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D E C I S I O N
of 28 April 2005

Case Number: T 0816/03 - 3.2.3

Application Number: 95200920.7

Publication Number: 0678720

IPC: F27D 3/00, B65G 57/30,
F27D 23/02, B28B 13/04

Language of the proceedings: EN

Title of invention:
A method and a device for cleaning kiln cars

Patentee:
MACHINEFABRIEK DE OUDE RIJN PANNERDEN B.V.

Opponent:
Hellmich GmbH & Co. KG

Headword:
-

Relevant legal provisions:
EPC Art. 54

Keyword:
"Prior use: state of art (yes)"
"Novelty: no (main request)"
"Auxiliary request: not admitted"

Decisions cited:
-

Catchword:
-



Case Number: T 0816/03 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 28 April 2005

Appellant: Hellmich GmbH & Co. KG
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
27 May 2003 concerning maintenance of European
patent No. 0678720 in amended form.

Composition of the Board:

Chairman: U. Krause
Members: Y. G. A. Jest
K. M. Garnett

Summary of Facts and Submissions

I. The appeal is directed against the decision posted on 27 May 2003 of an opposition division which maintained the European patent No. 0678720 in an amended form. In the decision under appeal, the opposition division held that the grounds of lack of novelty and inventive step raised by the opponent did not prejudice the maintenance of the patent as amended.

The opponent, hereinafter the appellant, lodged the appeal on 23 July 2003 and paid the appeal fee on the same day. In the statement of grounds, which was received on 23 September 2003, lack of novelty and inventive step under Article 100(a) EPC were again relied on.

Claim 1 as maintained by the impugned decision reads as follows:

"A device for handling kiln cars (1) on which rows of blocks having recesses (11) and butting against each other are present in side-by-side relationship during normal use, whereby said device is provided with a frame (21) extending over the path of movement of the kiln cars and comprises a lifting mechanism (23, 24) supported by said frame, characterized in that said lifting mechanism (23, 24) is provided with two carriers (25, 26) which are movable in both horizontal and vertical direction and which are provided with a plurality of parallel teeth (36, 37) projecting from said carrier, which teeth fit recesses in a row of blocks (11) butting against each other and being supported by the kiln car (1) and whereby said carriers

(25, 26) can be moved towards and away from each other by means of a driving mechanism (29-31)."

II. The following documents were inter alia of relevance in the proceedings:

- **alleged prior use EB16**: affidavit of Mr Jungmeier, dated 5 June 2001 and accompanied by copies of technical drawings,
- **alleged prior use EB17**: affidavit of Mr Jacobi, dated 7 August 2001 and accompanied by copies of technical drawings,
- **EB29**: letter of Hans Lingl Anlagebau GmbH & CoKG to the appellant, dated 30 November 2004, including technical drawings corresponding to the copies annexed in EB16 and EB17:
 - **EB29-1**: "Kassettenentladeanlage", Drawing-N° 66/80412-00 from LINGL, dated 14 January 1992;
 - **EB29-2**: "H-Kassetten Entladegreifer", Drawing-N° 66/80412-01 from LINGL, dated 12 February 1992 and with customer name: "Jacobi TO-4, 19102910-2365";
 - **EB29-3**: "Kassetten Stapelung", Drawing-N° 66/81805-00 from LINGL, dated 28 December 1992 (changed on 11 January 1993);
 - **EB29-4**: "Stapelgreifer", Drawing-N° 66/81805-01 from LINGL, dated 17 November 1992.

III. On 28 April 2005 oral proceedings took place during which the proprietor filed the following amended claim 1 on the basis of claim 1 as maintained by the first instance but including additional (hereinafter in *italic*) features:

"A device for handling kiln cars (1) *having an upper surface (4) on which rows of blocks having recesses (11)*

and butting against each other are present in side-by-side relationship during normal use, whereby said device is provided with a frame (21) extending over the path of movement of the kiln cars and comprising a lifting mechanism (23, 24) supported by said frame, said lifting mechanism (23, 24) is provided with two carriers (25, 26) which are movable in both horizontal and vertical direction and which are provided with a plurality of parallel teeth (36, 37) projecting from said carrier, which teeth fit recesses in a row of blocks (11) butting against each other and being supported by the kiln car (1), said carriers (25, 26) can be moved towards and away from each other by means of a driving mechanism (29-31) *and wherein said carriers (25,26) are secured to supporting means (27,28), which are movable along an auxiliary frame (22), which can be moved upwards and downwards by lifting means (23,24), characterized in that said device is provided with suction means movable accommodated in said frame and over said path of movement of the killn car and movable to and from a position just above the upper surface (4) of the killn car in order to extract dirt present on the upper surface of the killn car.*"

- IV. The appellant requested that the decision be set aside and the patent be revoked for lack of novelty and inventive step of the claimed device.

The appellant's arguments on novelty can be summarised as follows:

Both prior uses EB16 and EB17 are part of the state of art since the circumstances described in the affidavits

of Mr Jungmeier and Mr Jacobi, unambiguously refer to the sale of handling devices according to the technical drawings EB29-3 and EB29-4, and EB29-1 and EB29-2 respectively. The machines were sold and delivered by the company Lingl in 1992 to end-use customers (Jungmeier, Jacobi) as independent companies who were not bound by any obligation of confidentiality. Once installed and operational in the manufacturing plants, the said handling devices were freely accessible to visitors and especially to potentially interested clients of the Jungmeier or Jacobi companies. The companies involved in the sale did not provide further evidence such as delivery notes, debit notes, etc. This could, however, be confirmed, if necessary, by three witnesses.

During the oral proceedings the appellant explained where the features of claim 1 could be found in the detailed construction shown in "Jacobi" drawings EB29-1 and EB29-2. The appellant's conclusion was that the subject-matter of the invention as defined by the claims lacked novelty when compared to the prior uses.

- V. The patentee, hereinafter respondent, requested that the appeal be dismissed and the patent be maintained in the form as amended during the opposition proceedings or alternatively in the form of the auxiliary claim 1 as filed during the oral proceedings.

The respondent presented his argument as follows:

The alleged prior uses based on affidavits EB16 and EB17 could not be sufficiently proven by the appellant and should therefore not be considered as state of the art. A first and major insufficiency of the case

presented by the appellant consisted in the lack of any written piece of evidence (debit or delivery notes) which could support the alleged sale and/or delivery of the handling devices by Lingl to Jacobi or Jungmeier. Second, the wording used in the affidavits is very similar in both documents so that one could assume that they had not been drafted independently from each other, so that their testimony alone could and should not be considered as sufficient proof for the alleged facts. And even if the handling devices had been delivered in 1992 as put forward by the appellant, it would still need to be proven that these devices had actually been made accessible to the public during visits to Jacobi's and Jungmeier's factories and, in particular, it needed to be established under what circumstances (either free access or obligation of confidentiality) those visits took place. In summary, the alleged prior uses could not be proven beyond reasonable doubt such that they should be considered as state of the art. The appeal on this ground should thus be dismissed. In substance, the drawings showed a device for handling single stacked rows of cassettes for tiles, whereas the invention related to handling two rows at one time by means of opposite teathed forks.

Reasons for the Decision

1. The appeal is admissible.

2. *State of the art*
 - 2.1 The alleged prior uses based on documents EB16 and EB17, in combination with EB29-1 to EB29-4, are comprised

within the state of the art within the meaning of Article 54(2) EPC.

Both affidavits of M. Jungmeier (EB16) and M. Jacobi (EB17) certify that handling devices had been sold and delivered by the manufacturer Lingl to their companies in 1992. These devices corresponded to the technical drawings EB29-3 and EB29-4, No. 66/81805-00 and -01, and EB29-1 and EB29-2, No. 66/80412-00 and -01 respectively.

The Board considers that the affidavits, in combination with the drawings, contain all the required information and has no reason to doubt the content or the credibility of these affidavits. First, there is no apparent common interest between the three companies (Firma Lingl, Jacobi Tonwerke GmbH, Firma Jungmeier). Second, the relationship presented in the affidavits EB16 and EB17 refers to an usual commercial offer/sale relationship between companies and does not suggest that there was some kind of joint project under which it might be expected there was some obligation of confidentiality.

- 2.2 The respondent has objected to the evidence of the alleged sale and delivery merely because the Appellant has failed to provide any written piece of evidence which could objectively prove the circumstances of the prior uses. The Board nevertheless accepts that the sale and delivery as described in the affidavits did take place. The fact that the Appellant did not provide further written evidence, such as delivery or debit notes, does not in itself render the affidavits worthless. It is clear that such documents, if they

still exist, are not in the possession of the appellant but belong to the three companies involved in the prior uses, these companies being independent from the Appellant. Furthermore the circumstances of the prior uses took place more than 10 years ago and there is generally no national obligation (for instance, for tax issues) to keep such internal documentation for a longer period.

Although the appellant offered to produce three witnesses for them to testify orally, it is generally the practice of the Boards of Appeal to regard affidavits or statutory declarations as acceptable means for providing evidence of the state of the art within the meaning of Article 54(2) EPC. Since one object of such form of evidence is to avoid the hearing of witnesses, it seems superfluous and unduly lengthening of the proceedings to have the content of these statements confirmed orally by the person concerned.

The respondent pointed out that both texts of the affidavits were very close to each other, so that their value as evidence was questionable. In the board's view it is likely that these statements were produced from answers given to questions relating to similar issues, so that it is not surprising to find in declarations about closely related facts the same or similar wording.

In summary, the board does not share the respondent's objections and has no objective reason to doubt on the affidavits of Mr Jacobi and Mr Jungmeier.

3. *Main request - Novelty*

The subject-matter of claim 1 of the main request lacks novelty when compared to the prior use based on affidavit EB17 and drawings EB29-1, EB29-2, which prior use will be referred to as "Jacobi" hereinafter.

3.1 Indeed no clear and unambiguous distinction between the device of claim 1 and "Jacobi" can be made.

The subject-matter of said prior use as derivable from the technical drawings EB29-1 and EB29-2 discloses the following features of claim 1:

- a device for handling kiln cars on which rows of stacked blocks (i.e. blocks in form of U or H-shaped cassettes which support roof tiles) having recesses (not in form of through-bores but in form of closed cavities formed by stepped edges as can be seen for instance in view "X 1:5" of drawing EB29-2) and butting against each other (in view "A-A" of drawing EB29-1 the blocks of the row are butting against each other in the sense that there is practically no space between them), whereby the rows are present in side-by-side relationship during normal use (as shown in the main view of EB29-1),
- whereby said device is provided with a frame (see "Grundrahmen 66/80413-00" in main view of EB29-1) extending over the path of movement of the kiln cars and comprising a lifting mechanism (specific subject-matter of drawing EB29-2: "Entladegreifer" and shown in the whole arrangement in EB29-1),
- said lifting mechanism being supported by said frame (by means of rods 1 shown in EB29-1) and being provided with two carriers (the two L-shaped

elements shown in bold lines in view A-A of EB29-2) which are movable in both horizontal direction (undoubtedly derivable from the drawings EB29-1 and EB29-2 (with title: "Entladegreifer" and indicating the horizontal movement by giving the minimum and maximum values for the spacing between the carriers) in combination with the information contained in the affidavit EB17 concerning the object of the device) and in vertical direction (again clearly derivable from the drawings, in particular in form of a cable-pulley lifting system as shown in view "A-A" of EB29-1 in the light of the explained mode of operation according to EB17),

- the carriers are provided with a plurality of parallel teeth (see element with sign 7 in view "X 1:5" of EB29-2) projecting from said carrier,
- which teeth fit recesses in a row of blocks butting against each other and being supported by the kiln car (as illustrated in the drawings), and whereby said carriers can be moved towards and away from each other by means of a driving mechanism (clearly derivable from views "X 1:5" and "A" of EB29-2).

All the constructional features of claim 1 are thus known from "Jacobi".

3.2 The respondent argued that in the handling device of "Jacobi" both carriers were needed to handle a single row of blocks while the claimed construction enables the simultaneous handling of two contiguous rows of blocks, each row being engaged by the teeth of a single carrier; this is unambiguously the content of the

patent and is illustrated in the drawings, especially Figures 10 to 18 of the patent.

From the scope of protection sought by claim 1 it must, however, be emphasized that the rows of blocks do not form part of the handling device per se but constitute merely the preferred application or use of the same. Furthermore the wording of claim 1 does not contain any feature relating to this particular mode of operation of the handling device but embraces all the devices handling a single row of blocks. The question of whether or not the handling device of "Jacobi" was also suitable for handling simultaneously two juxtaposed rows of blocks with its two carriers has therefore no basis in claim 1 and thus does not need to be answered when evaluating the novelty of the claimed device.

- 3.3 Having regard to the conclusion above, namely that the claimed device lacks novelty when compared to "Jacobi", it is unnecessary for the board to investigate the possible merits of the invention in comparison with the second prior use, "Jungmeier", based on affidavit EB16 and drawings EB29-3 and EB29-4.

4. *Auxiliary request*

The board came to the conclusion that the amended claim 1 filed during the oral proceedings defined a new case in the sense that it would have directed the invention towards the particular arrangement of the suction means. Although the general concept of suction means was indeed present in the set of claims as granted (see dependent claim 7 of the granted patent),

the location and the directions of movement of said suction means were only present in the description. Additionally the board was not convinced that the requirements of Articles 84 and 123(2) EPC were met by the revised independent claim, so that it was prima facie not acceptable for formal reasons. In the circumstances, the board used its power of discretion and did not allow the late-filed auxiliary request.

Order

For these reasons it is decided that:

1. The impugned decision is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

A. Counillon

U. Krause