

Veröffentlichung im Amtsblatt	Ja/Nein
Publication in the Official Journal	Yes/No
Publication au Journal Officiel	Oui/Non

Aktenzeichen / Case Number / N^o du recours : T 633/89 - 3.2.1

Anmeldenummer / Filing No / N^o de la demande : 86 906 895.7

Veröffentlichungs-Nr. / Publication No / N^o de la publication : WO87/03259

Bezeichnung der Erfindung: Improvements in off-the-road vehicles

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : B62D 33/06

ENTSCHEIDUNG / DECISION

vom / of / du 30 July 1990

Anmelder / Applicant / Demandeur : GKN Sankey Limited

Patentinhaber / Proprietor of the patent /

Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Art. 56, 96(2), Rule 67

Schlagwort / Keyword / Mot clé : "Inventive step" (yes)
"Procedural violation" (no)

Leitsatz / Headnote / Sommaire



Case Number : T 633/89 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 30 July 1990

Appellant : GKN Sankey Ltd
P.O. Box 20
Hadley Castle Works
Telford, Shropshire
TF1 4RE (GB)

Representative : Thorpe, Brian
Guest, Keen and Nettlefolds plc
Group Patents and Licensing Department
P.O. Box 55
Ipsley House
Ipsley Church Lane
Redditch
Worcestershire B98 0TL (GB)

Decision under appeal : Decision of Examining Division 079
of the European Patent Office dated
28 April 1989 refusing European
patent application No. 86 906 895.7
pursuant to Article 97(1) EPC

Composition of the Board :

Chairman : F. Gumbel
Members : P. Alting van Geusau
J.-C. Saisset

Summary of Facts and Submissions

- I. European patent application No. 86 906 895.7, filed as International application PCT/GB86/00722 on 26 November 1986 and published under No. WO87/03259 on 4 June 1987 was refused by a decision of the Examining Division dated 28 April 1989.

- II. The decision was based on Claims 1-5 as originally filed and Claims 6-9 as submitted with letter dated 23 December 1988. The reason for the refusal was that the subject-matter of Claim 1 lacked an inventive step having regard to the disclosures of the documents US-B-463 671 (D1) and US-A-3 682 464 (D2).

- III. An appeal was lodged against this decision on 14 June 1989 together with payment of the appeal fee.

The Statement of Grounds of Appeal was submitted on 6 July 1989.

The arguments submitted to the Board by the Appellant can be summarised as follows:

- (1) The Examining Division was not justified in submitting the application for a decision to refusal since to do so was contrary to the "Guidelines for Examination in the EPO". In particular the Examining Division was wrong in not accepting that the applicants had made a real effort to deal with the objections raised in the only communication, in considering that there was little prospect of progress towards grant and in failing to take proper account of the applicant's observations and to warn the applicant that refusal was possible. In view of these clear failures by the Examining Division which,

in the Appellant's view constitute a substantial procedural violation (Article 96(2) EPC), the Appellant requests that the appeal fee be reimbursed.

- (2) The Decision in its discussion of D1 and of the applicant's arguments contains serious factual errors, omissions and incorrect conclusions. It is considered that these errors and omissions were material in leading to refusal and that consequently the inventive step of the subject-matter of Claim 1 has not been properly considered. Also on this ground the Appellant requests that the appeal fee be refunded.
- (3) It had been admitted by the Examiner in relation to Claim 7 that the application contains patentable subject-matter. Since patentable subject-matter is present, in the opinion of the Appellant a patent should have been granted.

IV. In a telephone call dated 13 February 1990 the Rapporteur informed the Appellant that in accordance with the Board of Appeal decisions T 162/82, OJ EPO 1987, 533 and T 42/84, OJ EPO 1988, 251 a failure to follow the Guidelines cannot be regarded as a procedural violation and therefore no basis for a refund of the appeal fee appeared to be present.

Some amendments were suggested to bring the application in order for grant.

The Appellant was further requested to reconsider his auxiliary request for oral proceedings, since the application could be forwarded for grant straight away if such request were withdrawn.

- V. With his response dated 2 April 1990 the Appellant filed new Claims 1 to 9 and a new description (pages 1 to 7) and, by implication, now requests grant of a patent on the basis of these documents and the original drawings.

The auxiliary request for oral proceedings was withdrawn on the condition that the application was forwarded for grant.

The Appellant maintained his request for return of the appeal fee because in his opinion the Examining Division has made serious procedural errors such that reimbursement of the appeal fee is equitable.

- VI. The current Claim 1 reads as follows:

"1. An off-the-road vehicle comprising a cab (10) and a chassis (12) wherein the cab is suspended relative to the chassis, characterised in that the cab (10) is pivotally mounted on the chassis (12) about a pivot axis (18) extending transversely of the cab at the forward end thereof, the pivot axis being located between the front and rear wheels (16 and 14) of the vehicle and in a horizontal plane in or adjacent to a horizontal plane containing the centre of gravity of the cab, the cab also being connected to the vehicle chassis by compressible gas suspension means (22) remote from the forward end of the cab.

Reasons for the Decision

1. The appeal is admissible.

2. Amendments

2.1 The current Claims 1 to 9 represent, in substance, the respective original Claims 1 to 9. The amendments made to the description are only for the purpose of indicating the nearest prior art in accordance with Rule 27(1)(c) EPC.

Therefore the current version of the application does not contravene Art. 123(2) EPC.

3. Novelty

3.1 The nearest prior art relating to an off-the-road vehicle is in the Board's view disclosed in US-B-463 671 (D1), which discloses an off-the-road vehicle comprising the features of the precharacterising part of Claim 1. The subject-matter of Claim 1 differs from what is disclosed in D1 by its characterising features and is therefore deemed novel (Art. 54 EPC).

3.2 Contrary to the opinion expressed by the Examining Division the mounting of the cab in D1 by the mounting means 14,16 cannot, in the Board's view, be regarded as a pivotable mounting in the sense of Claim 1.

Although small angular movements of the cab are not excluded, because of the resilient four-point mounting of the cab the movement of the cab under operating conditions is considered to be a movement involving all four mounting points rather than that a preference for pivoting about the shafts 96 and 98 of the mounting means 14,16 would occur. The location of the centre of gravity of the cab

referred to by the Examining Division might, in the Board's opinion, influence the amount of movement in the mounting points when compared with each other but would not change the vibratory character of the movements in all the mounting means.

In view of the conclusion that D1 does not include a "pivot axis" within the meaning of Claim 1 the subsequent features in Claim 1 defining the position of the pivot axis are, as a consequence, also not disclosed in D1.

Although, further, D1 shows mounting means of the cab remote from the forward end of the cab (mounting means 18,20) it does not show compressible gas suspension means as defined in the characterising part of Claim 1 and therefore Claim 1, in the Board's opinion, also does not in this respect give rise to objections on grounds of Rule 29(1) EPC.

4. Inventive step

4.1 Starting from the disclosure of the above cited nearest prior art the characterising features of Claim 1 under consideration lead to the Board's conviction to a better ride comfort for the driver of the off-the-road vehicle.

4.2 The general objective problem to be solved by the present invention relates therefore to the provision of an off-the-road vehicle of the type referred to in the first part of Claim 1 with better riding comfort.

4.3 In the Board's opinion, the above cited nearest prior art in D1 does not give a lead to the characterising features of Claim 1, in particular since D1 does not disclose the idea of a pivotally mounting of the cab.

4.4 In this respect another document, DE-A-1 780 211 (D2) is considered to be of more relevance because a pivotally mounted cab is shown in this prior art for the purpose of increased riding comfort (see page 4, lines 21,22).

The embodiment of Figures 3 and 4 of D2 shows a vehicle comprising a cab and a chassis wherein the cab is pivotally mounted on the chassis (2) about a pivot axis (1) extending transversely of the cab at the forward end thereof, the cab also being connected to the vehicle chassis by compressible suspension means (8) remote from the forward end of the cab.

The vehicle according to Claim 1 of the present application differs from this known vehicle in that

- (a) the vehicle is an off-the-road vehicle,
- (b) the pivot axis is located between the front and rear wheels of the vehicle,
- (c) the pivot axis lies in a horizontal plane in or adjacent to a horizontal plane containing the centre of gravity of the cab and
- (d) the suspension means are gas suspension means.

4.5 Considering these differences and whether D2 could give a lead to adapt the cab suspension of D1 to include all the features of Claim 1 under consideration, the Board notes that feature (a) is known from D1 and that with respect to feature (b), there is stated on page 3, first paragraph of the description of D2 that the pivot should preferably be mounted away from the front of the car, thus consequently be mounted between the front and rear wheels.

Further, since D2 already shows compressible suspension means for the support of the cab on the chassis, the use of compressible gas suspension means (feature (a)) is considered to relate to an obvious alternative of the known helical or torsion bar springs, these gas suspension means being readily available.

The features (a), (b) and (d) cannot therefore, in the Board's opinion, be considered to have inventive significance when judged in themselves.

However, feature (c) does not have an antecedent in the documents D1 and D2 or in any of the other cited documents nor is there any reference to the effect obtained. This effect relates to the prevention of deflection of the cab under braking or accelerating which is a further comfort aspect (see page 5, lines 27, 28 of the original description of the application).

Therefore, irrespective of possible combinatory interactions of feature (c) with other features of Claim 1 at least feature (c) itself cannot be regarded as obvious in the combination of features of Claim 1 and therefore the subject-matter of Claim 1 is considered to comprise an inventive step.

5. It follows that Claim 1 is acceptable under Art. 52(1) and 56 EPC. The same applies to dependent Claims 2 to 9 which concern particular embodiments of the invention according to independent Claim 1 (Rule 29(3) EPC).
6. The description and the drawings are in agreement with the actual wording and scope of the claims. The description also complies with Rule 27(1)(c) and 27(1)(d) EPC. Hence these documents are in principle suitable for the grant of a patent.

7. Request for refund of the appeal fee

7.1 To support his view that a substantial procedural error has been made, the Appellant referred in his arguments contained in the paragraph "Ground 1" of the Statement of Grounds of Appeal to the "Guidelines for Examination in the EPO". He considers that he is entitled to expect that the Examiner should follow the Guidelines.

However, the Guidelines do not have the binding authority of a legal text such as the EPC, which fact is expressly stated in the General Introduction, paragraph 1.2 of the Guidelines.

Therefore, this argumentation cannot be considered to constitute a valid ground for substantiating the alleged procedural error.

7.2 In his letter dated 2 April 1990 the Appellant further expressed the view that Art. 96(2) EPC has been breached since as stated in the Board of Appeal decision T 162/82 (OJ EPO 1987, 533) "further invitations to file observations after the first communication are required if there is a reasonable prospect that further discussion with the applicant could lead to reconciling conflicting opinions of the applicant and the Examining Division as to the allowability of the application". According to the Appellant, there is no doubt that such circumstances existed in the present case since in view of the opinion expressed in the telephone call dated 13 February 1990, the claims have obviously been accepted by the present Appeal Board so there was clearly a reasonable prospect of allowability.

- 7.3 The Board cannot accept the above argument which is based on the general consideration that since the claims have subsequently been accepted by the present Board, the Examining Division should have sent a further invitation to file observations.

In accordance with the above cited decision T 162/82 (paragraph 12) the expression "as often as necessary" in Art. 96(2) EPC indicates that the Examining Division has a discretion which has to be exercised objectively in the light of the circumstances of each case. Further, in accordance with established jurisprudence of the Boards of Appeal, neither Art. 113(1) nor Art. 96(2) EPC requires that the applicant be given a repeated opportunity to comment on the argumentation of the Examining Division as long as the decisive objection against the grant of a patent remains the same (see also T 161/82, OJ EPO 1984, 551, point 11).

- 7.4 Although in the present case in the Board's view for the reasons set out above (point 3.2) the interpretation of the prior art disclosed in D1 was in error, this error by the Examining Division was an error of judgment and cannot be construed as a procedural violation of an Article of the EPC nor of the Implementing Regulations (see also paragraph 15 of the Decision T 162/82).

Therefore, when the Examining Division decided against the present application the decisive objection remained the same so that also no objections on grounds of Art. 113(1) EPC apply in the present case. A different matter is whether the Appellant was fairly treated by the Examining Division and whether the procedure chosen was in agreement with the Guidelines. However, these are issues which do not fall within the jurisdiction of the Board.

7.5 The decision of the Board of Appeal No. T 42/84 (see item 9 of this Decision) (OJ EPO 1988, 251) also makes it clear that a failure to follow the Guidelines is to be regarded as a substantial procedural violation only if it constitutes a violation of a Rule or principle of procedure governed by an Article of the EPC or one of the Implementing Regulations which, as shown above has not occurred in the present case.

7.6 In view of the above considerations the Board comes to the conclusion that the proceedings before the Examining Division did not in the present case suffer from a violation of a provision or principle of procedure in accordance with the EPC or its Implementing Regulations. Therefore, in the Board's judgment, there is no basis for a reimbursement of the appeal fee under 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 grant a patent on the basis of the following documents:

Claims: 1 to 9 filed on 6 April 1990;

Description: pages 1 to 7 filed on 6 April 1990,
(with corrections (Rule 88 EPC) of typing
errors; on page 2, line 1 "can" should read
"cab" and page 3, line 30 "supression"
should read "suppression");

Drawings: original drawing page 1/1.

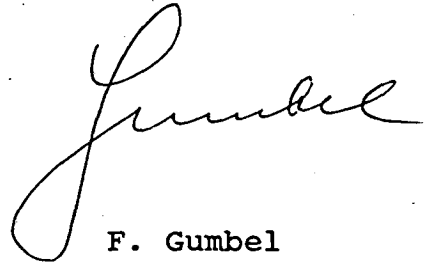
3. The request for reimbursement of the appeal fee is rejected.

The Registrar:



S. Fabiani

The Chairman:



F. Gumbel