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Datasheet for the decision of 18 November 2009

Case Number:	T 0212/07 - 3.2.03		
Application Number:	01310002.9		
Publication Number:	1211364		
IPC:	E04F 13/08		
Language of the proceedings:	EN		
Title of invention: Brickwork support system			
Patentee: Ancon CCL Limited			
Opponent: Normteq B.V.			
Headword:			
Relevant legal provisions: EPC Art. 54, 56, 104(1)			
Relevant legal provisions (EPC 1973): -			
Keyword: "Main request - novelty (yes)" "Inventive step (yes)" "Different apportionment of costs (yes)"			

Decisions cited:

T 0930/92, T 0934/91, T 0323/89, T 0952/00

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Catchword:

A party summoned to oral proceedings has an obligation either to appear at the oral proceedings or to notify the Board as soon as it knows that it is not going to do so (see Reasons 6).



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Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number: T 0212/07 - 3.2.03

DECISION of the Technical Board of Appeal 3.2.03 of 18 November 2009

Appellant: (Opponent)	Normteq B.V. Spinelstraat 45 NL-7554 TW Hengelo (NL)
Representative:	van Westenbrugge, Andries Nederlandsch Octrooibureau Postbus 29720 NL-2502 LS Den Haag (NL)
Respondent: (Patent Proprietor)	Ancon CCL Limited President Way President Park Sheffield S4 7UR (GB)
Representative:	Murnane, Graham John Murgitroyd & Company 165-169 Scotland Street Glasgow G5 8PL (GB)
Decision under appeal:	Decision of the Opposition Division of the European Patent Office posted 27 November 2006 rejecting the opposition filed against European patent No. 1211364 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman:	G.	Ashley
Members:	Ε.	Frank
	К.	Garnett

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Opposition Division posted on 27 November 2006, to reject the opposition against European patent No. 1 211 364 pursuant to Article 102(2) EPC 1973. Grant of the patent had been opposed on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and insufficient disclosure of the invention (Article 100(b) EPC).
- II. The Appellant (Opponent) filed a notice of Appeal on 5 February 2007, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 27 March 2007. The Appellant requested that the decision under appeal be set aside and the patent be revoked. In the event that the Board had a "different opinion", oral proceedings were requested.
- III. In its reply to the grounds of appeal the Respondent (Patent Proprietor) requested that the appeal be dismissed and the patent be maintained as granted or otherwise oral proceedings be held. Alternatively, the Respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of the set of claims according to the auxiliary request.
- IV. A communication dated 19 February 2009 pursuant to Article 15(1) RPBA was issued together with a summons to attend oral proceedings on 15 May 2009. The provisional opinion of the Board with regard to the Appellant's arguments, which had concentrated on the issue of novelty, was generally negative.

- V. With its letter sent by fax on 8 May 2009 (a Friday) the Appellant informed the Board that it would not be attending the oral proceedings "in view of the high costs" and that it was "looking forward" to receiving the Board's final decision. The Board forwarded the Appellant's letter of 8 May 2009 to the Respondent by fax on the same day, and with a fax of 11 May 2009 the oral proceedings were cancelled. With its letter of 14 May 2009 the Respondent acknowledged the receipt of both the faxes dated 8 May and 11 May from the European Patent Office, and requested a different apportionment of costs to cover the non-refundable travel and lodging costs of its representative and of the preparation costs for the oral proceedings.
- VI. With the letter of 19 May 2009 a communication pursuant to Rule 100(2) EPC was issued by the Board to both parties, inviting the Appellant to file submissions in reply to the Respondent's new request for a different apportionment of costs, and asking the Respondent for further evidence and information in support of its request. The Appellant did not respond to the Board's invitation. By letter dated 21 July 2009 the Respondent provided information and evidence in response to the Board's request.
- VII. The wording of claims 1, 19 and 20 of the granted patent (main request) reads as follows:

"1. A support means comprising:

at least one bracket (1,21) provided with a first fixing means for securing to a first structure and at least one longitudinally extending support member (2,22) for supporting a second structure at a distance from the first structure, the support member (2,22) having a substantially horizontal load-bearing projection (17,31) and a formation which is engageable with at least one corresponding slot (7,27) on the bracket to provide vertical support of the support member (2,22), the support member formation and slot (7,27) being shaped so as to permit relative longitudinal sliding movement of the support member (2,22) and bracket (1,21) and to prevent relative lateral horizontal movement, vertical movement and relative rotation about the longitudinal axis of the support member (2,22) and bracket (1,21), characterised in that the support member formation includes:

a flange having a first substantially vertical portion (8a,28a) and a second substantially horizontal portion (8b,28b); and the support member (2,22) includes a connecting web (10,30) connecting the second flange portion (8b,28b) and the load-bearing projection (17,31), wherein the connecting web (10,30) lies in a substantially vertical plane."

"19. A support means comprising:

a longitudinally extending support member (2,22) having a load-bearing projection (17,31) for supporting cladding for a building; and a plurality of spacedapart brackets (1,21) fixed to the wall of the building; the support member (2,22) and the brackets (1,21) being mutually engageable to permit relative longitudinal sliding movement of the support member (2,22) and brackets (1,21) and to prevent relative lateral movement, vertical movement and relative rotation about the longitudinal axis of the support member (2,22) and bracket (1,21) characterised in that the support member is provided with a formation with which to engage the bracket (1,21), the formation including:

a flange having a first substantially vertical portion (8a,28a) and a second substantially horizontal portion (8b,28b), wherein the flange engages at least one corresponding slot on the bracket; and the support member (2,22) includes a connecting web (10,30) connecting the second flange portion (8b,28b) and the load-bearing projection (17,31), wherein the connecting web (10,30) lies in a substantially vertical plane."

"20. A method of supporting cladding on a structure comprising:

securing a plurality of brackets (1,21) to the structure, and engaging a support member (2,22) with slots (7,27) provided in said plurality of brackets (1,21) by sliding the support member (2,22) in a direction parallel to its longitudinal axis, the slots (7,27) preventing relative lateral horizontal movement, vertical movement and relative rotation about the longitudinal axis of the support member (2,22) and brackets (1,21), and supporting one or more cladding members on a load-bearing projection (17,31) of said support member (2,22), characterised in that the engagement of the support member (2,22) and brackets (1,21) is facilitated by a formation on the support member (2,22), the formation including: a flange having a first substantially vertical portion (8a,28a) and a second substantially horizontal portion (8b,28b); and the support member (2,22) including a connecting web (10,30) connecting the second flange portion (8b,28b) and the load-bearing projection (17,31), wherein the connecting web (10,30) lies in a substantially vertical plane."

VIII. The following evidence has been considered for the purposes of the substantive decision on the Appellant's appeal:

D1 = EP-A-0 869 232 D2 = US-A-3 234 702 D3 = DE-U-90 04 887

- IX. In relation to its request for a different apportionment of costs, the Respondent provided the following information and evidence in its letters dated 14 May 2009 and 21 July 2009:
 - (a) Flights and a hotel room in Munich for the Respondent's representative had been booked on 2 April and 22 April 2009 respectively, both on a non-refundable basis in order to keep costs as low as possible.
 - (b) The flight costs amounted to a total of €325.79 (Münster/Osnabrück to Munich on 14 May 2009: €79; Munich to Glasgow on 15 May 2009: €246.79). A partial refund of €19.79 on the tax payable on the second of these flights was subsequently received.
 - (c) The cost of the hotel room booked for 14 May 2009 was €100.

- (d) The above costs are not defrayable, for example through insurance.
- (e) The Respondent's representative had spent four hours on preparing arguments in note form to assist him when presenting his submissions at the oral proceedings, inter alia taking account of the matters raised in the Board's communication of 19 February 2009. These arguments had been prepared on 6 May 2009, about a week in advance of the oral proceedings, since the representative was due to attend patent infringement proceedings in Düsseldorf on 11 and 12 May 2009.
- (f) The cost of his professional time in preparing these arguments amounted to GBP 1280.00 (four hours at an hourly billing rate of GBP 320).

Documentary evidence in support of the amounts claimed was also filed.

- X. The parties submitted the following arguments:
- X.1 Main request Novelty

The Appellant's case:

As to claim 1, the Appellant firstly argued that document D1 disclosed in the figures 1 to 3 embodiment a first condition before the securing member 17 was fitted, and a second condition, after its fitting. In the first condition, longitudinal sliding movement of the support member of D1 was permitted, whereas in the second one lateral horizontal movement, vertical movement, and rotation about the support member's longitudinal axis were prevented. In addition, a support member's longitudinal movement was also disclosed in the figures 4 to 5 embodiment of D1, which corresponded to the aforesaid first condition of figures 1 to 3. It was correct that, strictly arguing, there was no condition in which all features of claim 1 of the patent were derivable from D1. However, starting from the second condition of the figures 1 to 3 embodiment, i.e. after the securing member 17 had been provided, the step to allow "horizontal" (i.e. longitudinal) slidability was either known from the first condition of this embodiment or from the figure 4 to 5 embodiment. Since this step was very small, all features of claim 1 could be obtained from D1.

With regard to document D2, a locked and unlocked position (created by bolt 22) was also shown. The lower part of item 33 in figure 2 of D2 corresponded to the connecting web of claim 1 of the patent. Before the final tightening of the bolt 22 in the figure 2 embodiment, longitudinal sliding movement could (and would) be effected for making an adjustment. In this condition, however, lateral horizontal movement, vertical movement and rotation of the web portion 31 were not possible.

Finally, as regards document D3, the member 15 ("Halter 15") could also be understood as a support member. On this support member 15, a substantially load bearing projection 14 was provided. Even without key 23, vertical movement of the support member in downward direction, and therefore in a vertical direction, was impossible. Owing to the presence of the groove 13 (of the "Tragprofil 4"), in which the end portion 18 of the support member was received, and the U-shaped leg 7 which received portion 21, tilting of the support member 15 was not possible. Item 18 (of the "Halter 15") formed the vertical portion, item 21 (of the "Halter 15") the horizontal portion, and item 19 the vertical connecting web of the support member formation.

With regard to claims 19 and 20 the above arguments likewise applied. Thus, the independent claims as granted lacked novelty over the prior art documents D1 to D3.

The Respondent's case:

The Respondent argued, that it was not permissible, for the novelty attack with respect to claim 1, to combine features from both the first and second configuration of the figures 1 to 3 embodiment of D1, as these two configurations (i.e. prior to insertion and following the insertion of the securing member 17) are mutually exclusive. It appeared to the Respondent, however, that the Appellant had accepted the decision of the Opposition Division in recognising claim 1 as being novel over the figures 4 to 6 embodiment of D1.

As to document D2, there were again two mutually exclusive states of the clip 21 and channel member 30 arrangement, namely prior to tightening of the bolt 22, and after it had been tightened. Moreover, the structural arrangement of the elements of the channel member 39 did not correspond to a connecting web as described by the support member formation of claim 1. As regards document D3, there was no evidence of the connection 14 having any load bearing characteristics and constituting a horizontal planar projection in the sense of the teaching of the patent. Additionally, there was no suggestion in D3, that the end portion 18 of the retainer 15 provided vertical support of the support member as required by claim 1. Thus, the connection 14 did not correspond to the load bearing projection of a support member according to claim 1 as it did not possess a formation having all the required structure of features of claim 1. Moreover, the insertion of wedge 23 prevented all relative motion of the retainer 15 and the profile 4, thereby removing the possibility of relative longitudinal sliding motion of the retainer 15 and the profile 4. Thus, again mutually exclusive configurations of an embodiment are shown in D3.

Accordingly, the Respondent considered the reasoning of the decision of the Opposition Division to be well founded in relation to novelty of claims 1, 19 and 20 over D1 to D3.

X.2 Apportionment of costs

(a) The Respondent argued as follows in its letter of 14 May 2009. The Appellant had only informed the Office, and not the Respondent, of its intention not to attend oral proceedings. This amounted to a failure to exercise all due care, justifying a different apportionment of costs for reasons of equity. See T 937/04. The Appellant had also given "high costs" as the reason for not attending the oral proceedings but by not even withdrawing the request for oral proceedings it had not given the Respondent the opportunity to save costs. The Appellant seemingly had had no intention of attending the oral proceedings. The costs of attending had not suddenly escalated and the Appellant would have been aware of the costs involved when originally making a request for oral proceedings in the grounds of appeal. The Appellant had behaved in a similar way before the Opposition Division. There had been a systematic abuse of process.

(b) As already noted, the Appellant did not file any submissions in relation to the Respondent's request for a different apportionment of costs.

Reasons for the Decision

- 1. The appeal is admissible.
- Main request Sufficiency of disclosure (Article 100(b) EPC)

The Opposition Division held the Article 100(b) EPC objection not to be sufficiently substantiated, since no facts, evidence or arguments had been presented by the Appellant in the opposition procedure. The Appellant, while not formally withdrawing the opposition ground under Article 100(b) EPC in the appeal procedure, again did not put forward any arguments on this ground. This ground was therefore not open to decision by the Board. - 11 -

3.

Main request - novelty (Article 100(a) EPC, see Article 54 EPC)

Document D1:

Document D1 describes a console assembly comprising a support member 11 and a bracket assembly 1 according to a first embodiment: cf. column 2, lines 25 to 30; column 5, lines 12 to 18; figures 1 to 3. The slot 5 of D1 and its corresponding vertical securing lip 15 together with the adjacent horizontal section 23 as shown in figures 1 to 3 enables the member 11 to be connected to the recess 5 by tilting and inserting. After fitting member 11 on plate section 6 of the bracket, a securing operation with the aid of a wedgeshaped securing member 17 can be carried out wherein the member 11 is fixed to the plate section 6: cf. D1, column 5, lines 41 to 48. Thus, D1 discloses an unlocked and a locked condition of the support member 11. In the unlocked condition, slot 5 provides an amount of play, i.e. lateral, vertical and rotational movement, in order to enable fitting member 11 to be connected by tilting and inserting (cf. column 2, lines 25 to 30). The locked condition is achieved by a fixing means in the form of the wedge-shaped securing member 17 and hence no movement, in particular no relative longitudinal movement between member 11 and bracket assembly 1, is permitted. The Appellant conceded that D1 does not, in fact, disclose a condition of the figures 1 to 3 embodiment, in which all features of claims 1,19 and 20, respectively, are present at the same time.

In addition, the Board agrees with the parties' view, that the second embodiment according to figures 4 to 6 of D1 only concerns an unlocked state of a support member, viz. of the short or relatively long support plates 37 or 51: cf. column 6, lines 42 to 48; column 7, lines 45 to 48; figures 4 to 6. In this state there is also large play between the support and the bracket.

Document D2:

As regards document D2, a bracket formed by a clip member 21 is described, comprising a longitudinally extending slot-like recess at the lower end of its projection 29, which corresponds to the formation of a support member, viz. to the longitudinally slotted upper portion of the long leg 33 of the U-shaped channel member 30: cf. column 2, lines 17 to 54; figures 1 and 2.

The Board agrees with the parties' opinion, that two possible states are derivable from D2: either the cap screw 22 is not tightened and the channel member 30 is free to slide longitudinally with respect to the clip 21, or the cap screw is tightened, which effects the clamping of the channel member 30. However, contrary to the Appellant's view, merely based on figure 2 of D2, no condition before the final tightening of the screw 22 is disclosed, which would allow longitudinal sliding movement of the channel member's web portion 31, whilst preventing any other movements. Moreover, relative movement of the channel member 30 and the clip member 21 does not appear to be prevented merely by the slot of the clip member 21 and its corresponding leg portion of the channel member 30 as is required by claims 1, 19 and 20. Rather, vertical and lateral movement is prevented by means of the opposing edges 24 of the U-shaped strut 20, which neither forms part of the support member, i.e. the channel member 30, nor part of the bracket, i.e. the clip member 21.

Document D3:

Document D3 describes a support means having a horizontal load bearing profile ("waagrechtes Tragprofil 4") which supports a bracket making up a retainer ("Halter 15") for panels ("Bekleidungsplatten 5"): cf. page 3, last paragraph to page 5; figures.

The Board agrees with the opinion of the Respondent, that the horizontal load bearing profile 4 of D3 could hardly form the bracket within the terms of the claims 1,19 and 20, and that the retainer 15 and its cylindrical connections ("Verbindungen 14") form the claimed longitudinally extended support member. If, however, as argued by the Appellant, the horizontal load bearing profile 4 were to be considered as a bracket of the support means, and the retainer 15 and its connections 14 as a longitudinally extended support member having a substantially horizontal load bearing projection, the end portion ("Endabschnitt 18") of the retainer 15 would correspond to a flange having a first substantially vertical portion, the horizontal portion of the upper leg ("Oberer Schenkel 16") to a second substantially horizontal portion and the vertical section ("nach unten abgewinkelter Abschnitt 19") to a vertical connecting web of the support member formation, as defined in claims 1, 19 and 20. The end

portions of the retainer 15 ("Endabschnitt 18,21") are hooked into respective slots ("Nut 13" and "unterer Schenkel 7") of the load bearing profile: cf. D3, page 4, second and forth main paragraph; figure 1.

However, contrary to the Appellant's view, firstly no disclosure would then be derivable from figure 1 of D3, that at least one of the two slots shown were formed to prevent any vertical movement (i.e. both upwardly and downwardly) of the retainer 15, as is defined in claims 1, 19 and 20. Since both slots 13 and 7 are open to the top, none of them can prevent upward movement of the retainer 15. Secondly, merely based on figure 1 of D3 which is not drawn to scale, it would not be derivable for the skilled person that there is no play between the end portions 18,21 of the retainer 15 and at least one of the slots 13 and 7, such that relative lateral horizontal movement and relative rotation about the longitudinal axis of the retainer 15 and profile 4 are prevented when the retainer 15 is simply hooked onto the load bearing profile 4. To the contrary, as described on page 5, first bridging paragraph of D3, this is achieved by the insertion of a clamping wedge ("Keil 23"). After the wedge 23 has been introduced and clamped, no relative movement whatsoever, in particular no relative longitudinal movement, of the retainer 15 and the load bearing profile 4, can take place.

Conclusion:

It is well established case law of the Boards of Appeal that neither a combination of features derived from two mutually exclusive configurations of an embodiment, viz. the unlocked or locked states disclosed in D1 to D3, nor a combination of features disclosed in different embodiments, viz. the figures 1 to 3 and 4 to 6 embodiment of D1, can render the subject-matter of a claim as lacking novelty. Thus, the subject-matter of claims 1, 19 and 20 differs from the disclosures of D1, D2 and D3, respectively, in at least that the support member formation and slots of a bracket are mutually engageable so as to prevent relative lateral horizontal movement (i.e. in a direction other than in the longitudinal direction of the support member), vertical movement and relative rotation about the longitudinal axis of the support member, whilst relative longitudinal sliding movement of the support member and the bracket is permitted. Unlike the support means known from D1 to D3, that of the contested patent does not require an additional fixing means to prevent relative movements of the support member and bracket in the vertical, lateral and rotational direction.

The novelty of claims 1, 19 and 20 over the remaining known prior art was not disputed by the Appellant, and is also acknowledged by the Board. Therefore the subject-matter of claims 1, 19 and 20 meets the requirements of Article 54 EPC.

4. Main request - inventive step (Article 100(a) EPC, see Article 56 EPC)

No arguments have been brought forward by the Appellant in the appeal procedure with respect to inventive step. The Board has no compelling reasons to deviate from the conclusions reached by the Opposition Division (section 6 of the contested decision), that the claimed brickwork support system addresses the problem of providing a more simplified system that those known in the prior art.

The solution provided by the claimed subject-matter lies in allowing longitudinal movement of the support member and bracket, whilst preventing vertical, lateral and relative rotational movement, and achieving this without the need for additional fixing components.

None of the documents Dl to D3 discloses such a brickwork support system, and there is no basis for the skilled person to combine in piecemeal fashion features from the different embodiments described in these documents.

The subject-matter of claims 1, 19 and 20 thus complies with Article 56.

5. Auxiliary request

Since the subjects-matter of claims 1, 19 and 20 according to the main request comply with the EPC, there is no need for the Board to consider the auxiliary request.

- 6. Respondent's request for different apportionment of costs
- 6.1 The Board has power under Article 104(1) EPC to make an order for a different apportionment of costs "for reasons of equity". As to such reasons, the case law of the Boards of Appeal establishes that a party who receives a summons to oral proceedings has an equitable obligation either to appear at the oral proceedings at

the specified time and place, or to notify the Board as soon as it knows that it is not going to appear at such oral proceedings (emphasis added). See T 930/92 (OJ 1996, 191).

6.2 The Board has no direct evidence about when the Appellant decided, and thus knew, that it was not going to attend the oral proceedings. Although the Respondent has asserted that the Appellant never had any intention of attending the oral proceedings there is no evidence for this. All that the Board knows from the Appellant is that the reason it decided not to attend the hearing was the high cost involved. As to this, however, the Board accepts the Respondent's submission that the costs of attending had not suddenly escalated shortly before the date of the oral proceedings and that the Appellant would have been aware of the costs involved when originally making a request for oral proceedings in the grounds of appeal. More to the point, the Appellant would have been aware of the costs when it received the summons in February 2009. The summons would also have focussed the Appellant's mind on the forthcoming hearing and caused it to consider its position. As already pointed out, the summons was accompanied by a communication which was generally negative as regards the Appellant's prospects of success. The Appellant never filed any substantive response to the communication (of course, it was not obliged to), the only response being the letter dated 8 May 2009 saying that it would not be attending the oral proceedings. Given this background, and in the absence of any other evidence or response from the Appellant on this issue, the Board considers that it is a reasonable inference to draw, on the balance of

probabilities, that the Appellant had decided by about the end of March at the latest (i.e. giving the Appellant the benefit of a period of about one month to digest the contents of the communication) that it was not worth its while to incur the expense of coming to the oral proceedings. It follows that the Appellant failed in its duty to inform the Office and the Respondent as soon as it knew it was not going to attend. The Board therefore considers it right for reasons of equity to make a different apportionment of costs.

- 6.3 The Board also has power to make an order which fixes the amount of costs to be paid. See T 934/91 (OJ EPO 1994, 184) and T 323/89 (OJ EPO 1989, 169) and Rule 88 EPC 2000, which governs the present case. The Board proposes to exercise such power.
- 6.4 As to this, the order for apportionment of costs should be such as to compensate the other party for the unnecessary, i.e. wasted costs which it has incurred as the direct result of the Appellant's failure in its duty. See T 952/00, point 5 of the Reasons. In the Board's view the incurring of such costs should also be a foreseeable result of such failure, and the costs should be reasonable.
- 6.5 If in the present case the Appellant had informed the Office and the Respondent at the end of March or in early April that it did not intend to be present at the oral proceedings, then on the balance of probabilities the Board would have cancelled the date soon after being told this, just at it did when the Board received the Appellant's fax on 8 May 2009. This was because

nothing had happened to change the Board's initial negative view of the appeal and the Board was in a position to issue a decision dismissing the appeal without hearing the Respondent further in oral proceedings. The Respondent had only requested oral proceedings against the event that the Board did not intend to dismiss the appeal. Had the Board cancelled the date set for oral proceedings sometime in April, then none of the costs which the Respondent now claims would have been incurred. It follows that all these costs were wasted as the direct result of the Appellant's failure.

- 6.6 As regards the Respondent's costs of air travel and hotel accommodation for its representative, the nature of these expenses and the amounts appear perfectly reasonable. It was also foreseeable that such costs would be incurred when they were in fact incurred. The Board therefore intends to make an order in respect of the sums claimed, i.e. €306 in respect of air fares (€325.79 less €19.79) and €100 in respect of hotel accommodation, making €406 in total.
- 6.7 As to the costs of preparing for the oral proceedings, the Board accepts that a representative will properly spend time preparing himself for oral proceedings immediately before they take place, the cost of doing so being properly chargeable to his client. Although this preparation will often take place a day or so before the proceedings, in the present case this work was done the previous week. Nevertheless the Board accepts the Respondent's representative's explanation for this as being perfectly reasonable in the circumstances (see paragraph VIII(e), above). The Board

also considers that it was foreseeable that the Respondent's representative might prepare for the oral proceedings a week or so in advance. Finally, the Board has no grounds for saying that the amount claimed is not reasonable. The Board therefore intends to make an order in the amount claimed also, i.e. GBP 1280.00.

Order

For these reasons it is decided that:

- 1. The appeal is dismissed
- The Appellant shall pay the Respondent the sums of €406 and GBP 1280.00.

The Registrar

The Chairman

A. Counillon

G. Ashley