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D E C I S I O N
of 3 February 2004

Case Number: T 0012/03 - 3.2.5

Application Number: 96902503.0

Publication Number: 0873236

IPC: B29C 73/10

Language of the proceedings: EN

Title of invention:

A method for repairing a local damage

Patentee:

Coöperatieve Vereniging Profile Repair U.A.

Opponent:

HBC International ApS

Headword:

Relevant legal provisions:

EPC Art. 56, 84, 123

EPC R. 67

Keyword:

"Inventive step - yes"

"Substantial procedural violation - no"

"Reimbursement of the appeal fee - no"

Decisions cited:

T 0367/91

Catchword:

-



Case Number: T 0012/03 - 3.2.5

D E C I S I O N
of the Technical Board of Appeal 3.2.5
of 3 February 2004

Appellant: Coöperatieve Vereniging Profile Repair U.A.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 22 October 2002
revoking European patent No. 0873236 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: W. Moser
Members: H. M. Schram
W. Widmeier

Summary of Facts and Submissions

I. The appellant (patentee) lodged an appeal against the decision of the Opposition Division revoking the European patent No. 0 873 236 on the grounds that the subject-matter of independent method claim 1 lacked an inventive step, Article 56 EPC, and that the subject-matter of independent product claim 6 lacked novelty, Article 54 EPC.

II. The following document was *inter alia* referred to in the appeal proceedings:

D2: "Sätt en stämpel på bucklorna, Caravanbladet 1982, pages 10 and 13 (English translation)"

III. Oral proceedings were held before the Board of Appeal on 3 February 2004.

IV. The appellant requests that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 5 as granted, and claim 6 according to the first auxiliary request filed on 23 December 2003. The appellant further requests that the appeal fee be refunded by reason of an alleged substantial procedural violation committed by the Opposition Division.

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

V. Independent claims 1 and 6 read as follows:

"1. A method for repairing a locally damaged, dented surface (5) of a wall (1), which wall (1) is provided with a relief (4), whereby the dented surface (5) is filled with a filler after which a relief (4) is formed in the filler, characterized in that the wall (1) comprises a recurring relief whereby a relief (4) in an undamaged part of the surface is looked up which corresponds with the former relief (4) in the damaged surface, after which a mould (6) is made of an impression of said corresponding relief (4), subsequently the dented surface (5) is filled with a filler, after which the impression on the mould (6) is pressed into the filler and a relief (4) corresponding with the original relief (4) is formed in the filler."

"6. A wall (1) comprising a locally repaired surface which has been damaged, the wall (1) comprises a relief whereby the locally repaired surface comprises an impression of an undamaged part of the wall (1), which impression is made in a filler filling the damaged surface, characterized in that the wall comprises a recurring relief, whereby the impression corresponds with the former original relief in the damaged surface"

VI. The appellant argued essentially as follows:

In the repair method disclosed in document D2 an arbitrary piece of a spare wall was used for making a mould. With this mould the original relief of the damaged wall could only approximately be reinstated. The person skilled in the art of repairing a (caravan) wall reading document D2 was not aware that a caravan

wall was usually obtained by a rolling operation and that said wall consequently had a repetitive relief. By making a mould from an undamaged part of the wall having exactly the same relief as the damaged surface, the method according to the invention made it possible to obtain an identical copy of the original relief in the damaged surface, i.e. the repaired surface accurately matched the undamaged relief without having to rework the transition area by hand. Since this idea was not hinted at nor suggested by document D2, the subject-matter of claims 1 and 6 according to the main request was not obvious. The amendments to claim 6 were intended to bring claim 6 into line with claim 1 and were both clear and supported by the application as filed.

The Opposition Division had presumed under point 3 of the decision under appeal that the skilled person in the field of caravan repair and the skilled person in the field of caravan manufacture were the same persons and that it was common general knowledge in the art of caravan "repair and manufacture" that the surface contour of a caravan wall usually had a recurrent relief. This definition of the skilled person and his or her presumed knowledge was mentioned for the first time in the decision under appeal. Since the appellant had not been given an opportunity to present his comments on this important point, which led to the revocation of the patent, this amounted to a substantial procedural violation necessitating the reimbursement of the appeal fee.

VIII. The respondent argued essentially as follows:

Document D2 represented the closest state of the art. This document taught that a locally damaged, dented caravan wall with a ball-indented surface relief could be repaired almost invisibly by making a "die" using the surface contour of a spare plate and, with the help of this die, by filling the dents in the wall. This document also disclosed that missing items of a gustavian mirror frame could be replaced by copying these items from an undamaged part of the mirror frame *itself*. The subject-matter of claim 1 differed from the method that was disclosed in document D2 merely in that the wall to be repaired had a recurrent relief, enabling the skilled person to find a perfect match of the die relief and the damaged relief. This distinguishing feature was not inventive, since the person skilled in the art of caravan wall repair was aware that such walls had a repetitive surface contour. It was obvious to the skilled person to look up an undamaged area of the wall having exactly the same surface contour as the area to be repaired, with a view to making a die having an identical surface contour as the area to be repaired, just as in the example of the gustavian mirror frame. It followed that the claimed invention lacked an invention step with respect to document D2.

The amendments to claim 6 did not meet the requirements of Article 123(2) EPC, since the wording at the end of the claim, viz. "*whereby the impression corresponds with the former original relief in the damaged surface*" differed from the wording at page 3, lines 31 to 33, of the published application as filed W096/22877, i.e.

"The relief formed in this manner fully corresponds with the original relief of the damaged surface" in two respects: firstly, by deleting the word "fully" before "corresponds", the level of correspondence required in claim 6 was less than the level that was originally disclosed, and secondly, the expression "impression" in claim 6 had a different meaning than the expression "the relief formed" in the cited passage, which could therefore not serve as a basis for the amendment. Moreover, the claim did not define which measures were to be taken to reinstate the original relief without the need to rework the transition area, contrary to Article 84 EPC. In this respect it was noted that in the embodiment described in paragraph [0014] of the patent in suit it was stated that *"excess filler along the edge of mould 6 is removed before the filler has completely cured"* (see column 3, lines 6 to 8), implying that rework still had to be done so that the object of the invention was not achieved.

Reasons for the Decision

1. *Allowability of the amendments*

Apart from minor editorial changes relating to the two-part form of the claim, claim 6 has been amended with a view to clearly expressing that the relief of the repaired surface accurately matches the former original relief in the damaged surface: *"the locally repaired surface comprises an impression ..., whereby the impression corresponds with the former original relief in the damaged surface"*. A basis for this amendment is found *inter alia* on page 3, lines 31 to 33, of the

published application as filed. The expression "corresponds with" in the context of claims 1 and 6 must be construed, in the light of the description, to mean "corresponds one-to-one with", i.e. there exist an accurate, quasi-exact correspondence between the repaired relief and the original relief of the surface before it was damaged, see in particular column 1, lines 30 to 35, of the patent in suit. This expression should not be construed to mean "is similar to", which would imply that the relief on the repaired damaged surface is only an approximation of the original relief.

The respondent perceived a difference between "fully corresponding" (as used in the cited passage) and "corresponding" (as in claim 6), claiming that the deletion of the word "fully" contravened the requirements of Article 123(2) EPC. This perception is not shared by the Board. It may be noted that in claim 1 as filed the wording "*corresponding with the original relief*" is employed, which not only supports the view of the Board that both expressions are substantially equal in meaning, but in addition provides a further basis for the amendment in the application as filed. The respondent also perceived a difference between "The relief formed in this manner ..." (cf. the cited passage) and the term "impression" as employed in claim 6. In the judgement of the Board, this distinction is non-existent: the impression made in the damaged surface is the relief formed in the damaged surface.

Hence, the Board is satisfied that the subject-matter of claim 6 as amended is disclosed in the application as filed, cf. Article 123(2) EPC. Paragraph [0017] of the description (see column 3, lines 22 to 25, of the patent in suit) has been deleted, since this passage referred to an embodiment of the invention that was not covered by claims 1 and 6. Since the scope of protection has not been extended with respect to claim 6 of the patent in suit as granted, claim 6 meets the requirements of Article 123(3) EPC as well.

Contrary to the opinion of the respondent, claim 6 is also clear and supported by the description, cf. Article 84 EPC. There is no need, as suggested by the respondent, to include in (product) claim 6 process (!) steps relating to the case that an excess amount of filler is applied in the damaged surface which has subsequently to be removed (see column 3, lines 6 to 8, of the patent in suit), since the excess amount may also be zero. This follows from the statement that the filler must be added in a *sufficient* amount (see column 3, line 3, of the patent in suit). If excess filler is present and needs to be pressed out, such an additional step does not necessarily involve the transition area between the damaged and undamaged areas, nor does it imply that rework by hand is necessary. An embodiment of the invention wherein excess filler is present hence does not contradict the statement in the description that "*As a result of this the repaired surface will accurately match the undamaged relief, and it is no longer necessary to finish the transition area by hand*" (see column 1, lines 31 to 34, of the patent in suit).

2. *Novelty*

None of the cited documents (see the decision under appeal) discloses a *method for repairing a locally damaged, dented surface of a wall, or a wall comprising a locally repaired surface which has been damaged* with all the features of claims 1 and 6, respectively. Since this was not disputed, there is no need for further substantiation of this matter.

The subject-matter of claims 1 and 6 of the main request is therefore novel within the meaning of Article 54 EPC.

3. *Inventive step*

3.1 The invention relates to a method for repairing a locally damaged, dented surface of a profiled wall, whereby the dented surface is filled with a filler after which a relief is formed in the filler. The invention furthermore relates to a wall comprising such a locally repaired surface. The problem the present invention seeks to solve is to provide a repair method and a wall as described above, wherein a relief that exactly corresponds to the original relief can be formed in the repaired surface in a simple and efficient manner.

This problem is solved by the subject-matter of claims 1 and 6, respectively. In particular, the invention proposes that an undamaged part of the surface is looked up, which relief exactly corresponds with the former, original relief in the damaged surface, which is then used to make a mould having a

complementary relief matching the former, original relief in the damaged surface. Such an area can always be found if the relief of the wall is "periodic" or "recurrent" and the locally damaged area of the wall is small with respect to the undamaged wall and/or the periodicity of the recurrent relief.

- 3.2 Document D2 represents the closest state of the art. This document is an article appearing in a caravan magazine and is addressed to caravan owners. The article gives "do-it-yourself" advise how to repair dents in a caravan wall having a relief. The author explains that the idea of repairing a caravan wall by "copying" the relief from a piece of wall using a mould was based on his experience in repairing a gustavian mirror frame having curlicues in the form of flowers and leaves. Undamaged flowers were duplicated to replace "big missing items" in the frame (see document D2, third paragraph). It may be noted that a frame is not a wall and that the curlicues do not necessarily form a recurrent relief. In paragraph two of document D2 it is stated: "... I started speculating if it should be possible to fill the dent and even could have **the same** "ballindented" surface in the filler which existed on the remainder of the caravan" (emphasis added by the Board). However, as explained below, the repair method proposed in paragraphs four and five of document D2 is only capable to re-establish the original relief on the damaged surface, which is *approximately* the same, not *exactly* the same.

Document D2 does not disclose that the wall has a recurring relief. Individual bumps shown in the sole Figure (picture) do not seem to be arranged on a

regular lattice and there is no information that ball-indented pattern exhibits a periodicity at a larger scale, which would be the case if the relief of the wall was obtained by e.g. a rolling operation. Document D2 is silent however about the way the ball-indented surface shown in the Figure is made.

Another difference between the subject-matter of claim 1 and the method known from document D2 is that, in accordance with the invention, the mould is made using an undamaged part of the wall, whereas in the method known from document D2 a piece of a spare wall is used for that purpose. The piece of ball-indented caravan plate for making the mould is cut into a rectangle of 75 x 150 mm. Document D2 does not disclose that the piece of ball-indented caravan plate used to make the mould is selected beforehand to correspond exactly with the original relief of the damaged area, since for that purpose a replica in e.g. the form of a recurrent relief must be available. The relief of the rectangular plate represents the ball-indented surface of the damaged area in a generic, approximate way. There is simply no teaching that the relief of this plate accurately matches the original relief of the damaged area. This is confirmed by the last sentence of the fifth paragraph of document D2, viz. "Only a few small adjustments at the transition between filler and plate was required".

In contrast, the method according to the present invention is capable of restoring the relief in the damaged surface, which is indistinguishable from the former, original relief, whereby it is no longer

necessary to finish the transition area between the repaired wall area and the undamaged wall area by hand.

If the skilled person familiar with the teaching of document D2 is faced with a wall having a recurrent relief that needs to be repaired, and assuming that the skilled person realizes that he or she can use the undamaged wall for making a wall, there is still the step to be made to choose a part of the undamaged wall corresponding with the former relief of the damaged surface in order to arrive at the invention. If the recurring relief has a strikingly repetitive pattern this may seem trivial. It may be noted that claims 1 and 6 are not restricted to a caravan wall and do not qualify the relief pattern except that the relief must be recurrent.

Assuming, for the sake of argument, that document D2 did contain the additional information that the ball-indented caravan wall was obtained by a rolling operation (giving rise to an inconspicuous repetitive pattern of the surface contour). Even if document D2 would have disclosed a repair method for a wall having a recurrent relief, as assumed by the Opposition Division, it would still fail to disclose that the former, original relief can be exactly restored.

In the judgement of the Board, document D2 in fact shows that it was not obvious to choose a part of the undamaged wall corresponding with the former relief of the damaged surface.

It follows from the above that the person skilled in the art, starting from the method known from document D2, or from any other of the documents cited by the respondent (see the decision under appeal), would not have arrived at the subject-matter of claim 1 in an obvious manner.

Consequently, the subject-matter of claim 1 involves an inventive step.

The same applies to the subject-matter of claim 6, which concerns a wall comprising a locally repaired surface which has been damaged. The subject-matter of claims 2 to 5 which are appendant to the claim 1 similarly involve an inventive step.

Therefore, the request of the appellant that the patent be maintained on the basis of the documents filed as sole request is allowable.

4. *Reimbursement of the appeal fee*

- 4.1 The appellant has submitted that the Opposition Division had violated his right to be heard, because the decision under appeal was based on grounds unknown to the appellant, cf. Article 113(1) EPC. In particular, in the decision under appeal the person skilled in the art was presumed to be "an ordinary practitioner in the field of the manufacture and repair of caravans" (cf. point 3.1 and 4.1 of the reasons), whose general knowledge encompassed that "a caravan wall usually consists of two parallel metal sheets ...", and that the outer sheet "is usually obtained from a rolling operation" (cf. points 3.1.1 and 3.1.2 of the reasons).

The appellant alleged that he did not have had the opportunity to present his comments, neither on the definition of the skilled person nor on the presumed common knowledge of that person. The appellant did not contest that knowledge about the production process and the construction of a caravan wall having a recurrent relief such as, for example, hammer-blow course, was known as such in the art. The appellant also conceded that the information given by the Opposition Division in points 3.1.1 and 3.1.2 of the decision under appeal was basically correct and was known to suppliers of caravan walls. However, the appellant submitted that this knowledge did not belong to the common general technical knowledge of the person skilled in the art of caravan wall repair, which was considered to be the competent expert in the field of the invention. The examination of the subject-matter of the patent in suit with respect to inventive step and novelty was thus based on a false premise and the decision was therefore fundamentally flawed.

- 4.2 According to Rule 67 it is a precondition for reimbursement of the appeal fee that a *substantial* procedural violation has occurred. A *substantial* procedural violation is an objective deficiency in the procedure in the sense that the rules of procedure have not been applied in the manner prescribed by the EPC. The deficiency in the procedure must be substantial in the sense that ignoring, or deviating from, the provisions as laid down in the EPC have led to a different outcome of the case than if these provisions would have been applied correctly.

4.3 A ground for the revocation was *inter alia* that claim 6 lacked novelty with respect to document D2. The appellant did not contest that he had had an opportunity to present his comments on this ground of opposition under Article 100(a) EPC. The finding of the Opposition Division was based *inter alia* on the presumption that the skilled reader of document D2 was aware that a caravan wall is "usually obtained from a rolling operation" and thus has (usually) a recurrent relief. The definition of the skilled person and his knowledge is of secondary importance in assessing novelty. An invention shall be considered to be novel if it does not form part of the state of the art. An invention forms part of the state of the art, and thus lacks novelty, if its subject-matter as a whole is clearly and directly derivable from the prior art. Admittedly, what is "clearly and directly derivable from the prior art" is determined by what knowledge and understanding can be expected by the average skilled person in the technical field in question. This is not to say that the outcome of a novelty assessment is dependent on the concept of the person skilled in art. Whereas in the provision regarding inventive step, cf. Article 56 EPC, the requirement of "not being obvious" is inextricably bound up with the notion of the person skilled in the art ("obvious to whom"), such a connection is not present in the provision regarding novelty, cf. Article 54 EPC. Whereas obviousness depends on the eye of the beholder, novelty, or lack thereof, does not.

4.4 The implication of the submission of the appellant is that the subject-matter of claim 6 of the patent in suit was to be regarded as novel to the person skilled

in the art of caravan repair, whereas a different outcome may have been obtained if a different person skilled in the art having different technical knowledge (here: the skilled person in the art of caravan wall manufacture) would have examined novelty. This cannot be accepted for the reasons given in point 4.3 above.

4.5 In the judgement of the Board, the Opposition Division did not commit a substantial procedural violation with respect to their finding of lack of novelty by not informing the appellant about the technical knowledge and field of the notional skilled person, since this would have not made any difference in the outcome of the case. The Opposition Division may have misinterpreted the teaching of document D2 by assuming that the relief shown therein is a recurring relief (in the opinion of the Board document D2 indeed does not disclose a recurring relief, but that is not relevant here). A wrong assessment of the prior art is a substantive error, not a procedural violation (see e.g. T 367/91 of 14 December 1992 (not published in the OJ EPO), point 7 of the reasons).

4.6 In the opinion of the Board, no procedural violation occurred, let alone a substantial one. The request for reimbursement of the appeal fee has therefore to be refused, cf. Rule 67 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent on the basis of the following documents:
 - (a) claims 1 to 5 as granted, and claim 6 according to the first auxiliary request filed on 23 December 2003; and
 - (b) description, page 2 as granted, and page 3, column 3, lines 1 to 21 (with lines 22 to 25 being deleted) presented during oral proceedings; and
 - (c) drawings, Figures 1 and 2 as granted.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

D. Meyfarth

W. Moser