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**Datasheet for the decision  
of 22 May 2023**

**Case Number:** T 0872/20 - 3.2.03

**Application Number:** 03792366.1

**Publication Number:** 1543198

**IPC:** E01C23/06, E01C23/14

**Language of the proceedings:** EN

**Title of invention:**  
IMPROVED ROAD REPAIR SYSTEMS

**Applicant:**  
Nu-Phalt Limited

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56, 83, 84

**Keyword:**  
Inventive step - main request (no)  
Sufficiency of disclosure - auxiliary request (no)  
Claims - clarity - auxiliary request (no)

**Decisions cited:**

**Catchword:**



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Case Number: T 0872/20 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 22 May 2023**

**Appellant:** Nu-Phalt Limited  
(Applicant) Roman Way  
Glebe Farm Industrial Estate  
Rugby  
Warwickshire  
CV21 1DB (GB)

**Representative:** Bawden, Peter Charles  
Bawden & Associates  
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Harpenden, Hertfordshire AL5 2JQ (GB)

**Decision under appeal:** **Decision of the examining division of the  
European Patent Office posted on 14 October 2019  
refusing European patent application No.  
03792366.1 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** C. Herberhold  
**Members:** G. Patton  
F. Bostedt

## Summary of Facts and Submissions

- I. The applicant (appellant) lodged an appeal against the examining division's decision to refuse European patent application No. 03 792 366.1.
- II. The decision under appeal was made according to the state of the file and based on the ground that the claimed subject-matter lacked inventive step (Article 56 EPC), as provided in the communication dated 31 January 2019 and the minutes of the telephone conversation dated 24 September 2019.
- III. With the statement setting out the grounds of appeal, the appellant requested

that the decision be set aside and  
that a patent be granted on the basis of either the  
main request or the auxiliary request filed with  
the statement setting out the grounds of appeal.

The main request corresponds to the request underlying  
the decision under appeal.

- IV. The board presented its preliminary, non-binding  
opinion on these requests that the appeal was likely to  
be dismissed by communication pursuant to Article 15(1)  
RPBA 2020 dated 11 July 2022.

In response, by letter dated 11 April 2023 the  
appellant informed the board of its intention not to  
attend the oral proceedings scheduled for 17 April 2023  
and requested that "*a decision be issued on the basis  
of the proceedings to date*".

The board, interpreting the appellant's explicit intention not to attend oral proceedings as a withdrawal of the request for oral proceedings (see Case Law of the Boards of Appeal, 10th Edition, 2022, Chapter III.C.4.3.2) and after reviewing all the appellant's submissions in the light of the decision under appeal, considered that the decision could be made without holding oral proceedings and, hence, cancelled the scheduled oral proceedings.

V. Independent claim 1 of the **main request** reads as follows:

"A process for repairing damaged asphalt in which the damaged area to be repaired is heated using one or more infrared heaters the heating being to a depth of 10 mm to 100 mm from the surface to be repaired wherein the average heating temperature is from 50 to 200°C, and the heating is for from 5 to 20 minutes, once heated, the damaged area is raked and/or scarified, and in which a rejuvenating liquid comprising emulsified oils high in aromatics with a high level of polar compounds is applied to the raked and/or scarified area and the surface is then compacted and allowed to cool and harden for at least one hour characterized in that the heaters (13), (20), (21) comprise a blanket and are heated using LPG supplied through a vaporizer system and are adapted to be moved towards and away from the surface to be repaired."

Independent claim 1 of the **auxiliary request** reads as follows (the feature added compared with claim 1 of the main request is in bold):

"A process for repairing damaged asphalt in which the damaged area to be repaired is heated using one or more

infrared heaters the heating being to a depth of 10 mm to 100 mm from the surface to be repaired wherein the average heating temperature is from 50 to 200°C, and the heating is for from 5 to 20 minutes, once heated, the damaged area is raked and/or scarified, and in which a rejuvenating liquid comprising emulsified oils high in aromatics with a high level of polar compounds is applied to the raked and/or scarified area and the surface is then compacted and allowed to cool and harden for at least one hour characterized in that the heaters (13), (20), (21) comprise a blanket **of Fecralloy** and are heated using LPG supplied through a vaporizer system and are adapted to be moved towards and away from the surface to be repaired."

VI. The following documents considered in the examining proceedings are relevant to the present decision:

D1: WO 00/20689 A  
D2: US 3 625 489 A

The appellant filed the following documents with its statement setting out the grounds of appeal:

A1: Print-out dated 17 February 2020 of a website ([www.nuphalt.com/process/](http://www.nuphalt.com/process/)), 2020, 5 pages  
A2: Print-out of a website entitled "Goodfellow" about Fecralloy®, undated

VII. As far as they are relevant to the decision, the appellant's arguments are provided in the reasons for the decision below.

## Reasons for the Decision

1. The reasons for the decision provided below for the main request and the auxiliary request correspond in substance to those given in the board's communication dated 11 July 2022. They have subsequently not been commented on or contested by the appellant. After reconsidering all the relevant submissions by the appellant, the board saw no reason to change its preliminary assessment of the case.
2. Main request
  - 2.1 The appellant considered that D1 did not disclose the following combination of features of claim 1:
    - (i) the heaters comprise a blanket,
    - (ii) the heaters are heated using LPG,
    - (iii) the LPG is provided through a vaporizer system,  
and
    - (iv) the heaters are adapted to be moved towards and away from the surface to be heated.
  - 2.2 The board cannot find any reason to follow the appellant's view regarding feature (i) since, as put forward in point 1.1 of the examining division's communication dated 31 January 2019, D1 discloses heaters comprising a blanket; see page 3, line 24 ("fibre blanket infrared heater"). This has not been discussed by the appellant.
  - 2.3 Similarly, the board cannot find any reason to follow the appellant's view regarding feature (iv) since, as put forward in the minutes of the telephone conversation with the primary examiner of the examining

division dated 24 September 2019, said feature (iv) *"could also be interpreted that the heaters are simply brought to the place where road repair has to be done, which feature is always present when considering repairing a road using heaters"*, which is inevitably the case with the equipment in D1. This has not been discussed by the appellant.

2.4 Hence, the only distinguishing features of claim 1 over D1 are features (ii) and (iii).

2.5 Technical effects

The appellant refers to A1, a print-out of a website ([www.nuphalt.com/process/](http://www.nuphalt.com/process/)), for alleging technical effects; however, the print-out does not even mention LPG (liquefied petroleum gas) or a vaporizer, so it cannot be used as evidence of a technical effect associated with the distinguishing features.

The appellant also refers to page 4, lines 9 to 11 of the application as originally filed to argue that the claimed invention would be more efficient, compact and lightweight equipment that would enable a faster, quieter and more economic method of repair of a wearing course.

These general technical effects and statements are not actually disclosed as being linked to the distinguishing features. Furthermore, the appellant does not discuss the arguments and reasoning relating to the lack of inventive step as put forward on page 2 of the examining division's communication dated 31 January 2019 regarding features (ii) and (iii) (corresponding to feature (a) in said communication).



Therefore, there does not appear to be any reason to deviate from the examining division's finding that features (ii) and (iii) do not justify an inventive step.

As a consequence, the subject-matter of claim 1 of the main request does not involve an inventive step (Article 56 EPC).

### 3. Auxiliary request

3.1 With respect to claim 1 of the main request, claim 1 of the auxiliary request further comprises the feature whereby the blanket is made of Fecralloy (see point V above).

3.2 The appellant contests the examining division's finding that the added feature would contravene Article 83 EPC because it would relate to a trademark (see point 2 of the communication dated 31 January 2019). In this respect, the appellant relies on A2, a print-out of a website entitled "Goodfellow", providing the chemical formula of Fecralloy®. For the appellant the feature was therefore clearly defined and well known to the skilled person. For this reason, the appellant was of the opinion that it should be allowed.

3.3 The board is not convinced by the appellant's arguments based on the print-out of the "Goodfellow" website since it is undated and, hence, it remains unproven that the information provided on this print-out of a website was available to the skilled person before the priority date of the application (Article 83 EPC).

3.4 In addition, the appellant has not discussed the reasoning put forward in point 2 of the examining

division's communication dated 31 January 2019 relating to the feasibility of using such an alloy, reaching a high-temperature surface and still obtaining the results claimed in claim 1 without damaging the asphalt.

3.5 Furthermore, as the board also put forward in its communication, the products and their composition may evolve over time while the corresponding trademark remains unchanged. Hence, using a trademark induces *de facto* a lack of clarity in the claimed subject-matter, which has to remain unchanged for legal certainty (Article 84 EPC). This has not been discussed by the appellant either.

3.6 As a consequence, the auxiliary request is not allowable.

## Order

### For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



H. Jenney

C. Herberhold

Decision electronically authenticated