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**Datasheet for the decision
of 16 June 2023**

Case Number: T 1380/20 - 3.2.03

Application Number: 13712922.7

Publication Number: 2815028

IPC: E01C13/08

Language of the proceedings: EN

Title of invention:
MIXED TURF

Patent Proprietor:
Sarris, Nikolaos

Opponent:
Dywilan S.A.

Headword:

Relevant legal provisions:
EPC Art. 52(1), 54(3), 87(1)

Keyword:
Novelty - main request (no) - auxiliary request (yes)

Decisions cited:

Catchword:



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Case Number: T 1380/20 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 16 June 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 April 2020 concerning maintenance of the
European Patent No. 2815028 in amended form.**

Composition of the Board:

Chairman B. Miller
Members: M. Olapinski
N. Obrovski

Summary of Facts and Submissions

- I. The appeal was filed by the opponent against the interlocutory decision of the opposition division finding that, on the basis of the main request filed during oral proceedings before the opposition division, the patent in suit met the requirements of the EPC.
- II. Oral proceedings were held before the Board as requested by the appellant.

- III. The requests were as follows.

The appellant (opponent) requested that the decision under appeal be set aside and the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed and the patent be maintained as considered allowable by the opposition division (main request) or, as an auxiliary measure, that the patent be maintained in amended form on the basis of the auxiliary request filed with the reply to the statement of grounds of appeal with amendments to the description filed during the oral proceedings before the Board.

- IV. Independent claim 1 of the main request reads as follows (feature denominations added between []):

"[A] Soil (10) including a mixed turf (1);
[B] said mixed turf (1) comprising:
[B1] a synthetic turf (2),
[B2] natural grass (3) arranged in said synthetic turf (2),
[B1.1] said synthetic turf (2) comprising synthetic filaments (5) suitable to simulate grass blades

[B1.2] and a backing (4)
[B1.2.1] consisting of a membrane supporting said synthetic filaments (5),
[B1.2.2] wherein said backing (4): is on the whole substantially draining and enables transpiration and permits the passage therethrough of the roots of said natural grass (3),
[B1.2.3] is non-biodegradable,
[B1.2.3.a] said soil (10) comprising an upper layer (7) arranged on top of said backing (4),
[B1.2.4] wherein said backing (4) comprises a warp consisting of first yarns (40) having a diameter comprised between 0.3 mm and 3 mm
[B1.2.4.1] arranged on two different levels so as to form a backing (4) with a net-like open-work fabric,
[B1.2.5] and a weft consisting of second yarns (41) having a diameter comprised between 0.1 mm and 1.5 mm,
[B1.1.1] and in that [sic] the synthetic filaments (5) are woven into said backing (4) and are an integral part thereof."

Claim 1 of the auxiliary request differs from claim 1 of the main request in the additional specification "and mainly made up of sand" inserted at the end of feature B1.2.3.a.

V. Reference is made to the following documents:

D1: EP 2 698 460 A1 (based on application EP13177571 filed on 23.07.2013 and claiming priority of 14.08.2012 from PL40039912)

D2: Polish priority application PL40039912 for D1

D2a: Translation of D2 filed during the opposition proceedings

D2a1: Translation of D2 certified by a sworn translator, filed with the grounds for appeal

D3: FR 2 932 196 A1

D4: WO 89/01076 A1

D5: US 2001/007700 A1

D6: WO 99/56523 A1

D7: US 7 943 212 B2

D8: extract from PWN Oxford "Polish-English Dictionary" (2012)

D10: ASTM International Standard F2396-04: "Standard Guide for Construction of High Performance Sand-Based Rootzones for Sports Fields" (published January 2004)

VI. The appellant's arguments can be summarised as follows.

Main request

D1 disclosed all the features of claim 1 and validly claimed priority from D2. As the priority claimed by the patent for the subject-matter of claim 1 was invalid, D1 was prior art under Article 54(3) EPC. Hence, the subject-matter of claim 1 of the main request lacked novelty over D1.

Auxiliary request

D3 to D7 and D10 disclosed sand as the standard main component of the filling layer of hybrid turfs. Taking into account this common general knowledge, the skilled person would have considered that the "filling layer" of D1 was "mainly made up of sand". The subject-matter of claim 1 of the auxiliary request was thus not new either.

VII. The respondent's arguments can be summarised as follows.

Main request

D1 did not disclose feature B1.2.3.a. In addition, the priority claimed for D1 from D2 was not valid. Hence, D1 was not prior art according to Article 54 EPC and was not prejudicial to the novelty of claim 1.

Auxiliary request

D1 did not disclose that the filling layer was mainly made up of sand. Although sand may have been the most common filling material for hybrid turfs, it was not the only option. Hence, sand was not implicitly disclosed in D1 and the subject-matter of claim 1 of the auxiliary request was new.

Reasons for the Decision

1. Main request - novelty

1.1 Disclosure of D1

1.1.1 In the appeal proceedings, it was common ground that D1 discloses features A, B, B1, B2, B1.1, B1.2, B1.2.1, B1.2.2, B1.2.3, B1.2.4, B1.2.4.1, B1.2.5 and B1.1.1. More specifically, D1 discloses:

[A] Soil including a mixed turf (1) ("*mat for a hybrid turf*", paragraphs [0001], [0020]; "*ready-to-install hybrid turf stripes*" with a "*filling layer with natural grass*", paragraph [0021]);

[B] said mixed turf comprising:

[B1] a synthetic turf ("artificial grass", paragraph [0001], "synthetic" fibres, paragraph [0020]),

[B2] natural grass arranged in said synthetic turf (although D1 relates to a "mat for a hybrid turf", "through which roots of natural grass can easily grow", paragraph [0020], this implicitly also discloses the resulting hybrid turf),

[B1.1] said synthetic turf comprising synthetic filaments suitable to simulate grass blades ("pile forming artificial grass", paragraph [0022]; "polyethylene and/or polypropylene", paragraph [0024])

[B1.2] and a backing ("woven [pile] fabric", paragraphs [0020] and [0022])

[B1.2.1] consisting of a membrane supporting said synthetic filaments (paragraph [0022], figures 1 and 2),

[B1.2.2] wherein said backing: is on the whole substantially draining and enables transpiration and permits the passage therethrough of the roots of said natural grass (paragraphs [0001], [0020] and [0029]),

[B1.2.3] is non-biodegradable (preferred embodiments with "polyethylene", "polypropylene", "polyester", paragraphs [0015], [0016] and [0023] to [0025]),

~~[B1.2.3.a] said soil (10) comprising an upper layer (7) arranged on top of said backing (4),~~

[B1.2.4] wherein said backing comprises a warp (2) consisting of first yarns having a diameter comprised between 0.3 mm and 3 mm (for polypropylene, paragraph [0016])

[B1.2.4.1] arranged on two different levels (Figures 1 and 2) so as to form a backing with a net-like open-work (paragraph [0029], "loose structure") fabric,

[B1.2.5] and a weft (5) consisting of second yarns having a diameter comprised between 0.1 mm and 1.5 mm (paragraphs [0015]),

[B1.1.1] and wherein the synthetic filaments are woven into said backing and are an integral part thereof (paragraph [0022]; figures 1 and 2).

- 1.1.2 The only contentious issue between the parties was whether the "filling layer with natural grass" in D1 (paragraph [0021]) represented an "upper layer arranged on top of said backing" of the soil as required by feature B1.2.3.a of claim 1.

The respondent submitted that paragraph [0021] of D1 did not specify any properties of the "filling layer". The term "filling layer" in itself did not imply a relative "upper" position with respect to the mat. The "filling layer" could also be a "lower" layer below the mat. In view of paragraphs [0020] and [0032] of D1, the roots of natural grass sown on top of the mat could grow through the base into this lower layer.

The appellant argued that the term "filling layer" implied filling a certain space. In the context of D1 it had to be understood as filling the mat structure. Hence, the term "filling layer" already implied that it was an upper layer arranged on top of the backing of the mat. The respondent's interpretation that the "filling layer" could be below the mat without "filling" anything was as artificial as assuming that paragraphs [0020] and [0032] referred to the "roots of natural grass" sown on top of the mat without any substrate.

- 1.1.3 The Board agrees with the appellant's view that the meaning of "filling" in the term "filling layer" in the context of D1 refers to the filling of the mat structure, that is, the spaces formed between the base and the artificial grass leaves. D1 does not disclose

any other space that could be "filled" - the mat is the only available object of reference to be filled. Hence, the "filling layer" mentioned in paragraph [0021] of D1 is an upper layer arranged on top of the base of the mat. As "roots of natural grass" grow through the base, it follows that the natural grass initially grows in the filling layer. The Board also concurs with the appellant that the skilled person would have understood that the filling layer comprises not only the natural grass itself but also a filling material serving as growth substrate. The filling layer can thus be considered a part of the "soil comprising a mixed turf" of feature A.

This understanding is also confirmed by the introductory section of D1. According to paragraph [0005] of D1, in a prior art hybrid turf the artificial grass blades "are kept substantially vertical by granular filling material" and the turf is "completed by living vegetable material put into the granular material". Although this passage relates to the prior art, it clarifies that in the context of D1 "filling" refers to the spaces between the artificial grass on top of the base. In addition, it explains that filling the spaces between the artificial grass leaves is required for the stability of the artificial grass and that the filling layer comprises a filling material through which the natural grass grows.

Accordingly, D1 discloses that the "soil comprises" an "upper layer arranged on top of said backing" (feature B1.2.3a).

- 1.1.4 Hence, D1 discloses all the features of claim 1, the subject-matter of which is thus known from D1.

1.2 Priority of D1

1.2.1 It is common ground that the priority of the patent in suit is not valid for the subject-matter of claim 1. Hence, the effective filing date for the subject-matter of claim 1 is 12 February 2013.

1.2.2 D1, filed on 23 July 2013, claims priority from D2 filed on 14 August 2012.

1.2.3 The priority claim of D1 is valid only if D2 discloses the same invention (Article 87(1) EPC), in particular with regard to the subject-matter of D1 that was found to disclose the subject-matter of claim 1.

1.2.4 It was common ground that the subject-matter disclosed in paragraphs [0001, [0015], [0016], [0022] to [0025], and [0032] and figure 2 of D1, as well as in the first sentence of paragraph [0029] of D1, is also disclosed in D2.

1.2.5 However, according to the respondent, D2 did not directly and unambiguously disclose the subject-matter in paragraphs [0020] and [0021] of D1 which had been cited against feature B1.2.3.a of claim 1. In their view, the disclosures of D1 and D2 did not correspond in the following three aspects.

a) The term "warstwą zasypową" in D2 did not disclose a "filling layer" as disclosed in paragraph [0021] of D1.

b) The wording of D2 (according to translation D2a/D2a1) "with the charging/filling layer grown therethrough by natural grass" did not correspond to the disclosure "even with the filling layer with natural grass" in paragraph [0021] of D1.

c) The wording of D2 (according to translation D2a/D2a1) "allowing rapid growth therethrough by natural grass initially embedded in a filling layer" was not found in the corresponding paragraph [0020] of D1.

As a consequence of these discrepancies, the priority of D1 was invalid for the disclosure therein that corresponded to feature B1.2.3.a of claim 1.

Aspects a), b) and c) are dealt with individually in the following three subsections.

1.2.6 Aspect a): the term "warstwą zasypową" in D2

The respondent submitted that the terms "warstwie zasypowej" (page 2, line 9) and "warstwą zasypową" (page 2, line 16) in D2 had to be translated as "backfill layer". A backfill layer (or charging layer) was a layer of material that had first been removed and was then reinserted into a given location as a filler. It thus did not correspond to a more generic "filling layer" as used in paragraph [0021] of D1. A "filling layer" rather corresponded to the Polish term "warstwą wypełniająca". Hence, D2 did not directly and unambiguously disclose the "filling layer" in paragraph [0021] of D1.

These arguments are not convincing.

Both parties referred to the dictionary D8 for the translation of the Polish root verb "zasypywać" into English. The dictionary discloses several slightly different meanings, the first of which is "to fill in". The meaning referred to by the respondent, i.e. "to fill the hole back in", does not follow from the root

verb "zasypywać" itself but from the additional term "powrotem" in the corresponding phrase in D8. Accordingly, D8 supports the contention that "zasypywać" is to be understood as "to fill in".

Furthermore, whether the layer is "filled into", "filled back into" or "charges" the mat does not appear to result in different subject-matters in the context of D1, D2 or claim 1. A "filling layer" is always made up of material that has been taken from somewhere else and is filled "back" into (or "charges") a certain space.

Moreover, the terms "warstwie zasypowej" and "zasypową warstwę" already appear in the introductory section of D2 on page 1, lines 16 to 22 (which corresponds to the passage of paragraph [0005] in D1) together with the expression "materiału wypełniającego". These terms are translated as "filling layer" and "filling material", respectively, both in D2a (page 2, lines 10 to 14) and D2a1 (page 2, lines 15 to 20). Accordingly, the Polish original document D2 already uses "zasypywać" and "wypełniać" interchangeably. Both terms refer to a layer of material that is "filled in" between the artificial grass leaves above the base of the mat.

Hence, the term "warstwą zasypową" on page 2, line 16, in D2 directly and unambiguously discloses a "filling layer" in the same sense as in paragraph [0021] of D1.

1.2.7 Aspect b): "filling layer with natural grass" in D1

D2 discloses (according to the translation D2a1, page 3, lines 15 to 17) that "High elasticity of the mat, also with the filling layer grown therethrough by the

natural grass, allows rolling up and transportation of ready turf bands".

According to the respondent, the text between commas did not correspond to the expression in paragraph [0021] of D1: "even with the filling layer with natural grass".

The Board considers that the expression "with the filling layer grown therethrough by the natural grass" means that the natural grass has grown through the filling layer. It is true that the corresponding wording of D1, disclosing a filling layer "with natural grass", - when read in isolation - could be considered more generic in that it neither specifies where the natural grass has grown nor that the filling layer consists of more than the natural grass itself.

However, taking into account the whole disclosure of D1 as set out above under reasons 1.1.2, D1 discloses that the filling layer is "an upper layer arranged on top of said backing" and comprises a substrate through which the natural grass grows. Hence, D1 as a whole discloses a "filling layer grown therethrough by the natural grass" as defined in D2.

1.2.8 Aspect c): "through which roots of natural grass can easily grow" in D1

D1 discloses in paragraph [0020] that the mat comprises a base "through which roots of natural grass can easily grow" (emphasis added by the Board), implying that the natural grass must grow through the mat from above the base. The corresponding paragraph in priority application D2, however, merely discloses (according to the translation D2a1, page 3, lines 5 to 8) that the

mat comprises a "fabric [...] allowing rapid growth therethrough by natural grass initially embedded in a filling layer".

According to the respondent, D2 left it open whether the roots or leaves of the natural grass grew through the fabric. The filling layer in D2 could thus be a layer below the mat in which natural grass had been "initially embedded" before placing the mat on top of it. Accordingly, D2 did not unambiguously disclose an "upper layer arranged on top of said backing" and could thus not validly serve as priority for the subject-matter of claim 1 in D1.

However, as set out above in reasons 1.2.6, the term "filling layer" already appears in the introductory section of D2 relating to an item of prior art (page 1, lines 11 to 22). Like the corresponding passage in paragraph [0005] of D1 (see reasons 1.1.2 above), it discloses that the artificial grass blades in the prior art hybrid turf "are kept in at right angle position to the support by the filling layer being granular filling material" and embedding "a natural vegetal material" (see D2a1, page 2, lines 15 to 20). Although relating to the prior art, this disclosure clarifies that "filling" refers to the spaces between the artificial grass on top of the base of the mat. In addition, it explains that such a filling layer is required for the stability of the artificial grass and comprises a filling material through which the natural grass grows. Due to this antecedent definition of a "filling layer", the person skilled in the art understands the identical term on page 2, lines 15 to 17, of D2 in the same way.

Accordingly, D2 implicitly discloses that the "filling layer" in the passages corresponding to paragraphs [0020] and [0021] of D1 is an "upper layer" of material that is "filled in" between the artificial grass leaves on top of the mat and in which natural grass grows, such that its roots, not its leaves, grow through the base of the mat.

1.2.9 It follows from the above that D2 discloses the same subject-matter that was found to disclose all the features of claim 1 in D1 above (reasons 1.1). Hence, the priority claimed for D1 from D2 is valid for this subject-matter. Consequently, D1 is prior art according to Article 54(3) EPC for the subject-matter of claim 1.

1.3 Accordingly, the subject-matter of claim 1 of the main request lacks novelty over D1. The main request is thus not allowable.

2. Auxiliary request - novelty

2.1 Claim 1 of the auxiliary request differs from claim 1 of the main request in that it additionally requires the upper layer to be "mainly made up of sand".

2.2 The parties agreed that D1 does not explicitly disclose the type of material used for the filling layer.

2.3 According to the appellant, sand was generally known as the standard main component of the filling material in hybrid turf systems. It was disclosed as the first and main component in each of documents D3 to D7 as well as in the ASTM standard (D10) according to which sand was "commonly used" and "the primary construction material" for sports turf rootzone systems. In the appellant's view, the skilled person would not think of anything

else than sand for the filling layer (and that was the reason why it was not explicitly mentioned in D1). According to the appellant, there were only a few possibilities and sand was always disclosed as the main choice. In such a situation, the term "filling layer" in D1 had to be interpreted in view of the skilled person's common general knowledge as being "mainly made up of sand".

- 2.4 In the Board's view, and as conceded by the appellant, there are alternatives to sand as the filling material for the upper layer, albeit less commonly used and of smaller importance (appellant's letter of 16 April 2023, page 4/5, third paragraph). For example, D3 discloses several alternative materials such as pozzolan, incinerator bottom ash, soil or rubber (page 1, lines 3 to 5). D7 even discloses a filling material consisting entirely of rubber granules (column 2, lines 53 to 54). Accordingly, sand is not the only possible material to be used as filling material in D1. For these reasons, the Board does not concur with the appellant's assertion that the skilled person would not think of anything other than sand as the material for the filling layer. It cannot thus be argued that D1 implicitly disclosed sand as the main material of the filling layer.

According to established case law, for concluding lack of novelty, there must be a direct and unambiguous, implicit or explicit disclosure in the prior art which would inevitably lead to subject-matter falling within the scope of the claim (Case Law of the Boards of Appeal, 10th edition, 2022, I.C.4.1). This is not the case if multiple alternatives for the filling material exist. Whether or not one of them - such as sand - may have been the most common option is immaterial in this

regard. The selection of a possibly obvious choice is rather a matter of inventive step, for which D1, however, may not be considered (Article 56 EPC, second sentence).

2.5 Accordingly, the subject-matter of claim 1 of the auxiliary request is novel over D1.

2.6 No further objections were raised against the auxiliary request. The Board is also satisfied that the description as amended during the oral proceedings before the Board fulfils the requirements of the EPC, and the appellant had no objections against it, either.

2.7 Hence, the auxiliary request is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:
 - claims 1-12 according to the auxiliary request filed with the reply to the statement of grounds of appeal
 - description pages 1-10 and 12-17 as filed during the oral proceedings before the Opposition Division, and page 11 as filed during the oral proceedings before the Board
 - drawings figures 1-4 of the patent specification

The Registrar:

The Chairman:



C. Spira

B. Miller

Decision electronically authenticated