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**Datasheet for the decision
of 21 February 2024**

Case Number: T 1531/22 - 3.2.07

Application Number: 14790729.9

Publication Number: 3049605

IPC: E06B11/08, E01F13/06,
E01F13/02, E01F13/04

Language of the proceedings: EN

Title of invention:

A QUEUE MANAGEMENT GATE

Patent Proprietor:

Shortcutq Ltd

Opponent:

Via Guide GmbH

Headword:

Relevant legal provisions:

RPBA 2020 Art. 12(8)

EPC Art. 113, 116, 54, 123(3)

Keyword:

Novelty - public prior use - main request (no)
Amendments - broadening of claim (yes) - added subject-matter
(yes) - extension of protection conferred (yes)

Decisions cited:

Catchword:



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Case Number: T 1531/22 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 21 February 2024

Appellant: Via Guide GmbH
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
11 April 2022 concerning maintenance of the
European Patent No. 3049605 in amended form.**

Composition of the Board:

Chairman G. Patton
Members: A. Cano Palmero
E. Mille

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division to maintain European patent No. 3 049 605 in amended form on the basis of the then auxiliary request 1.
- II. The opposition was filed against the patent in its entirety and was based on Article 100(a) EPC (lack of novelty and inventive step), Article 100(b) EPC (insufficiency of disclosure) and Article 100(c) EPC (unallowable amendments).
- III. In preparation for oral proceedings requested by the parties, the board communicated its preliminary assessment of the case in a communication pursuant to Article 15(1) RPBA, according to which the decision was likely to be set aside and the patent revoked.
- IV. With letter dated 5 February 2024, the patent proprietor (respondent) announced that it would not attend the oral proceedings scheduled for 19 March 2024.
- V. The appellant requested

that the decision under appeal be set aside
and
that the patent be revoked.
- VI. The respondent requested

that the appeal be dismissed, *i.e.* that the patent be maintained in the amended form found by the

opposition division to meet the requirements of the EPC in accordance to the then auxiliary request 1 (main request),

or, in the alternative, that, when setting aside the decision under appeal, the patent be maintained in amended form according to the set of claims according to auxiliary request 1 filed with the reply to the statement setting out the grounds of appeal, which corresponds to auxiliary request 2 submitted during opposition proceedings.

VII. The following evidence relating to a prior use O3 has been filed during the opposition proceedings and is relied upon by the parties in the present decision:

O3a: Photograph of trade fair booth;

O3b: Video of the trade fair booth;

O3c: Affidavit of Mr Niklas Weyer of 9 June 2020;

O3d: Affidavit of Dr. Dieter Punzengruber of
12 June 2020;

O3e: Affidavit of Mr Thomas Tippl;

O3f: Affidavit of Mr Stefan Cloer;

O3g: Affidavit of Mr Andreas Schnieder;

O3h: Affidavit of Dr Dieter Punzengruber of
30 June 2021;

O3i: Affidavit of Mr Niklas Weyer of 30 June 2021.

VIII. The lines of argument of the parties relevant for the present decision are dealt with in detail in the reasons for the decision.

IX. Independent claim 2 of the main request with the feature labelling used by the parties reads as follows:

- "2.1) A method of reducing the length of a route, from start to finish, in a queue management system of the type which includes panels and/or flexible tapes extending between stanchions to form lanes, the method comprising the step of
- 2.2) (a) providing a queue management system (710) including panels and/or flexible tapes extending between stanchions (10) to form lanes (A, B, C, D), characterised in that the method further comprises the steps of
- 2.3) (b) providing a queue management device (510, 720) comprising a portable stanchion, having a post (530) and a base (520), and
- 2.4) a relatively rigid barrier (560), pivotable relative to the post in a substantially horizontal plane,
- 2.5) (c) inserting the queue management device (720) between two adjacent stanchions (10) in place of a panel or flexible tape
- 2.6) such that the barrier (560) in a first position blocks access between the two said adjacent stanchions (10) and in a second position allows access there between,
- 2.7) such that, in use, with the barrier (560) in a second position the route is shortened by access between adjacent lanes (A, B, C, D) being provided."

X. Independent claim 2 of auxiliary request 1 reads as follows (features added with respect to claim 2 of the main request are underlined, deleted are struck through):

"A method of reducing the length of a route, from start to finish, in a queue management system of the type which includes panels and/or flexible tapes extending

between stanchions to form lanes, the method comprising the step of

(a) providing a queue management system (710) including panels and/ or flexible tapes extending between stanchions (10) to form lanes (A, B, C, D), characterised in that the method further comprises the steps of

(b) providing a queue management device (510, 720) for allowing access between adjacent lanes formed by portable queue management systems of the type which include panels or flexible tapes extending between portable stanchions to form lanes, the device comprising a portable stanchion, having a ~~post~~ (530) and a base (520), and a relatively rigid barrier (560), pivotable relative to the ~~post~~ stanchion in a substantially horizontal plane,

(c) inserting the queue management device (720) between two adjacent stanchions (10) in place of a panel or flexible tape such that the barrier (560) in a first position blocks access between the two said adjacent stanchions (10) and in a second position allows access there between, such that, in use, with the barrier (560) in a second position the route is shortened by access between adjacent lanes (A, B, C, D) being provided."

Reasons for the Decision

1. *Procedural matters - decision in writing*

1.1 The case is ready for decision which is taken in written proceedings without holding oral proceedings in accordance with Article 12(8) RPBA and with Articles 113 and 116 EPC.

- 1.2 The board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA dated 16 November 2023, according to which the decision under appeal was likely to be set aside and the patent revoked.
- 1.3 In response to the communication, the respondent indicated that it would not attend the oral proceedings scheduled for 19 March 2024. Hence the respondent chose to rely on its written submissions only. Since the respondent was informed of the board's preliminary assessment of the case, on which the present decision is based, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that provision only affords the opportunity to be heard and the respondent's written submissions are fully taken into account.
- 1.4 The appellant's request for oral proceedings pursuant to Article 116(1) EPC is auxiliary to its request that the decision under appeal be set aside and that the patent be revoked. Since this request is followed by the board, the appellant's auxiliary request for oral proceedings remains procedurally inactive.
- 1.5 As a consequence, the board is in a position to take the present final decision on the basis of the contested decision to be reviewed and the extensive written submissions of the parties (Article 15(3) RPBA), while preserving their rights under Articles 113 and 116 EPC, so that the oral proceedings were cancelled.
- 1.6 The reasons for the decision given below substantially correspond to the board's preliminary opinion provided in the communication pursuant to Article 15(1) RPBA.

Said opinion was not subsequently commented on nor contested by the parties, in particular by the respondent.

1.7 Under these circumstances, the board - having once again taken into consideration all the relevant aspects put forward in the parties' written submissions - sees no reason to deviate from its above-mentioned preliminary opinion and confirms it.

2. *Main request, independent claim 2 - novelty in view of 03, Article 54 EPC*

2.1 In points 4.0.1 and 5.0.1 of its reply to the statement setting out the grounds of appeal, the respondent submitted that the appellant's grounds of appeal presented repetition of the original arguments along with new lines of argument, including those relating to novelty and inventive step, that largely do not contest points of the decision under appeal, and as such should not be admitted into the appeal proceedings in accordance with Article 12 RPBA, to the extent that they do not contest the earlier decision.

2.2 The board disagrees. In particular for the assessment of novelty and inventive step of claim 2 of the main request in view of 03, the appellant contested in several places the reasoned findings of the opposition division, namely the findings of at least points II.3.2, II.8.1, II.8.3 and II.12.2 of the decision under appeal (see points 4b and 5b of the statement setting out the grounds of appeal). In this light, the board cannot follow the respondent's allegation that these arguments do not contest the decision under appeal, and sees no reason to disregard these objections under Article 12 RPBA.

- 2.3 In point II.8.1 of the decision under appeal, the opposition division found that feature 2.5 was to be interpreted in the sense that the queue management (QM) device with a portable stanchion having a post, a base and a rigid pivotable barrier was inserted between two adjacent stanchions in the previously provided QM system. Since feature 2.5 required that the QM device was inserted in place of the (previously) provided panel or flexible tape, claim 2 was to be interpreted in the sense that the previously provided panel/tape was removed and that the post of the QM device was installed sufficiently close to one of the two adjacent stanchions to allow the functionality of feature 2.6.
- 2.4 The board does not follow this narrow interpretation of claim 2 made by the opposition division for the following reasons. As correctly argued by the appellant in points 4b and 5b of its statement setting out the grounds of appeal, a situation in which an original stanchion of the QM system with its corresponding panel or flexible tape is completely replaced by a QM device with a portable stanchion having a post, a base and a rigid pivotable barrier and inserted between two remaining adjacent stanchions would also meet the requirement of feature 2.5 that such QM device is inserted in place of that panel or flexible tape.
- 2.5 Prior use O3 consists of a photograph (O3a), a video (O3b) and multiple affidavits (O3c to O3i) that together demonstrate a public prior exhibition in Munich of a QM system. This system undisputedly includes a post having a pivoting barrier which is installed between two adjacent stanchions. The public availability before the priority date of the patent in suit was also not disputed.

- 2.6 The opposition division found in point II.8.3 of the decision under appeal that O3 did not disclose features 2.5 and 2.6. In particular, even in the case that it could be considered that O3 was the result of the integration of a QM device in an existing QM system, it would still not disclose a method according to claim 2, since in the open position of the barrier most of the space between the two adjacent stanchions would still be blocked by a tape.
- 2.7 The board cannot concur with this reasoned finding. Indeed, feature 2.6 requires that the pivotable barrier allows access in a second position between the two stanchions. This is exactly what the the barrier of the QM device of O3 does, in the same way that a conventional door allows (in its open position) access between two opposite walls, even when most of the space between opposite walls is occupied by the wall in which the door is installed. The board is thus convinced that a functionality according to feature 2.6 is anticipated by the QM system of O3.
- 2.8 The remaining question is whether O3 anticipates and/or suggests feature 2.5, *i.e.* whether the step of inserting the QM device in place of a panel or flexible tape is implicitly derivable and/or rendered obvious by O3. In this sense, it is undisputed by the parties in view of O3h and O3i, that the QM device of O3 is presented as a retrofitted QM system (in German: "*nachzurüstendes Produkt*"). In the board's view this is an unequivocal indication that the QM device with a pivotable barrier of O3 is intended to be integrated into any existing QM system. The board concurs with the appellant (see statement setting out the grounds of appeal, point 4b, page 16) that in view of O3a and O3b,

the barrier of the (retrofitted) QM device extends in the longitudinal direction of the flexible tape and would inevitably have had to replace at least the major part of a removed flexible tape in order to fulfil its blocking function.

2.9 In sum, the board concludes that the appellant has convincingly demonstrated the incorrectness of the decision under appeal with respect to novelty of claim 2 of the main request in view of O3, since this prior use shows all features of claim 2 of the main request, including features 2.5 and 2.6.

3. *Auxiliary request 1 - Article 123(3) EPC*

3.1 The appellant argued in point 6 of its letter dated 23 June 2023 that by the deletion of the word "post" in the last lines of section b) of claim 2 of auxiliary request 1, the scope of protection of the patent had been extended, contrary to the requirements of Article 123(3) EPC.

3.2 The board concurs with the appellant's view, that claim 2 of the patent as granted required that the QM device was provided with a portable stanchion having a post and a base, and a barrier pivotable relative to the post. In contrast, in the method according to claim 2 of auxiliary request 1, the QM device comprises a stanchion with a base and the barrier is rotatable relative to the stanchion, so that claim 2 of auxiliary request 1 extends beyond the subject-matter as protected thereby infringing Article 123(3) EPC.

4. *Conclusions*

4.1 It follows from the above that the appellant has convincingly demonstrated the incorrectness of the decision under appeal. Therefore, **the decision under appeal is to be set aside.**

4.2 In the absence of any admissible and in its substance allowable request, **the patent is to be revoked.**

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

G. Patton

Decision electronically authenticated