sand charge,**

- *said sand sample is dried **with the application of the drying process stimulating means,***

- a measurement value of weight difference is recorded relating to the difference in weight of said sand sample before and after drying,

- **said sand sample taking means being so timed that, with the selected drying process stimulating means, at the time of dosing the constituent of water into a mixture, either at least one value of weight difference is recorded being used for taking into account the moisture of the sand of the sand charge of mixture to be mixed,**

- or a plurality of values of weight difference is recorded from which a value of weight difference is calculated, said value being used for taking into account the moisture of the sand of the sand charge to be mixed, and said constituent of water is dosed subject to the **at least one** recorded measurement value of weight difference **or subject to said plurality of values of weight difference respectively**".

Claim 1 according to the auxiliary request comprises all features of claim 1 of main request and specifies that, firstly, in the second feature of the characterising part of claim 1 the feature "said sand sample is dried" **by heating** "with the application of the drying process stimulating means", and secondly the last feature of claim 1 reads as follows: a "plurality of values of weight difference is recorded from which **by extrapolation** a value of weight difference is calculated..."

(The words in bold relate to amendments of the claims)

Claim 10 according to main and auxiliary requests relate to the "apparatus for preparing, in series on production scale in at least one production concrete mixer" specific for the application of the method as claimed in any of the foregoing claims of each request.

During the oral proceedings the discussion focussed on the formal acceptability of the new claims and more specifically in relation to the second feature of the characterising part of the claims according to which the "*said sand sample is dried with the application of the drying process stimulating means*".

VII. The appellants (Patentees) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims in accordance with either the main or auxiliary request, filed at the oral proceedings.

The arguments developed in support of the formal admissibility of the amended claims can be summarised as follows:

With regard to the new claims only the amended features were to be considered when examining the claims for formal admissibility in respect of support by the description and clarity.

In accordance with the originally filed description, drying of the sand sample was carried out essentially by heating and it was additionally recommended to spread the sand sample out each time into a thin layer and to employ a fan which stimulated the drying further.

Therefore it was immediately apparent to the skilled person that stimulated drying was addressed in its broadest sense.

VIII. In support of their requests to dismiss the appeal the respondents (opponents) relied essentially on the following submissions:

Stimulated drying of the sand sample was originally disclosed only in relation to a fan. According to the present claims the stimulated drying of sand sample is carried out by the application of the drying process stimulating means. Since the claims now included any drying stimulating means other than a fan the original disclosure was extended.

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments*

2.1 The respective claims 1 of the requests result from the combination of all features of claims 1 and 6 of the patent as granted and by numerous additional features, which in the opinion of the Appellant were taken from the description of the application. More particularly this concerns the feature according to which the sand sample treated is dried **with the application of the drying process stimulating means** (according to the main request) or the drying is carried out **by heating with the application of the drying process stimulating means** (according to the auxiliary request).

2.2 Any amendments to a patent claim should meet the requirements of Article 123(2) EPC according to which they do not contain subject-matter extending beyond the content of the application as filed. Considering the amended claims with respect to added subject-matter, the following applies:

According to the description page 6, lines 25 to 31, drying of the sand sample involves heating which may be carried out by any conventional heater. Additionally it is recommended to spread the sand sample out into a thin layer and to employ a fan which stimulates the drying. This disclosure is thus limited to a drying process in which a heater increases the temperature of the whole mass of the sand sample and only for further stimulation of the drying process using heat, a fan is employed.

2.3 Therefore, the originally filed application documents neither disclose a method step in which the sand sample is dried with the application of a fan only nor is there any teaching that "stimulating means" other than a fan may be applied.

Already for the latter reason the second characterising feature of each of the claims 1 of the main- and of the auxiliary request indicated in point 2.1 above must be considered to comprise added subject-matter since they extend the original disclosure to include any drying stimulating means. Consequently, these claims are not admissible.

2.4 Since, due to the inadmissibility of the respective claims 1, neither the main request nor the auxiliary request is acceptable, there is no basis for further substantive examination in respect of novelty and inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau