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D E C I S I O N
of 14 July 1999

Case Number: T 0006/98 - 3.4.2

Application Number: 90101424.1

Publication Number: 0383068

IPC: G01M 17/00

Language of the proceedings: EN

Title of invention:

Bench for testing vehicular driving performance

Patentee:

Kabushiki Kaisha Meidensha

Opponent:

Carl Schenck AG

Headword:

-

Relevant legal provisions:

EPC Art. 54(3), 56, 104

Keyword:

"Claim 1 - novelty (confirmed)"

"Claim 1 - inventive step (confirmed)"

"Oral proceedings - different apportionment of costs (no)"

Decisions cited:

-

Catchword:

-



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Boards of Appeal

Chambres de recours

Case Number: T 0006/98 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 14 July 1999

Appellant: Carl Schenck AG
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64293 Darmstadt (DE)

Representative: Behrens, Helmut, Dipl.-Ing.
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Respondent: Kabushiki Kaisha Meidensha
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 29 October 1997
revoking European patent No. 0 383 068 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: E. Turrini
Members: M. A. Rayner
M. Lewenton

Summary of Facts and Submissions

I. Notice of appeal was filed against the decision of the opposition division rejecting the opposition against European patent No. 383 068 (application No. 90 101 424.1). The respondent is proprietor of the patent.

II. In the opposition proceedings, reference was made, inter alia, to the following documents as prior art:

D2: US-A-4 344 324

D3: EP-A-0 338 112

III. In the decision, the opposition division reasoned as follows:

Both document D2 and document D3 concern test apparatus employing a hydrodynamic bearing and disclose separate means for driving a vehicle wheel in addition to means for driving a drum supporting an endless belt. However, they do not disclose means for measuring driving torque exerted on the belt by the driving wheel.

Document D3 is comprised in the state of the art by virtue of Article 54(3) EPC and is therefore not to be considered in deciding whether there has been an inventive step. According to document D2, the endless belt is mainly driven by one of the drums even when the wheel is driven by a separate motor so that uniform stress is present in the endless belt. However, if the belt were to be driven by the vehicle wheel, then non-uniform stresses would be generated and the skilled

person would have expected this to destroy the fluid layer of the hydrodynamic bearing. The opposition division therefore came to the conclusion that the skilled person would not have arrived in an obvious manner to the apparatus according to claim 1, wherein the hydrodynamic support system is used in combination with the belt driven by vehicle wheel(s).

- IV. In the notice of appeal the appellant (opponent) requested that the decision of the opposition division be set aside, that the patent be revoked in its entirety and on an auxiliary basis oral proceedings. In the reply to the subsequent statement setting out the grounds of appeal, the respondent requested dismissal of the appeal in its entirety and on an auxiliary basis oral proceedings, for which refunding of costs was requested.
- V. In the annex to its summons to attend oral proceedings, the appeal board expressed its provisional opinion that the appellant had not identified where all of the features of claim 1 were known from D3 and that it seemed doubtful if the submissions of the appellant called into question the view of the respondent supporting inventive step. The board requested that any further observations from the parties be filed at least one month in advance of the proceedings. In addition, the board indicated that it had not identified any abuse of procedure which might occasion any apportionment of costs different to the parties bearing their own.
- VI. More than one month before the date scheduled for oral proceedings, the respondent filed eight auxiliary

requests concerning differing claim versions. Seven days before the date appointed for oral proceedings, the appellant notified the board by facsimile of its intention not to attend the oral proceedings. The respondent maintained its request for oral proceedings only if the board were not to maintain the patent as granted. The appeal board then informed the parties that the oral proceedings would take place as scheduled and the decision to attend was up to the parties.

VII. Independent claim 1 of the patent specification is worded as follows:

A bench testing apparatus for an automotive vehicle, comprising at least one rotary belt assembly including a pair of rotary drums (11,12) arranged in parallel and spaced apart relationship to each other, a metallic endless belt (13) extending over said drums (11,12) and wrapped therearound, and a supporting structure (15) disposed at a tread mounting section of said belt (13) and oriented between said drums (11,12), said tread mounting section oriented for receiving a vehicular wheel (30) tread for forming a testing surface to receive the driving torque of said vehicular wheel (30) and wherein a dummy load for simulating vehicular travelling resistance is provided associated with at least one of said drums (11,12),

and

means for measuring driving torque exerted on said belt (13) via a vehicular driving wheel (30), characterized in that said supporting structure (15) includes a rigid and stationary support base (16) and a non-compressible fluid layer (21) formed between said supporting base (15) and said belt (13) for acting as a hydrodynamic

bearing for said belt.

VIII. The arguments of the appellant can be summarised as follows.

The skilled person knows from document D3 that he can arrange a hydrodynamic bearing between the drums supporting an endless drive belt. Furthermore the skilled person derives from document D3 that driving takes place via a drum or a vehicle wheel itself. Since the principles of construction and function of a bench testing apparatus are known to a skilled person by virtue of his basic knowledge, he also knows that sensors for measuring the drive torque must be arranged on the apparatus. For this reason, the disclosure of document D3 deprives the subject matter of claim 1 of novelty. Moreover, the skilled person can also derive from document D2 that in a tyre testing apparatus with an endless belt running around drums and carrying a vehicle wheel, drive takes place via drive drums or the wheel itself. Document D2 also discloses that a fluid film supports the belt under the wheel carrying part thereof. Since the introduction to the specification mentions tyre testing arrangements and flat belt road simulators for the entire vehicle, it is clear to the skilled person to use the arrangement of document D2 for vehicles, so no inventive step can be seen therein. Thus the subject of the patent in dispute is obvious and does not involve an inventive step.

IX. The arguments of the respondent can be summarised as follows.

Documents D2 and D3 disclose tyre testing apparatus

whereas claim 1 of the patent is directed to bench testing apparatus for an automotive vehicle. Since, for example, no means for measuring driving torque exerted on said belt via a vehicular driving wheel is disclosed in document D3, the subject matter of claim 1 is novel with respect to the disclosure of document D3.

According to document D2, the tyre can be additionally driven by a separate motor, but this is for a slippage test. The belt is driven mainly by the drums and not by the tyre. Document D2 naturally fails to disclose means for measuring the driving torque exerted on the belt by the wheel since it is not driven by the wheel. Driving the belt by the wheel and at the same time applying a dummy load causes non-uniform stress in the belt and the skilled person would have expected the fluid layer of the hydrodynamic bearing to be destroyed under these conditions. Therefore the subject matter of claim 1 involves an inventive step over document D2.

The appellant submitted no new arguments beyond those which had been fully discussed before the first instance and had given a very late notification that he would not attend the oral proceedings. This notification was so late that preparation for the oral proceedings had already had to be put in hand by the respondent and its representative. Accordingly, the behaviour of the appellant justified a different apportionment of costs as mentioned in Article 104, which was therefore requested.

IX. At the end of the oral proceedings, the appeal board gave its decision.

Reasons for the Decision

1. *Admissibility*

The appeal complies with the provisions mentioned in Rule 65(1) EPC and is therefore admissible.

Main request

2. *Amendments - Article 123(2) and (3) EPC*

- 2.1 Claim 1 results from a rearrangement of the features of claim 1 as filed and is the same as the granted claim. Therefore, the board is satisfied that the requirements of Articles 123(2) and (3) are met.

3. *Novelty - Article 54 EPC*

- 3.1 The board has not found any disclosure for example of means for measuring the driving torque in document D3 and nor has the appellant identified where such means can be found in document D3 itself. Since this means is not clearly and unambiguously derivable from document D3 by the skilled person, the board agrees with the respondent that the subject matter of claim 1 is novel over the disclosure of document D3.

- 3.2 Document D2 also fails to disclose any means for measuring the driving torque so that the board agrees with the respondent that subject matter of claim 1 is novel over the disclosure of document D2.

4. *Inventive Step - Article 56 EPC*

4.1 Since document D3 is comprised in the state of the art by virtue of Article 54(3), it is according to Article 56 EPC not to be considered in deciding whether there has been any inventive step.

4.2 According to the teaching of document D2, the belt is driven by the motor (see column 4, lines 17 to 29). Document D2 discloses further that the tyre also may be driven with a separate motor (see column 9, lines 34 and 35). Therefore, the board concludes that whether or not the wheel (tyre) is driven, it is fundamental to the teaching of document D2 that the belt is driven by the motor. This conclusion applies even should the tyre testing device be used for a vehicle as submitted by the appellant. Accordingly, provision of a means for measuring driving torque exerted on the belt by the wheel is neither appropriate nor necessary because the driving of the belt itself masks the driving torque interaction between the wheel and the belt.

4.3 In the absence of any evidence to the contrary, the board concurs with the respondent that driving of the belt by the vehicle wheel causes non-uniform stress conditions which would have been considered by the skilled person as too great for a hydrodynamic bearing to bear. In particular, the skilled person would not have learned anything to the contrary from the use of the hydrodynamic bearing known from document D2, because he would have seen that more uniform stresses are applied according to its teaching because the belt is itself driven.

4.4 Accordingly, since the board sees no reason for the skilled person to have believed the hydrodynamic

bearing known from document D2 could be used where means is provided for measuring driving torque exerted on the belt by the wheel according to claim 1, it considers the subject matter of this claim to involve an inventive step within the meaning of Article 56 EPC.

Auxiliary requests

Since the subject matter of claim 1 according to the main request involves an inventive step, no consideration of the eight auxiliary requests of the respondent is necessary.

5. *Apportionment of costs*

5.1 Article 104(1) EPC provides for each party to the proceedings meeting the costs it has incurred. Any departure from this principle for reasons of equity requires special circumstances, such as costs being culpably incurred owing to improper behaviour or abuse of the proceedings. Contrary to the argument of the respondent, an abuse cannot be based on the fact that the problems to be discussed in oral proceedings had already been dealt with in the proceedings before the opposition division because a party of the opinion that a decision of the division is wrong is entitled to file an appeal according to the first sentence of Article 107 EPC and also to request oral proceedings according to Article 116(1) EPC with a view to trying to convince the board that its appeal has to be allowed.

5.2 When the oral proceedings were appointed, both parties in the present case had an opportunity to consider in

relation to their respective positions the, hitherto unknown to them, preliminary non binding opinion of the board, as expressed in the annex to the summons to oral proceedings, which tended towards the substantive case of the respondent. There is no obligation for a party requesting oral proceedings to be represented at these proceedings, although the proceedings may then continue without that party according to Rule 71(2) as in the present case where the proceedings continued without the appellant. The appellant notified the board of non attendance in time for it to consider whether or not to cancel the oral proceedings in the light of the state of the file and procedural economy. It was then up to the respondent with a conditional request for oral proceedings to decide, in the knowledge of the preliminary opinion of the board and of the absence of the appellant, whether it wished to attend the still scheduled proceedings in order to present its case orally. The respondent did so decide and this decision on its part offers no reason in equity for the appellant to bear the respondent's costs. Although the notification of non attendance occurred only a week before the date scheduled for oral proceedings, it did not give rise to any additional substantive response from the respondent and nor was it, in the present appeal, so late as to prevent the board from reviewing the procedural state of the file. Consequently, no improper behaviour or abuse justifying a different apportionment of costs has taken place in the present case.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for a different apportionment of costs is rejected.

The Registrar:

The Chairman:

M. Beer

E. Turrini