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**Datasheet for the decision
of 28 November 2006**

Case Number: T 0498/03 - 3.2.07

Application Number: 93918703.5

Publication Number: 0652843

IPC: B65G 17/06

Language of the proceedings: EN

Title of invention:

Low back pressure plastic conveyor

Patentees:

PALMAER, Karl., et al

Opponent:

MCC Nederland B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 84, 100(c), 114(2), 119, 123(2), 128(4)
EPC R. 67, 93(d)

Keyword:

"Application of reformatis in peius for the independent method claim - yes"

"Novelty - no (main and first to third auxiliary requests)"

"Clarity - objection not admitted"

"Added subject-matter - yes (fourth to eighth auxiliary requests)"

"Reimbursement of appeal fee - no"

"Request by appellants after announcement of decision for the reasons not to be notified or published - refused"

Decisions cited:

G 0009/92, T 0309/87

Catchword:

-



Case Number: T 0498/03 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 28 November 2006

Appellants: PALMAER, Karl V.
(Patent Proprietors) 6525 Puerto Driven Lane
Rancho Murieta, CA 95683 (US)

and

PALMAER, Eric, K.
11749 Melones Circle
Gold River
CA 95670 (US)

Representative: Casey, Lindsay Joseph
F. R. Kelly & Co.
27 Clyde Road
Ballsbridge
Dublin 4 (IE)

Respondent: MCC Nederland B.V.
(Opponent) Einsteinsstraat 1
NL-2691 GV 's-Gravensande (NL)

Representative: Ottevangers, Sietse Ulbe
Vereenigde
Postbus 87930
NL-2508 DH Den Haag (NL)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
17 February 2003 concerning maintenance of
European patent No. 0652843 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
C. Holtz
K. Poalas
E. Lachacinski

Summary of Facts and Submissions

- I. Opposition was filed against European patent No. 0 652 843 as a whole and based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division held that the subject-matter of claim 1 of the patent as granted (main request) was not novel. The opposition division decided to maintain the patent in amended form in accordance with the combination of auxiliary requests 3A and 1C.

- II. The appellants (proprietors) filed an appeal against the decision.

- III. The appellants requested that the decision under appeal be set aside and the patent be maintained unamended (main request). Alternatively, the patent should be maintained in amended form in accordance with one of the first to eighth auxiliary requests filed with letter of 27 October 2006. The appellants further requested that the appeal fee be reimbursed.

The respondent (opponent) requested that the appeal be dismissed. Remittal of the case was requested for the case that the Board were to find the claims of the main request to be novel.

- IV. Oral proceedings were held before the Board on 28 November 2006.

V. The independent apparatus claims of the patent as granted (main request) read as follows:

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, characterised in that at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with the first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, such that a backline pressure reducing roller (42) can be positioned

on the connecting rod between said projections of the one module row if desired."

"11. A plastic conveyor belt module (12) for use in forming a plastic conveyor belt (10) made up of a series of serially interconnected belt module rows each including one or more generally similar such modules comprising, a plurality of first spaced projections (24) extending in a row in one direction from the module and a plurality of second spaced projections (26) extending in a row in an opposite direction from the module, such that the modules can be assembled with the first and second projections of serially adjacent modules longitudinally overlapping and juxtaposed when the modules are connected serially in a conveyor belt by connecting rods (28) extending through transverse openings (32, 30) in the projections, characterised in that the row of second projections (26) of the module (12) having at least one space or void (40) where one of such second projections (26) would otherwise be located, whereby a backline pressure reducing roller (42) can be positioned within said space or void (40) in an assembled conveyor belt including the module, the roller (42) having a central bearing support opening (46) which receives a connecting rod (28) extending transversely through juxtaposed first and second projections (24, 26) of succeeding modules in the belt, so that the roller (42) is supported between adjacent first projections (24) of the succeeding module in said void (40)."

The **first** auxiliary request contains the independent claim 1 of the main request but does not include apparatus claims 11 to 16.

The independent apparatus claim 1 of the **second** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, characterised in that at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with ~~the~~ first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing

through a projection (26) of an adjacent module row, such that a backline pressure reducing roller (42) can be positioned on the connecting rod between said projections of the one module row if desired, **the conveyor belt including belt modules (12) with said spaces and belt modules without said spaces.**"

The independent claim of the **third** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, characterised in that at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) having spaces (40) in the positions of

certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with the first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, ~~such that~~ **with** a backline pressure reducing roller (42) ~~can be positioned on the connecting rod (28) in some of the spaces (40) so that the conveyor belt also serves as a low backline pressure conveyor belt between said projections of the one module row if desired.~~"

The independent claim of the **fourth** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the

conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, **the first (24) and second (26) projections are interdigitated in alternating arrangement, so that each projection which is interdigitated from one module into a serially adjacent module fits generally centrally between a pair of projections of the adjacent module**

characterised in that at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) **have one or more interruptions where the position normally occupied by a projection is vacant thus** having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with ~~the~~ first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, such that a backline pressure reducing roller (42) can be positioned on the connecting rod between said projections of the one module row if desired."

The independent claim of the **fifth** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending

transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, **the first (24) and second (26) projections are interdigitated in alternating arrangement, so that each projection which is interdigitated from one module into a serially adjacent module fits generally centrally between a pair of projections of the adjacent module**

characterised in that

at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with the first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, ~~such that~~ **with** a backline pressure reducing roller (42) ~~can be positioned on the connecting rod (28) in some of the spaces (40) so that the conveyor belt also serves as a low backline pressure conveyor belt between said projections of the one module row if desired.~~ **can be positioned on the connecting rod (28) in some of the spaces (40) so that the conveyor belt also serves as a low backline pressure conveyor belt between said projections of the one module row if desired.**"

The independent claim of the **sixth** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections,
characterised in that
at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) **have one or more interruptions where the position normally occupied by a projection is vacant thus** having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with the first (24) and second (26) projections overlapping and juxtaposed, the connecting

rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, ~~such that~~ **with** a backline pressure reducing roller (42) ~~can be positioned on the connecting rod (28) in some of the spaces (40) so that the conveyor belt also serves as a low backline pressure conveyor belt between said projections of the one module row if desired.~~"

The independent claim of the **seventh** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, **the first (24) and second (26) projections are interdigitated in alternating arrangement, so that**

each projection which is interdigitated from one module into a serially adjacent module fits generally centrally between a pair of projections of the adjacent module

characterised in that

at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) **have one or more interruptions where the position normally occupied by a projection is vacant thus** having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with the first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, ~~such that~~ **with** a backline pressure reducing roller (42) ~~can be positioned on the connecting rod (28) in some of the spaces (40) so that the conveyor belt also serves as a low backline pressure conveyor belt between said projections of the one module row if desired.~~ "

The independent claim of the **eighth** auxiliary request reads as follows (amendments when compared to claim 1 of the main request are struck through or depicted in bold):

"1. A modular plastic conveyor belt (10) including a series of connected elongated molded plastic belt module rows each including one or more belt modules (12, 14, 16, 18, 19, 20, 22) in the row, the belt module rows being connected by rods (28) extending transversely to the length of the conveyor belt (10), each belt module row having a plurality of first spaced

projections (24) generally in a pattern of regular spacings extending in one direction from the row and a plurality of second spaced projections (26) generally in a pattern of regular spacings extending in an opposite direction from the row, the first (24) and second (26) projections of serially adjacent module rows (12, 14, 16, 18, 19, 20, 22) being longitudinally overlapping and juxtaposed when the modules (12, 14, 16, 18, 19, 20, 22) are connected serially in the conveyor belt (10) by the connecting rods (28) extending through transverse openings in the projections, **the first (24) and second (26) projections are interdigitated in alternating arrangement, so that each projection which is interdigitated from one module into a serially adjacent module fits generally centrally between a pair of projections of the adjacent module**

characterised in that

at least some of the plastic modules (12, 14, 16, 18, 19, 20, 22) **have one or more interruptions where the position normally occupied by a projection is vacant thus** having spaces (40) in the positions of certain of the projections (24, 26), so that in the assembled conveyor belt made up of plastic modules (12, 14, 16, 18, 19, 20, 22) with the first (24) and second (26) projections overlapping and juxtaposed, the connecting rod (28) extends at said spaces (40) between projections (24) of one module row without passing through a projection (26) of an adjacent module row, ~~such that~~ **with** a backline pressure reducing roller (42) ~~can be positioned on the connecting rod (28) in some of the spaces (40) so that the conveyor belt also serves as a low backline pressure conveyor belt between said projections of the one module row if desired, the~~

conveyor belt including belt modules (12) with said spaces and belt modules without said spaces.."

VI. The documents cited by the parties and relevant to the present decision are the following:

- D1: US-A-4 231 469
- D2: Brochure "Multiwheel conveyor", Polyketting, Zelhem, The Netherlands, 1986
- D2a: Brochure "Leveringsprogramma", Polyketting, Zelhem, the Netherlands, 1986
- D4: Brochure "Uni-Chains Scharnierband- und Förderketten sowie Zubehör" Uni Chains BRD
- D4a: DE-U-3436734.2
- D7: Brochure "chains" Unichain
- D8: Brochure "KVP Innovators of engineered plastic conveyor and material handling components" KVP
- D9: Catalogue extracts from Uni
- D10.1: "Assembly standards" for Rexnord 5996 series chain with issue date of 16.7.1991
- D10.2: Brochure with reprint article from Snack Food, July 1988
- D10.2a: Bibliographic data for D10.2
- D10.3: Brochure "Mat top chain solutions: snack and bulk food handling" Rexnord bearing indication "8/96"
- D10.4a: Rexnord 5900 series chains engineering data, bearing indication "4-88"
- D10.4b: Rexnord 5900 series chains engineering data, bearing indication "4/90"
- D10.5: Letter of Mr Ensich dated 29 January 2001
- D10.6: Sworn statement of Mr Ensich legalised 29 October 2001

- D10.7: Brochure "5900 series mat top chain" Rexnord bearing indication "12/90"
- D10.7a: Delivery note from Color Ink, Inc. dated 21 December 1990
- D11: US-A-4 821 872
- D12: Intralox Engineering Manual
- D12a: Letter from Mr Cronwich dated 14 January 2004.
- D13: Brochure with reprint article from Prepared Foods, July 1988
- D13a: Bibliographic data for D13

VII. The arguments of the appellants may be summarised as follows:

(i) Method claim 17 of the patent as granted was maintained by the opposition division in its decision (renumbered as claim 10) and the proprietors are the sole appellants, so that this claim cannot be challenged following G 9/92 (OJ EPO 1994, 875).

(ii) D2, D2a, D4, D7, D8 and D9 were removed from the opposition proceedings and should not be readmitted into the appeal proceedings.

D4a, D10.2a, D10.4a, D10.4b, D10.7a, D12, D12a, D13 and D13a which have been filed by the respondent with its response to the appeal are all late filed and should not be admitted into the proceedings.

The prior use at Gardetto's bakery was asserted by the respondent after the time limit for filing the opposition had expired

and hence is late filed. The case law is clear that the essential matters of what, where, when and how must be indicated in the notice of opposition, otherwise the prior use is late filed. Since it was late filed it should not be admitted into the proceedings.

- (iii) The subject-matters of claims 1 and 11 of the main request (as granted) and claim 1 of the first auxiliary request, which is identical to claim 1 as granted, are novel over the disclosure of D1. D1 does not disclose the features of claim 1 whereby both the first and second projections are "generally in a pattern of regular spacings", and the module has "spaces (40) in the positions of certain of the projections". D1 on the contrary discloses a pattern of alternating wide and narrow spacings which hence is not regular. Indeed D1 was known to the appellants before the application underlying the patent in suit was filed and that application was directed to the differences to D1.

None of D4, D4a, D10.4a, D10.4b, D10.7 and the alleged prior use in Gardetto's bakery in 1988 takes away the novelty of claims 1 or 11.

- (iv) Claim 1 of the second auxiliary request is clear and its subject-matter is novel. D1 does not disclose the extra feature of this claim compared to claim 1 of the main request.

- (v) Claim 1 of the third auxiliary request is clear and its subject-matter is novel. D1 does not disclose the extra feature of this claim compared to claim 1 of the main request.

- (vi) The amendments to claim 1 of the fourth auxiliary request comply with Article 123(2) EPC. A basis for the amendment to the preamble of the claim may be found in the application as originally filed in claim 7 together with the description on page 4, lines 27 to 30. A basis for the amendment to the characterising portion of the claim may be found in the application as originally filed on page 2, lines 25 and 26.

- (vii) The amendments made to claim 1 of each of the fifth, sixth, seventh and eighth auxiliary requests were already made to claim 1 of the fourth auxiliary request. Since the amendments to claim 1 of the fourth auxiliary request comply with Article 123(2) EPC the same applies to claim 1 of each of these requests.

VIII. The arguments of the respondent may be summarised as follows:

- (i) The respondent does not rely on challenging the independent method claim 17 of the main request.

- (ii) During the oral proceedings before the opposition division several documents were not used further by the respondent in its

argumentation. However, these documents were not removed from the opposition proceedings as a whole.

Documents D4a, D10.2a, D10.4a, D10.4b, D10.7a, D13 and D13a which have been filed by the respondent in response to the appeal should be admitted into the appeal proceedings. The patent document D4a has the same content as the previously filed brochure D4. D13 is a magazine article and D13a relates to its bibliographic data. The other documents are brochures which carry dates well before the priority date of the patent in suit and on the balance of probabilities would have been available to the public before the priority date. However, D12 and D12a which were also filed are removed from the appeal proceedings.

The prior use at Gardetto's bakery does not need to have been substantiated within the time limit for opposition. The relevance of the prior use has precedence over its late filing so that the opposition division was right to admit it into the proceedings. The prior use was filed in response to a negative communication of that division. Finally, the opposition division partly based its decision on the prior use, which shows its relevance.

- (iii) The subject-matters of claims 1 and 11 of the main request and claim 1 of the first auxiliary request lacks novelty in view of the disclosure of the embodiment of figure 7 of

D1. The appellants argue that D1 discloses alternating wide and narrow spacings between the projections. That argument, however, is based on the form of the modules after some projections have been omitted whereas the pattern specified in the claims is the pattern before any projections have been omitted. Also, the claims do not specify how many projections have been omitted. If, however, an omitted projection was originally intended for each of the spaces currently occupied by a roller 27 in figure 7 then the pattern of projections so formed would clearly be regular, both in the sense of repeating itself and in the sense of the projections being equidistant.

Also, each of D4, D4a, D10.4a, D10.4b, D10.7 and the prior use in Gardetto's bakery in 1988 takes away the novelty of the subject-matters of claims 1 and 11.

- (iv) Claim 1 of the second auxiliary request is not clear as required by Article 84 EPC. The features whereby there are projections "generally in a pattern of regular spacings" and "spaces (40) in the positions of certain of the projections" are not clear.

The subject-matter of claim 1 of the second auxiliary request lacks novelty in view of the disclosure of D1. D1, in the embodiment of figure 7, discloses modules 21 with spaces as well as modules 18 without spaces. Therefore,

the extra feature of this claim compared to claim 1 of the main request is also disclosed in D1.

- (v) Claim 1 of the third auxiliary request lacks clarity for the same reasons as claim 1 of the second auxiliary request.

The subject-matter of claim 1 of the third auxiliary request lacks novelty in view of the disclosure of D1. D1, in the embodiment of figure 7, shows rollers in the spaces where projections have been omitted and the conveyor disclosed in D1 is a low backline pressure conveyor. Therefore, the extra features of this claim compared to claim 1 of the main request are also disclosed in D1.

- (vi) The amendments made to claim 1 of the fourth auxiliary request do not comply with Article 123(2) EPC.

- (vii) Claim 1 of each of the fifth, sixth, seventh and eighth auxiliary requests contains at least one of the amendments made to claim 1 of the fourth auxiliary request. Since the amendments to claim 1 of the fourth auxiliary request contravene Article 123(2) EPC the same applies to each claim 1 of these requests.

VII. With fax of 12 January 2007 the appellants stated that they did not wish to receive a copy of the "Reasons for the Decision" or to have them published. The former was

contrary to what it had stated "in response to a question of the chairman" at the oral proceedings.

Reasons for the Decision

1. *Reformatio in peius*

1.1 The set of claims maintained in accordance with the decision of the opposition division included an apparatus claim and a method claim. The patent as granted (main request), as well as each of the sets of claims of the auxiliary requests, contains a method claim which is identical to the method claim maintained in accordance with the decision of the opposition division.

In its Decision G 9/92 (*supra*), the Enlarged Board stated that "The scope of the appeal defined in an appellant's request is exceeded if the non-appealing opponent files a request for revocation of a patent. The opponent can thus no longer effectively file such a request once the time limit for appeal has expired." (cf. point 14 of the reasons for the decision). In the present case consideration of the method claim that has already been maintained in accordance with the decision of the opposition division would amount to considering an unacceptable request for partial revocation of the patent as so maintained.

Consideration of the method claim in the appeal proceedings could, in principle, lead to all the requests being refused solely because of the presence of this claim in the requests. The ensuing dismissal of

the appeal would have as a result that the claim which caused the dismissal would nevertheless be maintained in accordance with the decision of the opposition division.

If the appellants were forced to delete the method claim from the requests in order to avoid dismissal of the appeal whilst obtaining broader apparatus claims than those maintained in accordance with the decision of the opposition division, then the patent could end up being maintained without the method claim which is clearly to the detriment of the appellants. On the basis of G 9/92 (*supra*) consideration of the method claim is therefore excluded for all requests.

2. *Admissibility of late filed documents and prior use*

- 2.1 In the minutes of the oral proceedings before the opposition division it is stated that: "The opponent responded by removing D2, D2.A, D4, D7, D8 and D9 from the proceedings." (see section 4, second paragraph). This statement is not unequivocal since it does not stipulate whether it applies just to the oral proceedings or to the opposition proceedings as a whole. The documents were mentioned again by the respondent in its response to the appeal. The respondent has argued that in the oral proceedings before the opposition division it only stated that it would not argue with these documents without, however, withdrawing them from the opposition proceedings as a whole.

Without hearing those persons present at the oral proceedings as witnesses, the Board, however, can only judge the events during the oral proceedings on the basis of the minutes.

In view of these circumstances the Board concludes that the above cited statement in the minutes cannot unambiguously be interpreted as a withdrawal of the documents from the opposition proceedings as a whole. In any case the opposition division has referred to them in its reasons for the impugned decision. These documents are therefore in the proceedings.

- 2.2 D4a, D10.2a, D10.4a, D10.4b, D10.7a, D12, D12a, D13 and D13a were all filed by the respondent together with the response to the appeal. D12 and D12a support a further prior use in addition to the one already asserted in the opposition proceedings. During the oral proceedings before the Board the respondent, however, removed D12 and D12a from the appeal proceedings.

The other documents are either a patent equivalent (D4a) to a document already in the proceedings or concern further evidence regarding the public availability of documents already in the proceedings or the prior use already asserted before the opposition division. These other documents do not therefore change the legal or factual framework of the appeal proceedings. These documents are also relevant to the proceedings and have been filed at an early stage of the appeal proceedings. The Board therefore decided to admit these documents (with the exception of the removed documents D12 and D12a) into the proceedings.

2.3 The appellants further argued that the prior use at Gardetto's bakery asserted during the opposition proceedings should not have been admitted into the opposition proceedings since it was filed after the time limit for filing an opposition had expired. Since the prior use was admitted into the proceedings by the opposition division the Board can only review whether it used its discretion correctly in admitting the late filed facts and evidence relating to the alleged prior use at Gardetto's bakery under Article 114(2) EPC. An opposition division when deciding upon the admittance of the facts and evidence concerning an alleged prior use has to take into account their relevance as well as the point in the proceedings at which the assertion of prior use is made. In the present case the assertion of prior use was made after receipt of a communication of the opposition division which indicated that the opposition was likely to be rejected.

No oral proceedings had been appointed at the time that the assertion of prior use was made so that the appellants had adequate time to prepare themselves, including carrying out their own investigations. Also, no objection was raised at the time by the proprietors to its introduction into the proceedings.

The alleged prior use was also relevant to the decision of the opposition division since it referred to it in its decision to reach a finding of lack of novelty in the subject-matter of claims 1 - 3, 7 and 11 of the main request of the appellants.

The Board therefore concludes that the opposition division correctly used its discretion to admit the

facts and evidence relating to the alleged prior use into the proceedings and that there is no reason for the Board to remove the assertion of prior use from the appeal proceedings.

Main request

3. *Novelty*

3.1 The respondent argued lack of novelty of claim 1 of this request on the basis of a number of documents as well as on the basis of the alleged prior use at Gardetto's bakery. For the purposes of the present decision it is only necessary to consider the argument based on D1.

The appellants in particular disputed that D1 disclosed the features of claim 1 of this request whereby both the first and second projections are "generally in a pattern of regular spacings", and whereby the module has "spaces (40) in the positions of certain of the projections". In the view of the appellants D1 discloses a pattern of alternating wide and narrow spacings which hence is not regular.

The Board notes, however, that even in the definition of the word "regular" given in the Shorter Oxford Dictionary, as supplied by the appellants, it is stated as "Having a form, structure, or arrangement which follows, or is reducible to, some rule or principle". Alternating wide and narrow spacings are within the scope of this definition since they clearly follow a rule or principle. The Board concludes therefore that

the wording of the claim includes alternate wide and narrow spacings.

In fact, the claim defines the position of a space (40) by the absence of a respective projection. To interpret the claim it is therefore necessary to construct a fictitious array of projections and then to consider their distribution after some of these projections have been removed or were not placed where they theoretically should have been placed. There are many possible initial theoretical regular patterns of projections from which projections can be omitted so as to arrive at a particular actual pattern which may be regular or irregular. Each actual pattern which can be achieved by a theoretical regular pattern with projections subsequently omitted is within the scope of claim 1.

In the embodiment of figure 7 of D1 there is disclosed a pattern of projections with spaces therebetween. These spaces can be the result of a regular pattern of projections wherein the spaces presently occupied by the rollers 27 could have contained projections. Such a theoretical pattern of projections (before omitting or removing any) would have been regular and hence complied with this requirement of claim 1. Moreover, since some of these projections have been omitted (to allow the rollers to be positioned) also the requirement of the claim that there are spaces where some of the projections should have been positioned is also complied with. The two features of claim 1 whose disclosure in D1 has been disputed by the appellants are hence considered to be disclosed in the embodiment of figure 7 of D1.

3.2 Therefore, the subject-matter of claim 1 of the main request is not novel in the sense of Article 54 EPC.

First auxiliary request

4. *Novelty*

The first auxiliary request differs from the main request in that it does not contain the independent apparatus claim 11, or the dependent claims 12 to 16. The request does, however, contain the same claim 1 as the main request, the subject-matter of which has been found to lack novelty, see above. The first auxiliary request is therefore not allowable for the same reasons as the main request was not allowable.

Second auxiliary request

5. *Article 84 EPC*

The respondent argued that parts of claim 1 of this request were not clear. However, the parts of the claim to which the respondent objected were not the amended parts, but the parts which were present in claim 1 of the patent as granted. Since the objections do not arise out of the amendments made to the patent, the objection is not admissible since it is not a ground of opposition under Article 100 EPC (cf. T 301/87, OJ EPO 1990, 335, points 3.7 and 3.8 of the reasons).

6. *Article 123(2) EPC*

Claim 1 of the second auxiliary request is a combination of claims 1 and 10 as granted. The Board is therefore satisfied that the amendments to the claim comply with Article 123(2) EPC.

7. *Novelty*

7.1 Compared to claim 1 of the main request, claim 1 of the second auxiliary request includes the feature of claim 10 as granted of "the conveyor belt including belt modules (12) with said spaces and belt modules without said spaces".

This feature is also present in D1 wherein, in addition to the modules containing spaces, there are also modules 18 which do not include the spaces. These modules 18 are disclosed in the embodiment of figure 7 in a conveyor belt together with modules 20 which do have spaces.

7.2 Therefore, the subject-matter of claim 1 of the second auxiliary request is not novel in the sense of Article 54 EPC.

Third auxiliary request

8. *Article 84 EPC*

The respondent raised the same objections under Article 84 EPC against claim 1 of the third auxiliary request as it raised against claim 1 of the second auxiliary request. The Board, however, considers that

the objection is not admissible for the same reasons as explained above with respect to the second auxiliary request.

9. *Article 123(2) EPC*

A basis for the amendment to claim 1 of the third auxiliary request may be found on page 5, lines 36 to 38, of the application as originally filed. The Board is therefore satisfied that the amendments to the claim comply with Article 123(2) EPC.

10. *Novelty*

10.1 Claim 1 of the third auxiliary request contains the extra feature compared to claim 1 of the main request that some of the spaces between the projections have a roller positioned on the connecting rod therein so that the conveyor serves as a low backline pressure conveyor. In the conveyor according to D1 all of the spaces disclosed in figure 7 have rollers 27 on the connecting rods. The term "some" as used in the amendment to the claim includes 'all' within its scope. The extra feature of claim 1 of this request is thus also disclosed in D1 in combination with the remaining features of the claim.

10.2 Therefore, the subject-matter of claim 1 of the third auxiliary request is not novel in the sense of Article 54 EPC.

Fourth auxiliary request

11. *Article 123(2) EPC*

11.1 The preamble of claim 1 of the fourth auxiliary request contains the added feature that "the first (24) and second (26) projections are interdigitated in alternating arrangement, **so that** each projection which is interdigitated from one module into a serially adjacent module fits generally centrally between a pair of projections of the adjacent module" (emphasis added by the Board).

According to the appellants the basis for the first phrase of this amendment is claim 7 as originally filed, which indeed contained similar wording.

According to the appellants the basis for the second part of the amendment is on page 4, lines 27 to 30, of the description of the application as originally filed. That part of the description does indeed disclose the exact words used in the amendment. However, in the preceding lines 23 to 27 of the description it is stated that: "The first and second projections in this preferred embodiment are offset in staggered relationship in well known manner ... **so that...**" (emphasis added by the Board). This result is thus achieved by the staggered arrangement of the first and second projections on **a single module**. The amendment to the claim, however, implies that it is the alternating interdigitation of the first and second projections from serially connected modules which gives the result set out in the claim starting with: "so that...", i.e. it is the result of the interaction between the

projections on **two different modules**. The amendment made to the claim is therefore not supported by the parts of the description indicated by the appellants. The Board concludes that this amendment does not comply with Article 123(2) EPC.

11.2 The characterising portion of claim 1 of the fourth auxiliary request contains the added feature that at least some of the plastic modules "have one or more interruptions where the position normally occupied by a projection is vacant". According to the appellants the basis for this amendment is on page 2, lines 25 and 26, of the description of the application as originally filed. In that part of the description it is, however, further stated that there are interruptions for one set of projections. This further limitation of this feature in the description is not present in the claim and the appellants have not given an acceptable argument for the removal of this limitation. The Board concludes that also this amendment does not comply with Article 123(2) EPC.

11.3 Since the amendments to the claim do not comply with Article 123(2) EPC the fourth auxiliary request must be refused.

Fifth auxiliary request

12. *Article 123(2) EPC*

12.1 Claim 1 of this request contains the same amendments to its preamble as were made to the preamble of claim 1 of the fourth auxiliary request.

12.2 Therefore, the amendment to the claim does not comply with Article 123(2) EPC for the same reasons as explained with respect to the fourth auxiliary request and hence the fifth auxiliary request must be refused.

Sixth auxiliary request

13. *Article 123(2) EPC*

13.1 Claim 1 of this request contains the same amendment to its characterising portion as was made to the characterising portion of claim 1 of the fourth auxiliary request.

13.2 Therefore, the amendment to the claim does not comply with Article 123(2) EPC for the same reasons as explained with respect to the fourth auxiliary request and hence the sixth auxiliary request must be refused.

Seventh auxiliary request

14. *Article 123(2) EPC*

14.1 Claim 1 of this request contains the same amendments to its preamble and characterising portions as were made to the preamble and characterising portions of claim 1 of the fourth auxiliary request.

14.2 Therefore, the amendment to the claim does not comply with Article 123(2) EPC for the same reasons as explained with respect to the fourth auxiliary request and hence the seventh auxiliary request must be refused.

Eighth auxiliary request

15. *Article 123(2) EPC*

15.1 Claim 1 of this request contains the same amendments to its preamble and characterising portions as were made to the preamble and characterising portions of claim 1 of the fourth auxiliary request.

15.2 Therefore, the amendment to the claim does not comply with Article 123(2) EPC for the same reasons as explained with respect to the fourth auxiliary request and hence the eighth auxiliary request must be refused.

16. *Remittal to the department of first instance*

The respondent has requested remittal to the department of first instance for the case that the Board were to find the independent claims of any of the requests to be novel. Since the Board has found that none of the requests of the appellants are allowable the question of a remittal to the department of first instance does not arise.

17. *Request for reimbursement of the appeal fee*

In accordance with Rule 67 EPC one requirement for the reimbursement of the appeal fee is that the appeal is allowed. In the present case the appeal is to be dismissed so that the appeal fee cannot be reimbursed.

18. *Request by the appellants not to receive the reasons for the decision nor for the reasons to be published*
- 18.1 The request was filed by fax approximately six weeks after the oral proceedings had taken place before the Board in which the present decision to dismiss the appeal was announced. The request was therefore received too late to have an effect on the present decision.
- 18.2 Since the Board has already given its decision it is not possible to re-open the proceedings.
- 18.2.1 According to Article 119 EPC decisions are to be notified to the parties concerned "as a matter of course". Accordingly, the present written decision will be notified to the appellants, even though they requested not to receive a copy of it.
- 18.2.2 The present decision will not be published in the Official Journal. It is, however, part of the file of the patent in suit (and thus available to the public) pursuant to Article 128(4) EPC. None of the reasons set out in Rule 93(d) EPC in conjunction with the notice of the President of the EPO dated 7 September 2001 (OJ EPO 2001, 458) for exclusion from file inspection apply to the present decision.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders