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**Datasheet for the decision
of 10 December 2021**

Case Number: T 2211/18 - 3.2.07

Application Number: 12171803.5

Publication Number: 2505524

IPC: B65G21/18, B65G47/57, B65G47/71

Language of the proceedings: EN

Title of invention:
Conveyor system

Applicants:
Specialty Conveyor B.V.
Ambaflex International B.V.

Headword:

Relevant legal provisions:
EPC Art. 56, 111(1)
RPBA 2020 Art. 11

Keyword:
Inventive step - (yes)
Remittal - (yes)

Decisions cited:

T 1966/16

Catchword:



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Case Number: T 2211/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 10 December 2021

Appellant: Specialty Conveyor B.V.
(Applicant 1) De Corantijn 81
1689 AN Zwaag (NL)

Appellant: Ambaflex International B.V.
(Applicant 2) De Corantijn 81
1689 AN Zwaag (NL)

Representative: De Vries & Metman
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1062 XK Amsterdam (NL)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 16 March 2018
refusing European patent application No.
12171803.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: S. Watson
A. Pieracci

Summary of Facts and Submissions

- I. An appeal was filed by the applicants (appellants) in the prescribed form and within the prescribed period against the decision of the examining division refusing European patent application 12 171 803.5.
- II. In its decision the examining division found that the main request did not meet the requirements of Article 56 EPC (lack of inventive step). Auxiliary requests 1 and 2 were also held not to meet the requirements of Article 56 EPC.
- III. With their statement of grounds of appeal the appellants requested
- that the decision be set aside and a patent be granted on the basis of either the set of claims according to the main request or, in the alternative, the set of claims according to auxiliary request 1, both filed with the statement setting out the grounds of appeal, whereby the main request corresponds to the main request decided upon in the decision under appeal and auxiliary request 1 corresponds to auxiliary request 2 decided upon in the decision under appeal.

The appellants also requested that oral proceedings be held, in the event that the Board intended to refuse their main request.

- IV. The Board gave its preliminary opinion, in a communication pursuant to Rule 100(2) EPC, that although the appellants appeared to have convincingly shown the incorrectness of the decision under appeal

with respect to lack of inventive step of the subject-matter of claim 1 of the main request, a grant could not be ordered as it was not clear whether the examination division had decided that all other requirements of the EPC were fulfilled, therefore a remittal to the examining division for further prosecution was envisaged.

- V. The appellants responded to that communication with letter of 23 July 2021 which led the Board to arrange oral proceedings.
- VI. Oral proceedings before the Board were held on 10 December 2021 at the end of which the decision was announced. For further details of the oral proceedings reference is made to the minutes thereof.
- VII. The final requests of the appellants are
- that the decision under appeal be set aside;
 - that the case be remitted to the examining division for further prosecution.
- VIII. In the decision under appeal the following prior art documents are mentioned:
- D2: JP 7 157058 A;
D9: FR 2 607 108 A1.
- IX. Claim 1 of the main request reads as follows:
- "A conveyor system (1) for conveying at least one product, comprising at least one first conveyor (2), which is adjacent to at least one second conveyor (3) via a junction (4), wherein the conveying direction of the first conveyor (2) near the junction (4) is different from the conveying direction of the second conveyor (3) near the

junction (4) as seen from above, wherein the first conveyor (2) has a conveyor belt including a first conveying surface (6) and the second conveyor (3) has a second conveying surface (7) for supporting the product therein, wherein moving means (11-15) are provided for moving the product from the first conveyor (2) to the second conveyor (3), wherein the conveyor belt follows a spiral path at least near the junction (4), wherein the second conveyor (3) extends almost or fully tangentially relative to the first conveyor (2), wherein the moving means (11-15) comprise a guide (11, 14, 15) for guiding the product present on the first conveyor (2) near the junction (4) to the second conveyor (3), characterised in that the guide can be moved via a translating movement from a non-guiding position to a guiding position by means of an actuator, which actuator is disposed on the side of the second conveyor relative to the first conveyor."

X. In view of the appellants' final requests and the decision taken by the Board there is no need to reproduce the independent claim of the auxiliary request.

XI. The lines of argument of the appellants are dealt with in detail in the reasons for the decision.

Reasons for the Decision

1. The appeal proceedings are governed by the revised version of the Rules of Procedure which came into effect on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) and 13(2) RPBA

2020, instead of which Articles 12(4) and 13 RPBA 2007 remain applicable (Articles 25(2) and (3) RPBA 2020).

2. *Main request - claim 1 - Article 56 EPC*

2.1 In the decision under appeal the examining division found that the subject-matter of claim 1 was obvious compared with a combination of the teaching of document D2 together with the common general knowledge of the skilled person, or with the teaching of document D9.

2.2 The appellants did not contest that document D2 was a suitable starting point for assessing inventive step, nor that the distinguishing feature of claim 1 with respect to the teaching of document D2 is that:

"the guide can be moved via a translating movement from a non-guiding position to a guiding position by means of an actuator, which actuator is disposed on the side of the second conveyor relative to the first conveyor".

The appellants did argue, however, in its statement of grounds of appeal, that the decision under appeal was incorrect as

- the examining division used hindsight in looking for a solution to the objective technical problem;
- the examining division provided no evidence of common general knowledge;
- the conveyor systems of D2 and D9 were not similar so that the teachings could not be combined;
- the examining division did not show what would prompt the skilled person to make the required changes to the system of D2.

The Board finds at least the following arguments of the appellants convincing for the reasons set out below.

2.3 Use of hindsight when assessing inventive step

2.3.1 It is well-established jurisprudence of the Boards of Appeal that the assessment of inventive step must be carried out from the viewpoint of a skilled person without knowledge of the invention (see Case law of the Boards of Appeal (CLB), 9th edition, 2019, I.D.6.). In the present case, the examining division used an *ex-post facto* analysis to arrive at the claimed solution when it determined that an alternative diverter was required to solve the objective technical problem.

2.3.2 According to the examining division the objective technical problem was "to increase the speed of the product flow" (see the decision under appeal, point II.17.4). However, the examining division then found that the skilled person "would recognise that the bottle neck, for an increase in speed of the first and second conveyor, is the limitation resulting from the maximum pace of the diverter between its two working positions. The skilled person would therefore have to look for an alternative in the technical field of diverters" (see decision under appeal, point II.17.5).
The examining division has however not shown why the skilled person, in the absence of any knowledge of the invention, would have immediately determined that the provision of an alternative guide is required to increase the speed of product flow.

2.3.3 The Board follows the arguments of the appellants that the examining division has effectively taken the provision of an alternative guide as the objective

technical problem to be solved. It is however established case law that the objective technical problem should not anticipate the solution, in order to avoid the use of hindsight (see CLB, *supra*, I.D.4.3.1).

2.3.4 Therefore for the combination of document D2 and common general knowledge, as well as the combination of the teaching of documents D2 and D9, the examining division used hindsight in finding that the subject-matter of claim 1 was obvious. Without the use of hindsight the skilled person would not have focused on the provision of an alternative diverter in order to solve the problem of increasing the speed of product flow.

2.4 Combination of the teaching of document D2 with common general knowledge

2.4.1 The appellants have argued that no evidence was provided by the examining division that demonstrated that the identified plurality of alternative diverters formed part of the skilled person's common general knowledge.

2.4.2 The examining division found that four types of diverters (pivoting, translating, lifting and lowering) were "well-known to the skilled person", whereby translating diverters allowed a quicker flow than pivoting diverters but were not as quick as lifting and lowering diverters, which were however more expensive and difficult to install in the system of document D2 (see the decision under appeal, point II.17.5).

The examining division then found that the provision of a guide moved via a translating movement was merely the choice of one from several straightforward

possibilities, which the skilled person would select in order to solve the technical problem posed.

- 2.4.3 However, the Board again follows the arguments of the appellants that in the present case the objective problem to be solved, when starting from the system of document D2, is not to select a specific guide from a number of well-known alternative guides. Instead the skilled person is trying, without knowledge of the invention, to solve the problem of increasing the speed of product flow in the conveying system of D2.

Therefore it is not necessary to consider whether the various diverters mentioned by the examining division do form part of the common general knowledge of the skilled person.

- 2.5 Combination of the teaching of documents D2 and D9

- 2.5.1 It is well-established case law that in order to assess whether a claimed invention is obvious, the "could-would approach" is used, *i.e.* it must be considered not only whether the skilled person could have arrived at the claimed invention, but whether they would have done so (see CLB, *supra*, I.D.5.).

- 2.5.2 The examining division has not demonstrated why the skilled person would replace the guide of D2 with a guide known from document D9.

In the decision under appeal no passages of document D9 have been cited which indicate that a guide moved via a translating movement will increase the speed of product flow.

The appellants themselves made reference to a passage of this document, where it is disclosed that the guide allows the speed of unloading to be increased (D9, page 3, lines 12-19).

The Board however agrees with the appellants' conclusions that this passage does not indicate that the speed of unloading is increased due to the type of guide used, but rather that it is due to the angle of the guide with respect to the rotary platform and the unloading conveyor. Therefore the Board follows the appellants' arguments that document D9 does not contain any teaching regarding an improvement in speed of product flow when using a guide moved by translating.

2.5.3 The examining division found that, due to the closeness of articles on the rotating table of D9, a pivoting diverter would not be suitable for use in that system and that therefore document D9 taught the advantages of translating diverters "with respect to interference with the flow of articles on the first conveyor" (decision under appeal, point 17.6). The Board cannot follow this reasoning and agrees with the appellants that the suitability (or not) of a pivoting guide for the system of document D9 cannot be understood as teaching the skilled person that a pivoting guide in the system of document D2 should be replaced with a translating guide.

2.5.4 As there is no indication given in document D9 that a guide moved by translating movement would solve the problem of increasing the speed of product flow, the skilled person, without prior knowledge of the invention, would not replace the pivoting guide in the system of document D2 with the guide of document D9.

Thus, it is not necessary to consider whether or not the skilled person could combine the teachings of documents D2 and D9, as the examining division has not shown that the skilled person would combine them.

- 2.6 The Board therefore finds the appellants' arguments regarding the incorrectness of the decision under appeal convincing and finds that the subject-matter of claim 1 is not obvious with respect to a combination of the teaching of document D2 with either the common general knowledge of the skilled person or the teaching of document D9.

3. *Remittal*

- 3.1 It follows from the above that the sole ground for the refusal set out in the decision under appeal does not hold and the decision cannot be upheld.

The Board notes that in the present case it is not clear whether a complete examination with respect to the requirements of the EPC for all claims has been carried out by the examining division.

The findings in the decision under appeal relate only to inventive step of claim 1. The examining division did not make any reference to other requirements of the EPC in the decision under appeal, therefore no explicit decision has been taken with respect to matters such as clarity or added subject-matter.

During the examination proceedings objections were raised under Articles 84, 76(1) and 123(2) EPC, it is unclear whether the examining division was satisfied that these objections had been overcome by the amendments made and that the amendments did not give rise to any further objections. In the light of the examining division's decision that the subject-matter of claim 1 was not inventive, there was no obligation to assess the amended claims for compliance with any further requirements of the EPC.

Therefore, even if, as in the present case, a decision was taken only on objections raised relating to inventive step, this cannot be understood as an implicit decision of the examining division that all other requirements of the EPC have been fulfilled.

- 3.2 Pursuant to Article 111(1) EPC, the Board may continue with the examination, or may remit the case to the examining division for further prosecution. According to Article 11 RPBA 2020, a Board should only remit cases for further prosecution if special reasons present themselves.

The existence of such special reasons has to be assessed on a case-by-case basis, bearing in mind the primary object of the appeal proceedings, *i.e.* the review of the decision under appeal in a judicial manner (Article 12(2) RPBA 2020).

It is established case law that if essential questions regarding the patentability of the claimed subject-matter have not been examined and decided upon by the examination division then special reasons exist and the case can be remitted. See, for example, T 1966/16, Reasons 2.2.

In the present case, in view of objections raised during the examination proceedings, it is not clear to the Board, whether all further requirements of the EPC were in fact deemed fulfilled by the examining division.

The Board therefore judges it appropriate to remit the case to the examining division for further prosecution according to Article 111(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated