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D E C I S I O N
of 6 February 2002

Case Number: T 1084/99 - 3.2.7

Application Number: 93830038.1

Publication Number: 0556163

IPC: B28B 3/00

Language of the proceedings: EN

Title of invention:
A die for ceramic tiles

Patentee:
SICHENIA GRUPPO CERAMICHE S.p.A.

Opponent:
(01) International Stampi S.R.L.
(02) MASS S.P.A

Headword:
-

Relevant legal provisions:
EPC Art. 54, 87

Keyword:
"Right of priority (no)"
"Novelty (no)"

Decisions cited:
G 0003/93, G 0002/98

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1084/99 - 3.2.7

D E C I S I O N
of the Technical Board of Appeal 3.2.7
of 6 February 2002

Appellant: (Proprietor of the patent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 20 October 1999 revoking European patent No. 0 556 163 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: A. Burkhart
Members: H. E. Felgenhauer
J. H. P. Willems
P. A. O'Reilly

U. J. Tronser

Summary of Facts and Submissions

I. The appellant (proprietor of the patent) lodged an appeal against the decision of the Opposition Division revoking the patent No. 0 556 163.

Two oppositions were filed against the patent as a whole and based on Article 100(a) EPC (lack of novelty and of inventive step; invention not susceptible to industrial application), Article 100(b) EPC (insufficient disclosure) and Article 100(c) EPC (subject-matter extending beyond the content of the application as filed).

II. The Opposition Division held that the priority claimed for claim 1 of the patent as granted is not valid, that consequently the prior art made public after the priority date claimed for the patent but before its date of filing, i.e.

D1: RE 92 A 000049 together with

D2: Affidavit Battani or

Annex G: Affidavit Camorani,

is prior art according to Article 54(2) EPC, and that in view of this prior art the subject-matter of claim 1 lacks novelty (Articles 100(a), 54(1) EPC).

III. The appellant requested that the decision under appeal be set aside, that the priority claimed be considered valid, and that the patent be maintained as granted.

IV. The respondents I and II (opponents 01 and 02)

requested that the appeal be dismissed.

V. Claim 1 of the patent in suit reads as follows:

"1. A die for ceramic tiles of the type comprising two half-dies (1) and (2) between which the material to be compacted is pressed, at least one of which two half-dies (1) or (2) is of a special type and comprises a rigid, concave base (3) which defines a cavity (5) which cavity (5) is filled with an uncompressible fluid and which cavity (5) is closed by an elastic wall (4) on which elastic wall (4) external face the imprint of one of the faces of a tile to be realised (6) is inscribed characterised in that a lattice (7) is arranged in the cavity (5), which lattice (7) divides said cavity (5) into a plurality of portions (9) and defines a laying-surface for the said elastic wall (4), to which laying surface the elastic wall (4) is solidly anchored; the said imprint is made at the position of the said lattice (7); permitting to obtain a tile having equal overall density and enabling the tile laying-surfaces to be kept flat."

VI. The appellant argued essentially as follows:

(i) When assessing the validity of a claimed priority the Paris Convention needs to be considered. According to Article 4F of the Paris Convention a priority cannot be refused on the basis that the application claiming the priority contains one or more elements which are not present in the original application, as long as there is inventive unity as far as the local law is concerned. Further according to Article 4H of the Paris Convention a priority may not be

refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the first application, provided that the application documents as a whole specifically disclose such elements. Consequently, when assessing the validity of a claimed priority in order to determine whether the first application and the European patent application concern the same invention, unity must exist between the elements precisely disclosed within each of these applications.

(ii) According to a "Report of the Meeting of Members of SACEPO and the Boards of Appeal" (EPI Information 1/1998, page 6) in the case that a characteristic is added to a claim with the effect of limiting the protection sought, but without changing the way in which the invention solves the technical problem, the invention remains the same and therefore the priority is validly claimed.

(iii) According to decisions of the Boards of Appeal in determining whether the first application and the European patent application concern the same invention some characteristics of the European patent application do not have to be explicitly mentioned in the first application as long as the skilled person would be able to deduce such characteristics from the first application. Furthermore, it is not necessary to use identical wording in the European patent application and the first application. A priority can be validly claimed when a

characteristic introduced into the claims of the European patent application does not change the overall character and nature of the invention when compared to the invention of the first application.

(iv) The priority claimed for the subject-matter of claim 1 of the contested patent is valid, since the feature of claim 1 that "a lattice 7 is arranged in the cavity 5, which lattice 7 ... defines a laying-surface for the said elastic wall, to which laying surface the elastic wall is solidly anchored" corresponds to one of the solutions literally proposed in the first application IT-MO 92 A000018. The feature can be derived directly and unambiguously from the first application as a whole.

As regards the literal meaning of the invention disclosed in the first application, the expression "poggiare" used in the Italian description of the first application to define the relationship between the elastic wall and the laying surface defined by the lattice expresses two alternative meanings with respect to this relationship. One of these alternatives is that the elastic wall rests on the laying surface and the other one is that the elastic wall is solidly constrained to it.

An indication for these two alternatives being disclosed within the first application is given by the fact that when describing this relationship neither the expression "apoggiare", meaning resting with probably no fixed

constraint, nor an expression meaning "solidly constrained" has been used. Consequently, within the first application it is not expressly defined whether or not the elastic element is constrained to the laying surface.

The use of the expression "poggiare" within the context of the first application however clearly points to the meaning intended by the applicant that the elastic wall is solidly constrained.

Since the first application discloses two alternatives concerning the relationship between the elastic wall and the laying surface, the applicant would have been entitled to a right of priority for two distinct European patent applications, each covering a different one of these alternatives.

(v) Furthermore, a technical analysis of the first application provides numerous indications for the disclosure in the first application that the elastic wall rests on the lattice, which has to be understood as disclosing that the elastic wall is solidly constrained to the laying surface of the lattice.

One indication is that for dies for ceramic tiles working at high pressures it is impossible to conceive that their rigid parts are simply elements resting with no constraint one upon the other.

The use of different wording in the first application with respect to the arrangement of

the elastic element, by which the elastic wall is solidly anchored to the edges of the rigid base and by which the elastic wall rests on the lattice, does not express a structural difference but results merely from different relational concepts being used. The first wording concerns a mechanical concept and the second a functional one. The use of these different concepts of description however does not lead to a structural difference being expressed.

Such a structural difference remains unsupported by the remainder of the first application. On the contrary, the drawing, in which the contacts between the elastic wall and the edges of the rigid base and the laying surface of the lattice are shown to be alike, confirms that the elastic wall is attached to both elements in the same manner.

Furthermore, from the description of the first application it can be derived that the elastic wall is solidly anchored to the laying surface of the lattice. According to this description the die exerts the same pressure over a tile except for the area covered by the lattice where the die behaves like a traditional rigid die. The presence of the lattice guarantees perfect coplanarity and each of the two half-dies can be used either as bottom or top die. None of which is possible in the case that the elastic wall is not solidly constrained to the laying surface. According to this description through holes are provided to place all of the portions, into

which the lattice divides the cavity, in communication. The through holes are superfluous in the case that the elastic wall is not solidly constrained to the lattice.

(vi) The technical report (which is not further identified) presented in an infringement dispute in Italy, which was mentioned in the letter dated 5 July 2000, comprises a drawing, made on the basis of figure 2 of the first application. This drawing demonstrates by way of showing the deflected configuration of a portion of the elastic element in broken lines, that the elastic element has not only been anchored to the edges of the rigid base but necessarily also to the lattice, due to the resulting deflected shape of the membrane.

VII. The respondents I and II argued essentially as follows:

(i) According to the Paris Convention, the "Report of the Meeting of Members of SACEPO and the Boards of Appeal" and the decisions of the Board of Appeal mentioned by the appellant to support the right of priority being validly claimed, the European patent application must relate to the same invention as the first application. A characteristic may be added to the European patent application only if: it does not change the way in which the invention solves the problem, it does not change the overall character of the invention, and it can be easily deduced from the first application. With respect to the patent in suit none of these conditions is satisfied.

(ii) The expression "poggiare" used in the first application has in Italien the meaning of "to rest on" and refers to an object being kept in place by its own weight. This meaning could be enlarged to "to be in contact" but not beyond that.

An expression corresponding to "to anchor" and involving a further constraint is used in the first application only with respect to the elastic wall being anchored to the edges of the rigid base. No indication is given within the first application that such anchoring also applies to the relationship between the elastic wall and the laying surface of the lattice.

An analysis of the behaviour of the elastic wall for an elastic wall resting on the laying surface and one anchored to it shows, that in both cases provision of through holes is required and that with respect to some parts of the tile inferior surface the die works as a rigid die.

With regard to the use of a half-die comprising an elastic wall as the upper die, it needs to be recognised that the weight of the elastic wall and the oil above it cannot lead to the elastic wall being separated from the laying surface of the lattice. It needs to be taken into consideration that the behaviour of the elastic wall under working conditions is the same for the upper die half or the lower die half. In each case the elastic wall rests on the laying surface of the lattice.

(iii) The priority claimed for the patent in suit is not valid, since the patent concerns a different invention to the one disclosed in the first application. According to the opinion of the Enlarged Board of Appeal G 3/93 a claim to priority is invalid due to the fact that the priority document and the subsequent European application, do not concern the same invention because the European application claims subject-matter not disclosed in the priority document.

According to the first application the elastic wall is solidly anchored to the edges of the rigid base of the die and rests on the laying surface of the lattice. This arrangement leads to a functioning die as was admitted by the patent proprietor in the opposition proceedings (cf. the paragraph bridging the two last pages of the letter dated 18 December 1995) and as stated in Annex O ("Third Technical Writ on behalf of the Plaintiff", filed by the opponent I with letter dated 19 June 1996). Consequently, this arrangement provides sufficient co-planarity for the inferior side of the tile. The reason is that although the elastic wall can be lifted off from the lattice, it will not be lifted off at all parts of the lattice. At its periphery and at the parts at which more material or one with higher density is provided it will remain in contact with the laying surface of the lattice.

According to the invention claimed in the patent in suit the elastic wall is solidly anchored to the edges of the rigid base and at the laying

surface defined by the lattice. The behaviour of the elastic wall in this case is entirely different from the one disclosed in the first application, since the elastic wall cannot be lifted off the lattice at all. Consequently, perfect planarity is obtained for all portions of the inferior side of the tile corresponding to the elastic wall portions solidly anchored to the laying surface of the lattice. This is not the case for the die according to the first application, since deformations of the elastic wall in the portions of the die comprising more powder, or powder of higher density, can be so important that the elastic wall gets positioned under the laying surface of the lattice, thereby destroying the coplanarity of the tile inferior lattice.

Therefore, from a technical analysis of the invention of the first application and the one of the patent in suit it cannot be concluded that they are the same invention. This applies the more so when considering the different behaviour of the die disclosed in the first application and the one defined by the subject-matter of claim 1 of the patent in suit, which results from the structural difference between both dies.

(iv) Consequently, the content of the Italian application RE 92 A 000049 (D1) together with the affidavit Battani (D2) and the die for ceramic tiles according to the affidavit Camorani (Annex G) have to be considered as prior art according to Article 54(2) EPC, since

each of these pieces of prior art has been publicly available after the priority date but before the filing date of the patent in suit.

(v) Claim 1 uncontestedly lacks novelty with respect to either one of these pieces of prior art.

Reasons for the decision

Priority right

1. According to the opinion G 2/98 of the Enlarged Board of Appeal the requirement for claiming priority of "the same invention" referred to in Article 87(1) EPC, means that priority of a previous application in respect of a claim in a European patent application in accordance with Article 88 EPC is to be acknowledged only if the skilled person can derive the subject-matter of the claim directly and unambiguously, using common general knowledge, from the previous application as a whole (cf. conclusion of G 2/98).

This opinion concerns the interpretation of the concept of "the same invention" referred to in Article 87(1) EPC. The interpretation following this opinion needs to be applied when assessing the validity of the claimed priority in the present case. According to G 2/98 the interpretation of the concept of "the same invention" is perfectly in keeping with opinion G 3/93 of the Enlarged Board of Appeal referred to by respondent I.

According to G 2/98 the required narrow or strict interpretation of the concept of "the same invention" is perfectly consistent with Articles 4F and 4H of the

Paris Convention (cf. Reasons for the Opinion, paragraphs 4 and 5).

The meaning of the concept of "the same invention" stated in Article 87(1) EPC which is derivable from the articles in EPI Information and from the case law referred to by the appellant is consistent with the meaning of this concept according to G 2/98.

2. When considering whether claim 1 of the patent in suit concerns the same invention as disclosed in the first application, namely the Italian application No. MO92 A 000018, it needs to be determined whether the skilled person can derive the subject-matter of claim 1 directly and unambiguously, using common general knowledge, from the previous application as a whole.

Claim 1 of the patent in suit is directed to a die for ceramic tiles of the type comprising two half-dies, at least one of which is of a special type and comprises a rigid, concave base which defines a cavity. The cavity, within which a lattice is arranged, is filled with an incompressible fluid and closed by an elastic wall.

It therefore needs to be determined whether the cooperation of the elastic wall with the lattice, as defined in claim 1 in that the "lattice ... defines a laying surface for said elastic wall (4), to which laying surface the elastic wall is solidly anchored", can be derived directly and unambiguously, using common general knowledge, from the first application as a whole.

3. With respect to this feature, in the first application

there is disclosed "all'interno della cavita' 5 e' ricavato un reticolo 7, su cui poggia la pareta elastica 4, che divide la cavita' stessa in una pluralita' di porzioni 9" (page 6, lines 3 to 5; cf. also claim 3).

In the English translation of the priority document this disclosure is translated into "internally to the cavity 5 a lattice 7 is made, on which the elastic wall 4 rests, which elastic wall 4 divides the said cavity 5 into a plurality of portions 9" (page 6, lines 2 to 5 from the bottom). According to claim 3 of this translation the elastic wall leans on the lattice.

The correctness of this translation is undisputed.

4. The verb "poggiare" defines in the first application the relationship between the elastic wall and the lattice. According to the appellant it expresses the concept both of an element resting on another element and of an element solidly constrained to another element. The Board cannot consider this assertion as having been proven.

The Board considers that from the dictionaries referred to by the appellant and filed by the patent proprietor as Annexes 1 to 3 during the opposition proceedings (cf. Remarks filed with letter dated 18.12.95) it is unambiguously clear that the verb "poggiare" has the meaning of one element resting on another one. This meaning corresponds to the opinion expressed in said Remarks (page 1, paragraph 4) and is also expressed in the English translation of the passage concerned (cf. paragraph 3. above).

The appellant has argued that according to its full meaning in the context in which it is used in the first application, the verb "poggiare" can alternatively have the meanings of the elastic wall resting on the lattice, or of the elastic wall being solidly constrained to the lattice. No proof is given that the literal meaning of this verb encompasses these two alternatives instead of the one meaning clearly indicated in the dictionaries.

No proof is given that the literal meaning of this verb according to the dictionaries is altered due to the context within which it is used in the first application. No evidence is given that the clear meaning the verb "poggiare" taken by itself, is modified due to the manner within which it is used in the passage concerned (cf. paragraph 3. above).

As indicated in paragraph 5. below, a die half having, as disclosed in the first application, an elastic wall resting on the lattice, leads to a structure of a die for ceramic tiles which results in a proper functioning of the die. Consequently, with respect to the "semantic consideration" referred to by the appellant to the meaning of the verb "poggiare", concerning the relationship between the elastic wall and the lattice from the first application no meaning can be derived other than the one referred to above that the elastic wall rests on the lattice.

Consequently the verb "poggiare" cannot be considered as having an alternative additional meaning within the context of the first application beyond the meaning of "to rest". The argument given by the appellant that each one of these alternative meanings could have led

to its own right of priority therefore needs not be further considered.

5. With respect to the remaining arguments given by the appellant as "technical analysis" the Board likewise cannot consider the subject-matter of claim 1 of the contested patent to be derivable by the person skilled in the art, directly and unambiguously, using general knowledge, from the first application as a whole.

(a) The argument that the invention relates to a die for tiles working at high pressures, which leads to it being impossible to conceive their rigid elements simply resting with no constraint on one another such that no other solution is conceivable besides one that the elastic wall is solidly constrained to the lattice, cannot be followed. According to the first application (cf. English translation, page 6, end of first paragraph) as well as the description of the patent in suit (column 2, lines 39 to 42) the elastic wall is solidly anchored to the edges of the rigid base such that, irrespective of the relationship between the elastic wall and the lattice, the elastic wall is constrained to the base. As admitted by the patent proprietor in the opposition proceedings (cf. the paragraph bridging the last two pages of the letter dated 18 December 1995) and as can be derived from Annex O ("Third Technical Writ on behalf of the Plaintiff", filed by the opponent I with letter dated 19 June 1996) the die concerned works irrespective of whether the elastic wall rests on the lattice or whether it is solidly anchored to the laying surface of the lattice.

The Italian utility model No. 214739 referred to in this respect by the appellant concerns a die having a half-die with a base comprising bores, each housing a piston, the base, including the openings of the bores, being covered with an elastic wall. Since no lattice is provided and the elastic wall is attached solely to the base, this utility model cannot assist the person skilled in the art in assessing the relationship between the elastic wall and the lattice disclosed in the first application.

(b) According to a further argument the two disclosures of the first application given with respect to the arrangement of the elastic wall, one stating that the elastic wall is solidly anchored to the edges of the rigid base and the other one that the elastic wall rests on the lattice, differ only with respect to the wording used but do not express a structural difference. Even if the assumption underlying this argument, namely that the first statement (solidly anchored) relates to a mechanical and the second statement (rests) to a functional concept, is followed no evidence is given that it can be derived from the use of such formulations that in each case the same relationship is referred to. On the contrary, it is evident that such an assumption would lead to a contradiction between the then assumed relationship between the elastic wall and the lattice (solidly anchored to the lattice) and the one disclosed in the first application (resting on the lattice).

Correspondingly the argument cannot be followed

that the existence of an exact constructional relationship between the elastic wall on the one hand and the edges of the rigid base or the lattice on the other hand can be derived from the drawings, since in each case this relationship is represented in the same manner. When the schematically shown cross-section of the half-die shown in figure 2 of the first application is considered without consideration of the description, no conclusion can be drawn as to the relationship between the elastic wall and the edges on the base or the lattice. From figure 2 it can only be derived that the elastic wall is - in the shown orientation of the die - in contact with the base and the lattice. Figure 1 does not show any more than figure 2. In particular, no structural elements are shown which indicate that the elastic wall not only contacts the base and the lattice, but is solidly anchored to either one of these elements. The omission of such an indication in respect of the contacting area between the elastic element and the edges of the rigid base which according to the description is solidly anchored to the base, cannot be understood as indicating, that in respect of the contacting area between the elastic wall and the lattice the connection is of a structure as described for the former case, which is contrary to the corresponding description according to which the elastic wall rests on the lattice.

(c) According to a first portion of the description of the first application (page 8, last two paragraphs) it is an important fact that all areas of the tile are subjected to the same pressure and

thus have the same density with the exception of the surface occupied by the lattice, where the die behaves like a rigid die. This portion cannot be considered as indicating directly and unambiguously that the elastic wall is solidly anchored to the lattice, which would be contrary to the portion of the description of the priority document (page 6, paragraph 2 from bottom) according to which the elastic wall rests on the lattice. It is conceivable that, in the particular situation of the elastic wall lifting from the lattice e.g. due to lack of powder in this area, the statement that within the surface occupied by the lattice the die behaves like a rigid die, might be considered as being in contradiction with the actual deflection of the elastic wall. Such a contradiction which is possible for a particular situation cannot be considered as directly and unambiguously disclosing, contrary to the corresponding description, that the elastic wall is solidly anchored to the lattice.

Such a disclosure can also not be derived from the effect stated in the first application (page 8, end of second paragraph) that the presence of the lattice ensures the always-perfect coplanarity of the tile inferior lattice, even for tiles of considerable size, since no evidence is given for this effect not being obtainable with the die as disclosed in the first application.

The provision of through holes, to connect all portions of the cavity separated by the lattice, likewise cannot be considered as a disclosure of the elastic wall being solidly anchored to the

laying surface of the lattice. As can be derived from claim 1 of the first application and of the patent in suit, the provision of such through holes is not an essential feature and thus cannot be understood as leading to a requirement concerning the relationship between the elastic wall and the lattice as defined within claim 1.

For the die disclosed in the first application, according to which the elastic wall rests on the lattice and, given a particular pressure condition, can be lifted from it, provision of through holes can nevertheless be advantageous to enhance mutual communication between all of the portions of the cavity, thus enabling rapid distribution of the incompressible fluid over all these portions. Thus, from the provision of these through holes it cannot be derived directly and unambiguously that the elastic wall is solidly anchored to the laying surface of the lattice.

The above considerations apply also considering the argument that the elastic wall can be provided in an upper die-half (first application, page 7, last sentence of paragraph 3). The elastic wall, being then situated underneath the lattice, could in the non-operating state of the die only be considered to "rest" on the lattice if it is appropriately rigid or prestressed in horizontal direction, e.g. via its solid anchoring to the edges of the rigid base. Thus, for the non-operative state of such a die, a relationship that the elastic element "rests" on the lattice as disclosed in the priority document is conceivable. More importantly however, irrespective whether or

not the elastic element is rigid or horizontally prestressed in this sense, in the operating state the elastic element provided in an upper die-half can come to rest on the lattice, even if this would not be the case for the non-operating state of the die. Thus, as far as a contradiction could be seen between the portion of the description of the first application by which a die-half comprising an elastic wall can be the upper half and the one by which the elastic wall rests on the lattice, such a contradiction cannot be understood as leading directly and unambiguously to a relationship of the elastic wall and the lattice being defined that the elastic wall is solidly anchored on the laying surface of the lattice as defined in claim 1 of the patent in suit. Such a relationship would be contrary to the remainder of the description.

With regard to the drawing filed by the appellant with observations dated 5 July 2000 the appellant alleges that the deflected configuration of a portion of the elastic element shown in broken lines represents a deflection considered by the skilled person as being the one resulting from a cooperation of the elastic element with the lattice as described in the first application. He furthermore alleges that the deflection shown is due to the elastic wall being solidly anchored to the laying surface of the lattice and not for example due to pressure imposed on the area of the elastic wall at which it also rests on the lattice (cf. figure 2 of the first application). However the appellant has given no proof for these allegations.

6. Consequently from the priority document considered as a whole, the person skilled in the art cannot derive the subject-matter of claim 1 directly and unambiguously, using common general knowledge since the feature of claim 1 of the patent in suit that the elastic element is solidly anchored to the lattice cannot be derived from either the wording or the technical information of the first application.

As compared to the first application the die according to claim 1 of the patent in suit thus does not concern the same invention, since the relationship between the elastic element and the lattice is defined differently from the one disclosed in the first application. Under certain conditions (cf. paragraph 5.(c) above), this different relationship can also lead to an improvement in how the tile-laying surfaces are kept flat, since the elastic wall, being solidly anchored to the lattice, is not permitted to lift from the lattice, which otherwise could lead to a distortion with respect to the flatness of the tile-laying surfaces.

The priority claimed for the contested patent is thus not valid since the first application and the patent in suit do not concern "the same invention" as required by Article 87(1) EPC (cf. G 2/98).

Novelty

7. The appeal is not directed to the part of the contested decision within which it has been found that the subject-matter of claim 1 lacks novelty (Articles 54, 100(a) EPC) with respect to D1 in combination with D2 or the Annex G, which have been considered as prior art in the sense of Article 54(2) EPC due to the priority

of claim 1 of the contested patent not being valid. The Board does not see any circumstances leading to a different opinion with respect to public availability of the die according to D1 or the Annex G prior to the date of filing of the patent in suit and with respect to the subject-matter of claim 1 lacking novelty with respect to the die according to D1 or the Annex G.

Procedural matters

8. The finding of the Board that the priority of claim 1 is not valid is based on the same facts and arguments as for the appealed decision. The grounds of appeal in essence do not go beyond the facts and arguments presented in the opposition proceedings and moreover the appeal does not concern the part of the decision by which the subject-matter of claim 1 lacks novelty in the case that its priority is not valid. It was therefore neither necessary nor effective to issue a communication (Article 110(2) EPC). It thus could be decided immediately.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Martinuzzi A. Burkhart