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**Datasheet for the decision
of 8 November 2007**

Case Number: T 0774/05 - 3.2.07

Application Number: 95116064.7

Publication Number: 0713753

IPC: B26D 1/00

Language of the proceedings: EN

Title of invention:

Slicing machine for slicing two or more food loaves

Patentee:

Formax, Inc.

Opponents:

Weber Maschinenbau GmbH & Co. KG
CFS GmbH Kempten

Headword:

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Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 54, 69(1), 99(1), 99(4), 101(2), 107, 111(1)
EPC R. 2(1), 2(5), 55(1)(c), 56(1), 65(2), 84
RPBA Art. 9

Keyword:

"Admissibility of oppositions - yes (points 1 and 2)"
"Admissibility of appeal I - yes (point 3)"
"Admissibility of appeal II - no (point 4)"
"Request for accompanying person to present parts of the case - refused (point 5)"
"Late request to derogate from language of proceedings - allowed (point 6)"
"Interpretation from that language into the language of the proceedings - not allowed (point 6)"
"Late filed documents - admitted (point 7)"
"Admissibility of ground of novelty for one appellant - yes (point 8)"
"Novelty (patent as granted) - no (point 10)"
"Remittal - yes (point 11)"
"Request to refer questions to Enlarged Board of Appeal - refused (point 12)"

Decisions cited:

G 0010/91, G 0001/95, G 0004/95, T 0222/85, T 0758/90,
T 0270/94, T 0620/99, T 0009/00

Catchword:

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Case Number: T 0774/05 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 8 November 2007

Appellant I: Weber Maschinenbau GmbH & Co. KG
(Opponent I) Formerstrasse 3
D-35263 Breidenbach (DE)

Representative: Finsterwald, Martin
Manitz, Finsterwald & Partner GbR
Postfach 31 02 20
D-80102 München (DE)

Appellant II: CFS GmbH Kempten
(Opponent II) Römerstrasse 12
D-87437 Kempten (DE)

Representative: Wolff, Felix
Kutzenberger & Wolff
Theodor-Heuss-Ring 23
D-50668 Köln (DE)

Respondent: Formax, Inc.
(Patent Proprietor) 9150 191st Street
Mokena
Illinois 60448-0330 (US)

Representative: Heusler, Wolfgang
v. Bezold & Partner
Patentanwälte
Akademiestrasse 7
D-80799 München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 3 June 2005
rejecting the opposition filed against European
patent No. 0713753 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
I. Beckedorf

Summary of Facts and Submissions

I. Oppositions were filed against European patent No. 0 713 753 as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division decided to reject the oppositions.

II. The appellants I and II (opponents I and II) filed appeals against that decision.

III. Appellants I and II each requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (proprietor) requested that the appeals be rejected as inadmissible. Alternatively, the respondent requested that questions be referred to the Enlarged Board of Appeal; the appeals be dismissed; or the decision under appeal be set aside and the case be remitted to the department of first instance for further prosecution.

IV. Oral proceedings were held before the Board on 8 November 2007.

V. The independent claim 1 of the patent as main request (patent as granted) reads as follows:

"1. High speed food loaf slicing machine (50) comprising a slicing station (66) including a knife blade (149) and a knife blade drive (171, 172, 148) driving the knife blade along a predetermined cutting path, and loaf support means (116, 117) for supporting a

first food loaf (91, 502) and a second food loaf (503) for movement along parallel first and second loaf paths, respectively, into the slicing station for repetitive slicing of both loaves by the knife blade (149), the machine (50) comprising: a first loaf feed drive (75, 163, 164) for advancing the first food loaf (91, 502) along the first loaf path at a first preselected loaf feed rate; a second loaf feed drive (75, 165, 166) for advancing the second food loaf along the second loaf path at a second preselected loaf feed rate; and means (174, 175) for varying one loaf feed rate independently of the other so that slices cut from one loaf can differ in thickness from slices cut from the other; characterized by means (66) for cutting slices (92, 93) simultaneously from said first and second loaves (91, 502, 503) and said loaf feed drives (75, 163-166) moving said loaves along said parallel loaf paths on a common plane perpendicular to the cutting path of said knife blade 149)."

VI. The documents cited in the present decision are the following:

- D5: AT-B-386 792
- E5: US-A-3 827 319
- E8: DE-A-4 206 196
- E9: DE-A-3 010 732
- E10: DE-A-3 612 996
- E11: DE-A-3 912 445
- E12: DE-A-3 912 446
- E13: US-A-4 405 186
- E14: DE-A-4 113 435
- E15: DE-C-497 452
- E16: Illustration of slicer of Great Lakes Corp

E17: EP-A-0 412 295

VII. The arguments of appellant I may be summarised as follows:

- (i) The opposition of the present appellant was admissible. It was not necessary in the opposition grounds to indicate where the features of the preamble of claim 1 were disclosed in D1, which was referred to in the notice of opposition. The description of the patent in suit already stated that D1 disclosed these features and there was no reason to doubt this statement of the patent proprietor. The situation considered in T 222/85 (OJ EPO 1988, 128) was quite different to the present case. For E1, which was referred to in the notice of opposition for the characterising features, it was sufficient to look at the drawings which for a skilled person are the most important source of technical information. A reference to the description was pointless since it is a Japanese document.
- (ii) The present appeal is admissible since clearly the date when the decision was sent to the internal postal services is not relevant. The relevant date is the date indicated as "Date" on the decision since this is when the decision was posted from the EPO to the parties. The appeal grounds were therefore filed in due time.
- (iii) There is no objection to Mr Erickson speaking.

- (iv) There is no objection to the representative of the respondent presenting its case in German.
- (v) The documents E8 to E14 and E17, filed by the present appellant in the appeal proceedings, have been filed as a result of the auxiliary requests of the respondent which had already been filed during the opposition proceedings and were subsequently maintained in the appeal proceedings. The documents are hence relevant to the proceedings.
- (vi) The present appellant is entitled to argue lack of novelty since this ground is in the proceedings.
- (vii) The term "simultaneous" means cutting both loaves in a single cycle of the knife blade. It is not necessary that the blade is cutting both loaves at the same time. No other interpretation would make technical sense. Also, such an action is visible in figure 16 of the patent drawings. The expression "on a common plane" does not imply any supporting function and is the same as "in a common plane".
- (viii) The subject-matter of claim 1 of the main request lacks novelty in view of E5. In this document there is disclosed a slicer having a knife blade which cuts slices from two loaves in a single cycle of the blade. The blade moves in an orbital path and cuts the loaves simultaneously since for each cycle a slice from each loaf is cut. The loaf paths are also parallel on a common plane

since this is visible in the figures wherein a plane can be drawn passing through both loaves.

- (ix) The appellant does not object to a remittal to the department of first instance.

VIII. The arguments of appellant II may be summarised as follows:

- (i) The opposition of the present appellant was admissible. All the acts necessary for filing a valid opposition were performed within the opposition period. The fact that there was only one opposition is shown by the statement in the filing on 9 February 2001 that the cheque filed the previous day should be used.
- (ii) The present appeal is admissible. With respect to the filing of the appeal grounds in due time the same arguments as set forth by appellant I apply to the present appeal.

It is correct that the address of the appellant was filed outside of the time limit set by the Board for overcoming the relevant deficiency. However, no notice of loss of rights was received. It is requested that the time limit be extended or that the appeal be re-established. Although there have been name changes the legal status of the present appellant has not changed.

- (iii) There is no objection to Mr Erickson speaking.

- (iv) There is no objection to the representative of the respondent presenting its case in German.
- (v) The document E15 filed by the present appellant in the appeal proceedings is relevant to the proceedings and hence should be admitted.
- (vi) With regard to the interpretation of the claim the arguments of the present appellant are essentially the same as those of appellant I.
- (vii) The subject-matter of claim 1 of the main request lacks novelty in view of D5. In this document there is disclosed a slicer having a knife blade which cuts slices from three loaves in a single cycle of the blade. The loaves are also parallel on a common plane as is visible in the figures 5 to 10 wherein a plane can be drawn passing through each loaf.
- (viii) The appellant does not object to a remittal to the department of first instance.

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

- (i) The opposition of appellant I was not admissible. The notice of opposition mentioned D1 as disclosing the features of the preamble of claim 1 but did not indicate where all the features were to be found in the document. T 222/85 (*supra*) is relevant in this respect. For E1 the notice of opposition only referred to the figures. In particular in the case of a Japanese

document reference in detail to the description is required. The notice of opposition also referred to a public prior use, but did not indicate where it took place so that this prior use is not substantiated.

- (ii) The opposition of appellant II is not admissible. There was a first opposition filed on 8 February 2001 for which an opposition fee was paid but no grounds were filed. There was then a second opposition filed on 9 February 2001, with grounds, but no fee was paid. It was not permissible to transfer the fee paid for the first opposition to the second opposition. In accordance with T 9/00 (OJ EPO 2000, 275), when two oppositions are filed by the same party they are to be treated separately. Since neither opposition was individually admissible there was no admissible opposition.
- (iii) The appeals of appellants I and II are not admissible because in each case the appeal grounds were not filed in due time. The relevant date for calculating the time limit is the date indicated on the decision when the decision was sent to the internal postal services. That date is the date when the opposition division posted the decision and which is to be applied for the purposes of Rule 78(2) EPC.
- (iv) The appeal of appellant II is not admissible since the missing address of that appellant was not notified to the EPO within the time limit set for filing this. Also, there is doubt about the

identity of the appellant in view of the different names used.

- (v) Mr Erickson is a US attorney who knows this case and is familiar with slicers. He should be allowed to speak on claim interpretation, novelty and inventive step. This intention was announced more than one month in advance of the oral proceedings. Also, the other criteria set out in G 4/95 (OJ EPO 1996, 412) are fulfilled.
- (vi) The representative of the respondent who is a German native speaker should be allowed to present the case in German since this is necessary for the equality of arms, given that the representatives of both appellants are German native speakers. Also, interpretation into English should be provided since it was indicated in advance that English would be spoken by Mr Erickson and that interpretation into English was necessary.
- (vii) The documents filed by the appellants during the appeal proceedings should not be allowed into the proceedings. E8 to E15 are late filed and are not prima facie highly relevant. E17 is also late filed and is not prima facie relevant and was already known to appellant I via another proceedings in which the proprietor of appellant I was named as an inventor.
- (viii) Appellant I should not be allowed to argue lack of novelty since this ground was not argued by it in the opposition proceedings and the respondent

does not give its permission as required by G 1/95 (OJ EPO 1996, 615). In this respect T 758/90 (not published in OJ EPO) is relevant since in circumstances similar to the present case the Board had doubts as to whether a ground could be introduced by a party when the party had not argued the ground in the opposition proceedings.

- (ix) The term "simultaneous" must be interpreted in the light of the description in accordance with Article 69(1) EPC. In the description of the patent it is clear from figure 4a that the blade knife is in cutting contact with the two loaves at the same time and not with one after the other. The blade cannot both start and finish its cutting action on the two loaves at the same time as loaves vary in their sizes making this impossible in practice.

The expression "**on** a common plane" (emphasis added by the Board) cannot mean the same as "**in** a common plane" (emphasis added by the Board) since that would be superfluous in a claim which already defines parallel paths. The expression "on a common plane" must therefore imply a support function for the plane. Such a support function implies that the plane is horizontal or at an angle thereto but is not vertical.

- (x) On the basis of the above interpretation of claim 1, E5 and D5 do not take away the novelty of the claim since neither document discloses a simultaneous cutting action of the two loaves,

nor in the case of E5 are the loaves disclosed on a common plane.

- (xi) Since the appellants have introduced new documents in their appeals the case should be remitted to the department of first instance so as to preserve the right to two instances.

Reasons for the Decision

- 1. *Admissibility of the opposition of appellant I*
 - 1.1 The notice of opposition of appellant I indicated that the features of the preamble of claim 1 are undisputedly known from D1 as this was stated in the patent in suit. It further indicated that the characterising feature of claim 1 was known to the skilled person as evidenced by E1 which showed this feature in figures 1 and 2. A prior use of the characterising feature was also alleged.
 - 1.2 The respondent sees two deficiencies in the argumentation concerning D1 and E1 as well as a deficiency in the argumentation concerning the alleged prior use.
 - 1.2.1 The first deficiency alleged by the respondent is that opponent I had not indicated where in D1 the features of the preamble of claim 1 are to be found. Although the respondent is factually correct in so far as it goes, it nevertheless overlooks the fact that there is a statement in the patent as granted on page 2, line 38 that the preamble of claim 1 is known from D1. In the opinion of the Board an opponent is entitled to rely on

such an unequivocal statement in a patent when filing its grounds of opposition. If the proprietor subsequently denies the correctness such a statement in the patent, which it has not done in the present case, only then could it become incumbent upon the opponent to provide a more detailed argumentation. In this respect the respondent referred to T 222/85 (*supra*). However, in that case an opposition was filed referring to sixteen documents without providing any argumentation. The facts of that case were thus quite different to the facts of the present case.

1.2.2 The second deficiency alleged by the respondent lay in the argumentation regarding the disclosure in E1 of the characterising feature of claim 1. E1 is a Japanese published application and appellant I argued that it would not have helped to point out the relevant parts of the document for this reason. The respondent argued that because it was a Japanese document it was necessary to explain the disclosure in detail. In the opinion of the Board the language of the document is irrelevant when, as in the present case, an argument is based only on the drawings. In this situation the essential question is whether the information contained in the figures was sufficient for the skilled person to recognise therein the possible disclosure of the charactering feature. The drawings of E1 are quite clear and in the opinion of the Board a skilled person considering them would have no difficulty in understanding how the disclosed device functioned and hence could have come to a conclusion as to whether or not the relevant feature was disclosed in the drawings.

1.3 The Board considers that already the argument of lack of inventive step of the subject-matter of claim 1 in view of a combination of D1 and E1 as set out in the notice of opposition was sufficient to establish that the opposition was substantiated. It is not therefore necessary to consider whether or not the alleged prior use was sufficiently substantiated.

1.4 The Board concludes that the opposition of appellant I was admissible.

2. *Admissibility of the opposition of appellant II*

2.1 Appellant II filed a notice of opposition on 8 February 2001 against the patent in suit. The document stated that the patent as a whole was attacked based on Article 100(a) EPC, i.e. lack of novelty and/or lack of inventive step. A cheque for the opposition fee was enclosed. No reasoned statement in support of the notice of opposition was enclosed. On 9 February 2001 a first fax was received from opponent II, which just contained three patent documents and requested that they be added to the notice of opposition "already filed by fax that day". A second fax filed later the same day stated that opposition was filed against the patent as whole based on Article 100(a) EPC, i.e. lack of novelty and/or lack of inventive step. The document stated that the opposition fee had been paid by the cheque filed on 8 February 2001. This fax also contained the reasoned statement of opposition. A third fax was filed on 9 February 2001 shortly after the second fax. Apart from one minor detail, the third fax was identical to the second fax.

- 2.2 Appellant II argues that the requirements for a valid opposition were fulfilled within the time limit for opposition by a combination of the actions of opponent II. The respondent argues that there were two oppositions neither of which was admissible. It considered that the first opposition from 8 February 2001 was not admissible because it contained no reasoned statement and the second opposition was not admissible since no fee for opposition was paid for it. The respondent referred to T 9/00 (not published in OJ EPO).
- 2.3 The Board first notes that the legal basis for declaring an opposition inadmissible following the argumentation of the respondent is Rule 56(1) EPC. The Board considers that opponent II filed only one opposition and that for this opposition the requirements for a valid filing were completed within the opposition period. In this respect the Board notes that Rule 56(1) EPC indicates that an opposition is to be rejected if a deficiency of non-compliance with Article 99(1) and Rule 55(1)(c) EPC is not remedied before expiry of the opposition period. Article 99(1) EPC requires that the opposition fee be paid and that the notice shall contain a reasoned statement and Rule 55(1)(c) EPC requires an indication of the facts, evidence and arguments in support of the ground. The lack of such statement and indication in the notice of opposition filed on 8 February 2001 was therefore a deficiency in the sense of Rule 56(1) EPC. This deficiency was remedied before the expiry of the opposition period, i.e. 10 February 2001, by the second fax filed on 9 February 2001 which contained the reasoned statement including an indication of the facts grounds and evidence.

The situation dealt with in T 9/00 was quite different. In that case two oppositions, although filed by the same opponent, were filed two months apart and had differing content. For each opposition an opposition fee was paid. There were no cross-references between the oppositions. The opponent in that case subsequently stated that although the double filing had been a mistake it still wished to maintain the two oppositions. Those circumstances are quite different from the circumstances of the present case both factually and in terms of the intentions of the opponent. In the case T 9/00 all the requirements for filing two valid oppositions were fulfilled and the intention of the opponent was to maintain two separate oppositions. In the present case only the requirements for filing one opposition could have been fulfilled and the intention of the opponent was to maintain a single opposition as evidenced by the statement in the second and third faxes that the cheque for the opposition fee already presented the day before should be used for the opposition. The only indication of separate oppositions was the fact that both the document filed on 8 February 2001 and the faxes filed on 9 February 2001 each stated that they were an opposition. This is not an indication, however, of an intention on the part of the opponent to achieve the filing of two oppositions but rather an indication of their content.

- 2.4 The Board concludes that the opposition of opponent II complied with Article 99(1), Rule 1(1) and Rule 55(1)(c) EPC and was admissible.

3. *Admissibility of the appeal of appellant I*

3.1 The respondent argued that the appeal of appellant I is not admissible because the appeal grounds were not filed in due time. It considers that the relevant date of despatch for calculating the start of the time limit in accordance with Rule 78(2) EPC is not the date which is indicated under "Date" on the front sheet of the decision - in this case "03.06.2005" - but the date which is given under "to EPO postal service: 31.05.05". The statement of grounds of appeal was filed on 13 October 2005 so that they would have been filed within the applicable time limit of four months based on a date of despatch of 3 June 2005 but not within that time limit when based on a date of despatch of 31 May 2005.

3.2 The Board cannot agree with the argument of the respondent. Rule 78(2) EPC refers to the "the tenth day following its posting" for determining when a registered letter is deemed to have been delivered. This fictive delivery date is the date which is then used as the starting date for the time limit. It is self-evident that this posting is the despatch by the European Patent Office to the parties via the postal services and not the internal posting from the opposition division to the EPO postal service. The rule is dealing with the deemed delivery of a registered letter to the party which can only be based on the actual despatch to that party, with simultaneous registering of the date of despatch.

3.3 The Board concludes that the grounds of appeal of appellant I were filed in due time and that this appeal is admissible.

4. *Admissibility of the appeal of appellant II - party as of right*

4.1 The respondent has also argued that the appeal of appellant II was late filed because the appeal grounds were not filed in due time. The statement of grounds of appeal of appellant II was filed on 13 October 2005, i.e. on the same date as that of appellant I. The Board considers that the statement of grounds of appeal of appellant II was filed in due time for the same reasons as explained in point 3 above.

4.2 The respondent pointed out that the notice of appeal of appellant II did not contain the address of appellant II as required by Rule 64(1)(a) EPC. In accordance with Rule 65(2) EPC the Board invited the appellant to remedy the deficiency within a time limit set by the Board, i.e. one month before the oral proceedings. Appellant II failed to do this within the set time limit and only informed the Board with fax of 5 November 2007 of the required address, i.e. a few days before the oral proceedings. In the oral proceedings appellant II admitted that the time limit had been missed. The effect of the failure to observe the time limit is clearly set out in Rule 65(2) EPC. This rule obliges the Board to reject the appeal as inadmissible.

4.3 In the oral proceedings before the Board appellant II requested an extension of the time limit for remedying the deficiency. However, according to Rule 84 EPC, last sentence, such requests must be filed before the expiry of the time limit in question. Since the legal effects of the failure to meet the time limit became effective

immediately after the time limit ran out a retrospectively granted extension is not possible.

4.4 Appellant II also mentioned that it had received no notification under Rule 69(1) EPC of a loss of rights. This could have allowed appellant II to request re-establishment of rights under Article 122 EPC earlier than at the oral proceedings before the Board. The question of the applicability of this rule in the present case does not need to be answered since the appellant, at the latest on 5 November 2007 when it communicated the address in question, itself was aware of its failure to meet the time limit. Had the notification under Rule 69(1) EPC been sent, the appellant would have had the possibility of requesting a decision under Rule 69(2) EPC. However, Rule 69(2) EPC indicates that such decision is for the case that: "...the person concerned considers that the finding of the European Patent Office was inaccurate..." which is not the situation here since Appellant II acknowledges that it has missed the time limit. In any case, by the present decision appellant II has received a decision regarding its failure to meet the time limit.

4.5 In the oral proceedings appellant II requested a decision of the Board that it be re-established into the time limit for correcting the deficiency although it had been aware before the oral proceedings of its failure to meet the time limit. In accordance with Article 122(3) EPC, however, such a request is not deemed to be filed until the fee for re-establishment has been paid. As no fee had been paid no effective request had been filed on which the Board could take a decision.

- 4.6 The Board concludes therefore that the appeal of appellant II is not admissible.

However, the appellant remains in the proceedings as a party as of right pursuant to Article 107 EPC.

In these decision grounds for the sake of clarity appellant II will continue to be referred to as such despite the finding of inadmissibility.

5. *Request for an accompanying person to present parts of the case of the respondent*

- 5.1 More than one month before the oral proceedings the respondent informed the Board with its submission dated 26 September 2007 that a Mr Erickson would argue the case with respect to novelty, inventive step and claim interpretation. He would be under the continuing responsibility and control of the professional representative. Mr Erickson is a US patent attorney who represents the respondent in the United States, though he is not an employee of the respondent.

- 5.2 The Enlarged Board of Appeal in its decision G 4/95 (*supra*) set out the conditions under which an accompanying person may make submissions. In point (3)(a) of the order it is stated that "Such oral submissions cannot be made as a matter of right, but only with the permission of and under the discretion of the EPO." The Board therefore has a discretion which it may exercise.

According to point (3)(c) of the order no special criteria apply to the making of oral submissions by qualified patent lawyers of countries which are not

contracting states to the EPC. This is the situation of Mr Erickson. The Board understands this point of the order to mean that the fact that a person is such a patent lawyer is not alone a reason to refuse permission to speak.

With regard to the status of Mr Erickson the Board has confirmed that he is neither a European patent attorney nor under training to become a European patent attorney. He is also not indicated to be a technical expert who would explain technical issues. Mr Erickson is therefore 'simply' a person who knows the case quite well. In the view of the Board this is not a reason for allowing Mr Erickson to speak.

- 5.3 With regard to the topics on which it was requested that Mr Erickson should speak these were, as indicated above, novelty, inventive step and claim interpretation. In fact, these topics constitute the entire substantive issues of the case. These are moreover topics for which an attorney needs to present them in the context of European patent law, in which Mr Erickson is neither qualified nor under training to become qualified. In points (1) and (2) of the above mentioned decision of the Enlarged Board of Appeal it is stated that an accompanying person "may be allowed to make oral submissions on specific legal or technical issues on behalf of that party, otherwise than under Article 117 EPC, in addition to the complete presentation of the party's case by the professional representative." The Board understands that this means that the topic on which the accompanying person will speak should be quite specific and should be an addition to the case as presented by the European patent attorney of the party.

However, in the present case it was requested that Mr Erickson should present what constituted the complete substantive part of the case of the appellant. The Board considers that therefore the extent of the proposed topics is inappropriate and is not in accordance with the decision of the Enlarged Board of Appeal for a person in the situation of Mr Erickson.

5.4 The Board therefore exercised its discretion and decided not to allow Mr Erickson to speak.

6. *Belated request from the respondent to derogate from the language of the proceedings*

6.1 The language of the proceeding is English. All the written submissions of the respondent have been made in English. In its submission of 26 September 2007, which was written in English, the respondent had indicated that interpretation out of German into English would be required because of the presence of Mr Erickson and his intention to speak in English. Interpreters had been provided for interpretation both from English into German at the request of Appellant I and from German into English at the request of the respondent. After the Board had decided not to allow Mr Erickson to speak the representative of the respondent requested to present the respondent's case in German. The representative further requested that the interpretation from German into English should continue for the benefit of Mr Erickson.

6.2 There was no indication in any of the submissions of the respondent that it would use a language other than English. The request of its attorney to use German must

be seen as a request that the conditions set out in Rule 2(1) EPC, i.e. to inform the European Patent Office at least one month before the oral proceedings of its intention to derogate from the language of the proceedings, should be waived by the Board. In this respect the Board does not accept that the argument of equivalence of arms as brought forward by the respondent changes the situation. It is Rule 2(1) EPC which ensures this equivalence of arms. However, the party must act in accordance with the rule in order to ensure that it has equivalent arms available.

- 6.3 In the view of the Board Rule 2(1) EPC implies that a party may choose to use one of the official languages set out in Article 14(1) EPC and is entitled to speak and hear that language. The request of the respondent to use German whilst having interpretation into English would mean that the party would be using one official language but requiring interpretation into another official language for a reason which is not relevant to the language in which it is presenting its case. The Board cannot agree that a party has such a right under the European Patent Convention. In the view of the Board a party must be clear as to which official language it wishes to use. The party then has a right to both speak and hear in that language, so long as the conditions of Rule 2(1) EPC have been fulfilled. The party does not, however, have a right to have a language in which it will speak and a different language in which it will hear.

The Board therefore refused to allow the representative of the respondent to present its case in German whilst continuing to use interpretation into English.

6.4 The representatives of the other parties were German native speakers so that they would not be disturbed by the professional representative of the respondent using German, and they confirmed this. The Board therefore informed the representative of the respondent that it could waive the requirement of one month's notice as set out in Rule 2(1) EPC for the derogation from the language of the proceedings, but would then dismiss the interpreters since the European Patent Office would then have no necessity under Rule 2(5) EPC to provide interpretation. Alternatively, the representative could speak in English as foreseen and the interpretation would continue from German into English. The respondent decided to choose the former option and then presented its case in German without interpretation into English.

The request to present the respondent's case in German was thus allowed.

7. *Admissibility of late filed documents*

7.1 The opposition division had already decided to admit the documents E4 to E7 which were late filed during the opposition proceedings.

7.2 The respondent requested that the documents filed by the appellants during the appeal proceedings should not be admitted into the proceedings. The Board notes that there were already ten auxiliary requests filed by the respondent during the opposition proceedings, whereby several of the requests each included a claim 1 which had extra features compared to claim 1 of the main request which differed in each request. The appellants

filed new documents with the appeal grounds partly in anticipation of the maintenance of these requests in the appeal proceedings and indeed exactly these requests were filed by the respondent as a response to the appeals. These requests were later replaced by a set of six auxiliary requests which overlapped in their content with the preceding requests.

- 7.3 Taking account of the number and content of the auxiliary requests and the fact that with one exception the documents were filed at the start of the appeal proceedings, the Board decided that it was appropriate to allow the introduction of all the documents, including E16 filed by the respondent, and not to conduct an enquiry into every document individually.

The documents E8 to E17 were therefore admitted into the proceedings.

8. *Admissibility of the ground of novelty when argued by appellant I*

- 8.1 The respondent argued that the notice of opposition of opponent I was limited to inventive step and that its introduction of the ground of lack of novelty into the appeal proceedings is a fresh ground of opposition for appellant I to which the respondent objects in accordance with G 1/95 (*supra*).

- 8.2 The Board notes that lack of novelty was argued in its notice of opposition by opponent II. In the opinion of the Board there is only a single opposition proceedings even when there is more than one opponent. This can be derived from Article 99(4) EPC which states that:

"Opponents shall be parties to **the** opposition proceedings as well as the proprietor of the patent." (emphasis added by the Board), and from Article 101(2) which states that: "In the examination of **the** opposition, ...the opposition division shall invite the parties,...on communications from another party or issued by itself." (emphasis added by the Board). See in this respect also T 270/94 (not published in OJ EPO, point 2.1 of the reasons) and T 620/99 (not published in OJ EPO, point 1 of the reasons).

The same applies to the opposition-appeal proceedings (see Article 9 of the Rules of Procedure of the Boards of Appeal). In the oral proceedings before the opposition division opponent I, apparently for the first time, argued lack of novelty over E5 (see section 2, first paragraph of the minutes of the oral proceedings). The opposition division considered and took a decision on novelty (cf. point 2 of the decision reasons which discusses novelty in view of E5 and D5) so that this ground is in the proceedings and is open to discussion by all the parties. The respondent referred to T 758/90 (not published in OJ EPO). The situation which the case dealt with was that a ground of opposition had been brought forward by one opponent and had been decided on by the opposition division, and was subsequently relied upon in appeal proceedings by the other opponent as sole appellant. In its decision, however, the Board only concluded that it was uncertain that the matter could be decided on following the principles of G 9/91 or G 10/91 (OJ EPO, 1993, 408, 420), i.e. the ground could only be admitted with the agreement of the patent proprietor. In actual fact, the Board took no decision on the matter

arguing that the disputed ground in any case would not succeed against the patent.

8.3 The Board therefore concludes that the ground of lack of novelty is in the appeal proceedings both for appellant I and for appellant II.

9. *Interpretation of claim 1 of the main request*

9.1 The meanings of some of the terms and expressions used in claim 1 are critical to the discussion of novelty and inventive step. The Board considers it appropriate therefore to give its interpretation of these.

9.2 The term "simultaneous" is used in claim 1 and its interpretation is critical to the consideration of the prior art. The respondent argued that in view of Article 69(1) EPC the term has to be interpreted using the embodiments disclosed in the description. Article 69 EPC, however, is an article of the Convention setting out the interpretation of claims for the purposes of determining the extent of protection for infringement purposes. The article hence is not applicable in the present opposition appeal proceedings. Nevertheless, the Board considers that the description can play a role in determining how the skilled person will understand a term that is used in the claims.

At least three possible interpretations of the term "simultaneous" were considered in the discussions. In a first interpretation the term could mean that the knife blade starts its cutting action on both loaves at the same time and finishes its cutting action on both loaves at the same time. In a second interpretation the term

could mean that the knife blade starts its cutting action first on one loaf and then, whilst still cutting the first loaf, starts cutting the second loaf. The knife blade then finishes cutting the first loaf and subsequently finishes cutting the second loaf. The cutting action is thus at the same time for both loaves for only a part of the cutting action. In a third interpretation the term could mean that in a single cutting action of the knife blade it cuts both loaves without necessarily having a cutting contact on both loaves at the same time.

9.2.1 The respondent has rejected the first interpretation on the practical grounds that the varying sizes of loaves would make it impossible to start and finish the cutting actions on both loaves at the same time. The Board agrees with the respondent in this respect. Also, the appellants did not argue for this interpretation.

9.2.2 The respondent argued for the second interpretation. The basis of the argument of the respondent is that this is the case in the embodiments, referring particularly to figure 4a. In the view of the Board, however, figure 4a, however, does not give a clear indication of the cutting action, nor is there any indication that the particular action shown in the figure is one to which the interpretation of the claimed term "simultaneous" should be limited.

9.2.3 The appellants argued for the third interpretation. As mentioned above the description does not explicitly show that any one of the three interpretations is the one which the skilled person would understand to be the correct one. The title of the originally filed

application is "Slicing machine and method for slicing two or more food loaves". In the description as originally filed on page 3, lines 2 to 9 it is stated that "It is a principal object of the present invention to provide a new and improved versatile high speed slicing machine and method for slicing one, two, or more food loaves with a single cyclically driven knife blade ...". Also, on page 21, lines 7 to 9 it is stated that "Three or more loaves can be sliced simultaneously; slicing of two loaves is more common."

It is apparent to the skilled reader that a high speed machine with a cyclically driven knife blade increases its capacity by cutting multiple loaves each cycle. There is nothing in the application as originally filed to suggest that the blade should necessarily be in cutting relationship with all the loaves at the same time. Indeed the description speaks against this since it is indicated that three or more loaves could be cut simultaneously. In order for the knife blade to be in cutting relationship with all the loaves at the same time the size of the knife blade would have to increase corresponding to the number and size of the loaves, which would be unmanageable. The skilled person would not consider this to be the intention unless there was an express explanation in the application that this was necessary. The argument of the respondent that figure 4a shows the blade in cutting relationship with both loaves at the same time would not, even it were proven to be correct, alter the interpretation since it would simply mean that in one particular example with two loaves there was an overlap in the cutting action. Also, figure 16 shows a cutting path which, depending upon the

meaning of this path, could imply a cutting action in conformity with the third interpretation.

The Board concludes therefore that the third interpretation is the correct interpretation.

- 9.3 The respondent argued that the expression "on a common plane" implied a surface which is horizontal or inclined to the horizontal, but is not vertical. The respondent's view rests on the use of the preposition "on" and that any other interpretation would mean that the feature was superfluous. The reason why the feature would be superfluous is the preceding statement in the claim that the first and second loaves move along parallel paths. In the view of the Board the meaning of the "parallel" must be seen in the context of the paths of loaves in the sense that as they are advanced they each move towards the knife blade. The addition of the expression "on a common plane" does not necessarily have to mean something different since it cannot be assumed that a claim has perfect wording wherein every word has a meaning and no word is superfluous. In the present case the references to parallel and "on a common plane" can be seen as a desire to eliminate any doubt in the meaning of the claim. Moreover, the Board can see no basis for the argument that the use of the preposition "on" in the expression indicates a mechanical function in addition to a geometrical arrangement as argued by the respondent. Finally, the claim reads: "... drives (75, 163-166) moving said loaves along said parallel loaf paths on a common plane perpendicular..." which can just as well mean that it is the parallel loaf **paths** which are on a common plane.

10. *Novelty*

10.1 Appellant I argued lack of novelty of claim 1 based on E5 and appellant II argued lack of novelty of claim 1 based on D5.

10.2 The Board considers that D5 does not take away the novelty of claim 1 of the main request. The knife blade disclosed in the document does not cut slices from the loaves simultaneously, i.e. in a single cutting action, since it cuts several slices first from one loaf, then several from a second loaf and finally several from a third loaf. This is set out in figures 7 to 10 which indicate the movements relative to the blade. Also, figure 3 shows that the slices from one loaf all lie beneath the adjacent slices from a different loaf and the slices from the loaf with the smallest diameter are all overlying the adjacent slices. This result would not be produced if all the loaves were cut in a single slicing action. Furthermore, claim 1 specifies that the knife blade is driven "along a predetermined path". In the slicer according to D5 the tray 1 moves relative to the knife blade while the knife blade itself remains stationary so that there is no path along which the knife blade is driven.

10.3 With regard to E5 the question of novelty depends upon the interpretation of the claim already discussed above.

The respondent argued that the cutting action disclosed in E5 was not "simultaneous" in the interpretation argued by it, i.e. the second one. However, as explained above the Board does not follow the interpretation of the respondent with respect to the term "simultaneous".

In E5 there is a knife blade which performs an orbital motion. During one orbit of this motion the knife blade cuts a slice from each of two loaves. In the view of the Board this slicing action is to be considered as "simultaneous" since both loaves are cut in a single cutting cycle.

The respondent further argued that the arrangement of the loaves disclosed in E5 was not "on a common plane". However the loaves disclosed in E5 are parallel and a plane can be drawn which passes through the centres of the loaves so that they as well as their paths must be seen as "on a common plane". In this respect even if the preposition "on" is considered to imply a supporting function, as argued by the respondent, it is self-evident that this is also the case for the loaves in E5 which require some support even though they are vertically orientated.

10.4 The Board considers therefore that the subject-matter of claim 1 of the main request lacks novelty over E5.

11. *Remittal to the department of first instance*

11.1 The respondent requested that the case be remitted to the department of first instance for the further examination of the auxiliary requests and neither of the appellants objected to such a remittal.

11.2 The Board notes that already the independent claim of the first auxiliary request involves a feature which was not considered in the first instance proceedings and the opposition division has also yet not been able to take account of documents E8 to E17 which have been

introduced during the appeal proceedings in connection with the auxiliary requests. In accordance with Article 111(1) EPC, the Board therefore considers it appropriate to remit the case to the department of first instance so as to give the parties the possibility to argue their case before two instances.

12. *Request to refer questions to the Enlarged Board of Appeal*

12.1 The respondent requested that questions be referred to the Enlarged Board of Appeal concerning the admissibility of the appeal of appellant II and the admissibility of the auxiliary requests, whose admissibility had been objected to by the appellants.

12.2 The Board found that the appeal of appellant II was not admissible. The Board decided to remit the case without deciding upon the admissibility of the auxiliary requests. A referral of the questions to the Enlarged Board of Appeal could not therefore affect the outcome of the proceedings so that it would serve no purpose.

12.3 The Board therefore did not refer the questions to the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

1. The appeal of opponent II is rejected as inadmissible.
2. The request to refer questions to the Enlarged Board of Appeal is refused.
3. The decision under appeal is set aside and the case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

D. Sauter

H. Meinders