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**Datasheet for the decision
of 29 June 2021**

Case Number: T 1320/19 - 3.2.07

Application Number: 12784793.7

Publication Number: 2769341

IPC: B65G57/09, B65G57/03,
B65G61/00, G06Q10/04, G06Q10/08

Language of the proceedings: EN

Title of invention:
PALLET BUILDING SYSTEM

Patent Proprietor:
Symbotic LLC

Opponent:
Dematic GmbH

Headword:

Relevant legal provisions:
EPC Art. 108
EPC R. 99(2)
RPBA Art. 12(4)
RPBA 2020 Art. 12(2), 12(3), 25(2)

Keyword:

Admissibility of appeal - appeal admissible (yes)
Late-filed request - submitted with the statement of grounds
of appeal - request could have been filed in first instance
proceedings (yes) - admitted (no)

Decisions cited:

Catchword:



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Case Number: T 1320/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 29 June 2021

Appellant: Symbotic LLC
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Respondent: Dematic GmbH
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Representative: Moser Götze & Partner Patentanwälte mbB
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 25 February
2019 revoking European patent No. 2769341
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Cano Palmero
A. Pieracci

Summary of Facts and Submissions

- I. The patent proprietor (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division revoking the European patent No. 2 769 341 for non-compliance with the requirements of Article 123(2) EPC. The requests decided upon in the appealed decision were not proceeded with by the appellant with its appeal.
- II. The opposition was filed on the grounds according to Articles 100(a) and (b) (lack of novelty and inventive step, lack of sufficiency of disclosure).
- III. In preparation for oral proceedings, scheduled upon the parties' requests, the Board communicated its preliminary assessment of the case to the parties by means of a communication dated 30 July 2020, according to which the appeal was likely to be dismissed.
- IV. Oral proceedings before the Board were held on 29 June 2021. During the oral proceedings, the respondent withdrew its initial request for apportionment of costs. At the conclusion of the proceedings the decision was announced. For the further details of the oral proceedings, in particular the issues discussed with the parties, reference is made to the minutes.
- V. The appellant requested

that the decision under appeal be set aside and that the patent be maintained in amended form based on the set of claims according to the sole request

submitted with the statement setting out the grounds of appeal.

VI. The respondent (opponent) requested

that the appeal be rejected as inadmissible,
or, in the alternative,
that the case be remitted to the opposition
division for further prosecution,
or, in the further alternative,
that the patent be revoked, *i.e.* that the appeal be
dismissed.

VII. The lines of arguments of the parties relevant for the present decision, which are focused on the admissibility of the appeal and on the admittance into the proceedings of the appellant's sole request in appeal proceedings, are dealt with in detail in the reasons for the decision.

VIII. Since the wording of the claims of the appellant's sole request is not relevant for the present decision, there is no need to reproduce it here.

Reasons for the Decision

1. *Transitional provisions*

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 Article 12(4) to (6) RPBA 2020 instead of which Article 12(4) RPBA 2007 remains applicable (Article 25(2) RPBA 2020).

2. *Admissibility of the appeal - Article 108 and Rule 99(2) EPC*

2.1 The respondent objected to the admissibility of the appeal arguing that the statement of grounds of appeal was not directed to the requests on which the decision under appeal was based (Article 12(2) RPBA 2020) but on a new claim set. Hence, the appellant failed to set out why the opposition division's findings were wrong.

2.1.1 The Board disagrees for the following reasons. In accordance with Article 108 EPC in combination with Rule 99(2) EPC, in the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned. Article 12(3) RPBA 2020 further stipulates that the statement of grounds of appeal shall contain the appellant's complete case and shall set out clearly and concisely why it is requested that the decision under appeal should be reversed.

2.1.2 The Boards of Appeal have developed consistent jurisprudence on the conditions under which an appeal may be rejected as inadmissible for lack of adequate

substantiation. This includes the following principles:

(a) If the admissibility requirements are fulfilled in respect of at least one request, the appeal as a whole is admissible (Case Law of the Boards of Appeal [CLB], 9th edition 2019, V.A.2.6.3, third paragraph).

(b) It is not an absolute requirement for admissibility that the appellant should attack the contested decision as flawed. Where amended claims are filed, an appeal may also be admissible if sufficient reasons are given in the statement of grounds why the amendments are considered apt to remedy the deficiencies identified by the opposition division (CLB, *supra*, V.A.2.6.5.c)).

(c) Whether the appellant's arguments are convincing or likely to be successful is irrelevant for the purposes of determining the admissibility of the appeal (CLB, *supra*, V.A.2.6.2, first paragraph, final sentence, and 2.6.6).

2.1.3 Hence, contrary to the position of the respondent, an appeal is not necessarily rendered inadmissible by an appellant-proprietor filing amended claims, and defending the patent solely on the basis of claims as amended in the grounds of appeal.

2.1.4 In the present case, the appellant presented in the statement setting out the grounds of appeal reasons as to why the impugned decision should be set aside and why the patent should be maintained in amended form.

2.2 The respondent also argued during the oral proceedings that, in the event that the appellant's sole request would not be admitted, the appeal should be rejected as inadmissible.

However, this legal argument is not conclusive. The mere absence of any admissible request from an appellant-proprietor does not constitute *per se* a sufficient reason that automatically renders the appeal inadmissible, but rather could lead to a dismissal of such appeal.

2.3 The Board thus concludes that none of the respondent's objections are convincing and that **the appeal** meets the requirements of Article 108 EPC in combination with Rule 99(2) EPC and of Article 12(3) RPBA 2020, and **is** therefore **admissible**.

3. *Admittance of the set of claims filed with the statement of grounds of appeal as the appellant's sole request - Article 12(4) RPBA 2007*

3.1 The appellant filed with the statement setting out the grounds of appeal as its sole request a set of claims based on claims 11 to 20 of the patent as granted of which claims 1 to 10 were not maintained.

3.2 The Board notes that the claims of the patent as granted had not been subject of the decision under appeal. The appellant chose to base its case in opposition proceedings on amended claims according to a main and an auxiliary request filed on 11 December 2018, not pursuing thereby the patent as granted.

3.3 The Board further notes that the opposition division, after discussing the relevant issues, had informed the parties at two instances during the oral proceedings that neither the then main request nor the then auxiliary request were in compliance with the

requirements of Article 123(2) EPC (see points 9 and 15 of the minutes). Knowing this, the appellant, when asked by the chairman of the opposition division, stated that it did not have any further arguments or submissions (point 16 of the minutes). The appellant justifies this course of action based on internal reasons and to the right of the appellant to present requests at later appeal proceedings.

3.4 In view of the above, the Board is convinced that the appellant's sole request on file could and should have been filed in opposition proceedings. Its admittance into appeal proceedings is thus subject to the Board's discretion pursuant to Article 12(4) RPBA 2007.

3.5 The Board, considering that the main aim of appeal proceedings is that of reviewing the decisions of the administrative departments of the EPO (Article 12(2) RPBA 2020), does not consider it appropriate that the appellant starts a complete fresh case in appeal, thereby avoiding having a decision from the competent EPO department.

3.6 Therefore, the Board, exercising its discretion under Article 12(4) RPBA 2007 **does not admit the appellant's sole request into the proceedings.**

4. *Conclusion*

In the absence of any admissible request from the appellant, the appeal shall be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated