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**Datasheet for the decision  
of 2 September 2008**

**Case Number:** T 0455/06 - 3.2.06

**Application Number:** 99970699.7

**Publication Number:** 1129246

**IPC:** D04H 1/72

**Language of the proceedings:** EN

**Title of invention:**

A plant for producing a web-shaped product of fibres and powder

**Patentee:**

M & J Fibretech A/S

**Opponent:**

DAN-WEB HOLDING A/S

**Headword:**

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**Relevant legal provisions:**

EPC Art. 123(2)  
RPBA Art. 12(1)(c), 12(4), 13(1) and 13(3)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Main request - not admitted"  
"Auxiliary request - not allowable"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0455/06 - 3.2.06

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.06  
of 2 September 2008

**Appellant:** DAN-WEB HOLDING A/S  
(Opponent) Bryggervej 17-19  
DK-8240 Risskov (DK)

**Representative:** Nielsen, Leif  
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**Appellant:** M & J Fibretech A/S  
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**Representative:** Holme, Edvard  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
1 February 2006 concerning maintenance of  
European patent No. 1129246 in amended form.

**Composition of the Board:**

**Chairman:** P. Alting Van Geusau  
**Members:** M. Harrison  
K. Garnett

## Summary of Facts and Submissions

- I. The appellant/proprietor and appellant/opponent each filed an appeal against the interlocutory decision of the opposition division, according to which European patent number 0 129 246 as amended was found to meet the requirements of the European Patent Convention.
- II. With its grounds of appeal, the appellant/proprietor filed claims according to new main and first auxiliary requests upon which basis maintenance of the patent in an amended form was requested, together with a second auxiliary request corresponding to the amended form of the patent found to be allowable in the decision under appeal.

The appellant/opponent requested revocation of the patent.

- III. With its summons to oral proceedings, the Board informed the parties of its preliminary opinion regarding *inter alia* the issue of Article 123(2) EPC.

In particular it was noted that an expression used in claim 1, namely "blown...over said perforated bottom" was seemingly generalised wording which was not found in the original application. The parties were invited to comment on this matter. Further, the Board stated that any submissions which the parties wished to make before oral proceedings should be filed at least one month prior to the date of oral proceedings.

- IV. With its submission dated 1 August 2008, the appellant/proprietor filed a replacement main request

and made its previous main request its first auxiliary request. Similarly, its previous first and second auxiliary requests became the second and third auxiliary requests respectively.

No comments were filed by the appellant/proprietor in response to the Board's invitation concerning the generalised wording used in claim 1 in relation to the requirements of Article 123(2) EPC.

- V. During the oral proceedings of 2 September 2008 before the Board, the appellant/proprietor, having already filed one replacement main request upon which the Board had given a negative opinion, replaced this with another main request. The appellant/proprietor also maintained a sole auxiliary request for dismissal of the appellant/opponent's appeal and maintenance of the patent in the amended form found allowable by the opposition division.

The appellant/opponent confirmed its request for revocation of the patent.

- VI. Claim 1 of the main request reads as follows:

"Plant (1) which, when running, forms - without the use of liquid - an air-laid web of fibres (24) and a powder on a running endless forming wire which is air-permeable and which operates mainly horizontally, and comprising a suction unit (5) positioned under the forming wire (2), and a forming head (8) with a perforated base (9) and rows of rotating wings, said forming head is positioned above the forming wire (2); at least one fibre feed duct (11) to supply the forming

head with fibres from a fibre source (10) via an air flow; and at least one powder feed duct (13) for by means of another air flow to feed powder from a powder source (12) over the forming wire via a powder distributor, characterized in that the perforated base (9) of the forming head is placed between the forming wire and the powder distributor (28;34;45), and that the powder distributor is arranged to let the main air flow in the powder duct (13) with its content of powder divide into a number of finer air flows each of which is blown via its respective inlet duct, into the forming head over said perforated base and the rotating wings."

VII. The sole claim of the auxiliary request (i.e. the form found allowable by the opposition division) reads as follows:

"Plant (1) which, when running, forms - without the use of liquid - an air-laid web of fibres (24) and a powder on a running endless forming wire which is air-permeable and which operates mainly horizontally, and comprising a suction unit (5) positioned under the forming wire (2), and a forming head (8) with a perforated base (9) positioned above the forming wire (2); at least one fibre feed duct (11) to supply the forming head with fibres from a fibre source (10) via an air flow; and at least one powder feed duct (13) for by means of another air flow to feed powder from a powder source (12) over the forming wire via a powder distributor, characterized in that the forming head with the perforated base (9) is placed between the forming wire and the powder distributor (28;34;45), and that the powder distributor is arranged to let the main

air flow in the powder duct (13) with its content of powder divide into a number of finer air flows each of which is blown into the forming head over said perforated bottom, via each their inlet duct (29)."

VIII. The arguments of the appellant/proprietor can be summarised as follows:

Main request:

The amendments in the main request were a reaction to objections arising out of the discussion during the oral proceedings. The Board's comments in the provisional opinion relating to Article 123(2) EPC, concerning the disclosure of rotating wings over which the powder was blown, had simply been interpreted differently by the proprietor; no comments were therefore supplied in response to that opinion since the proprietor believed the Board's opinion was incorrect. It was normal practice to allow the introduction of requests during oral proceedings. The main request should thus be admitted. Further, the amendment made in the main request was minor as this merely added a further feature, namely "rows of", to further define the arrangement of the rotating wings; this amendment could not have surprised the opponent. The basis for the amendment was the disclosure on page 4, lines 21 to 23 of the published application. There was no need to define the position or function of the wings more precisely because it was implicit for a skilled person that they could only be positioned above the perforated base and their function was evident from the description. Also, the wording "blown ... over said perforated bottom" merely meant that the powder was blown from a position above the perforated bottom, as

"above" was a dictionary meaning of the word "over". This was furthermore the same structure in all the embodiments.

First auxiliary request:

This request was the request already found allowable by the opposition division.

IX. The arguments of the appellant/opponent may be summarised as follows:

Main request:

The main request was late-filed and, given the nature of the arguments made in the opponent's own submissions and the Board's communication, this matter should have been addressed by the proprietor in writing. Given the written submissions on file, it was thus surprising that the amendment, which came from the description and not the claims, was sought to be introduced during the oral proceedings for the first time. The Board had even explicitly invited comments on this matter in its communication and the proprietor had neither commented thereon nor made any auxiliary request taking this into account. The subject matter of claim 1 also failed to meet the requirements of Article 123(2) EPC in relation to the amendment introduced because the amendment was a clear generalisation of the original disclosure, where only a specific arrangement of rows was disclosed. In particular, the amendment introduced into the claims did not define where the rows of rotating wings were positioned, nor was their function indicated. The wings as claimed were thus not limited to being wings used for distributing powder and fibres, as was originally disclosed, and nothing in the claim limited the

placement of wings to having the specific location shown in the embodiments. The claim was therefore clearly not allowable at least for this reason and, not least due to its very late filing, the Board should not admit it into proceedings in accordance with its Rules of Procedure.

First auxiliary request:

This did not overcome the problems under Article 123(2) EPC existing with the main request.

## **Reasons for the Decision**

### 1. *Main request*

- 1.1 The main request was filed at a very late stage of the proceedings, namely during the oral proceedings and notably after the appellant/proprietor had already filed an earlier, different main request.

It is particularly relevant that in the Board's communication (sent under Article 15(1) RPBA with the summons to oral proceedings) attention was drawn in item 2.2 (the section of the communication relating to Article 123(2) EPC), to the general terminology "... each of which is blown into the forming head over said perforated bottom", which the Board stated did not appear in the originally filed application. Further, it was indicated by the Board that in Figure 2, blowing of jets of air with powder seemed only to be disclosed as being performed over a series of rotating wings which distributed the powder along the perforated base.



Although the appellant/proprietor and the appellant/opponent were explicitly invited to comment on the matter, the appellant/proprietor submitted only a (new) main request with its written submission of 1 August 2008, which request was aimed at dealing with a different issue raised in the Board's communication. No comments at all were supplied to the objection regarding the general terminology defining blowing of powder over the perforated bottom. Despite the opportunity given by the Board to address this issue (see also Article 12(1)(c) and Article 12(4) RPBA), the appellant/proprietor only sought to do this by way of introducing an amendment during oral proceedings after the objection was brought up again.

Already for this reason, the appellant/proprietor's filing of such a main request is wholly contrary to the rules of, and the principles underlying, the appeal procedure, since nothing prevented the proprietor from filing such a request earlier (before oral proceedings) in response to the Board's explicit invitation for the parties to comment. The Board thus concurs with the appellant/opponent's submission that it was surprising that the appellant/proprietor had attempted to address the Board's comments for the first time during the oral proceedings by way of filing a new request.

Further, the amendment introduced by way of the main request is, according to the appellant/proprietor, taken from the description on page 4, lines 21 to 23 of the published PCT application. This passage contains a general statement, i.e. not a statement made in relation to the specific disclosure of Figure 2. However, claim 1 of the main request defines a plant

where the powder distributor causes a number of finer air flows with powder to be blown into the forming head and whereby the terminology "or fed directly" (mentioned in specific relation to the embodiment of Figure 6 only) has been deleted from the claim as granted. The plant of claim 1 thus relates to the specific embodiment of the patent described in relation to Figure 2. On page 5, lines 21 to 25, the function of the rotating wings is stated as being distributing the fibres and SAP along the perforated base. On page 6, lines 16 to 27, it is disclosed that there are rows of rotating wings involved in this distribution. Additionally, Figure 2 discloses the rotating wings positioned immediately above the perforated base of the forming head. The introduction of the terminology "rows of rotating wings" is thus a generalisation of the disclosure, since only a specific placement and function performed by the rows of rotating wings is disclosed with respect to Figure 2. The requirements of Article 123(2) EPC are thus not met by the subject matter of claim 1, since the claim now defines a combination of features which is not disclosed in such a general manner in the application as filed, but is rather an unallowable intermediate generalisation of a more limited disclosure. The amended claim is therefore clearly not allowable, even when considering this aspect alone.

Considering the foregoing in light of Article 13(1) RPBA, it is apparent that the nature of the late-filed amendment is not only complex but also results in a claim that clearly does not meet the objections made against it. At least for these reasons, there is no

reason for the Board to exercise its discretion to admit the main request into proceedings.

Further, Article 13(3) RPBA states the following:

*"Amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings."*

In the present case, the amendment which the appellant/proprietor has sought to introduce involves structural features ("rows of rotating wings") mentioned only in the description. Already at the outset, there is a strong case that the appellant/opponent cannot reasonably be expected to deal with such an amendment since an additional search may indeed be required in order to find prior art which is relevant to such an amended claim. Such a search would require adjournment of the oral proceedings.

Thus also for this reason, the main request should not be admitted.

- 1.2 For the above reasons, the Board refused admittance of the main request into the proceedings.
- 1.3 The appellant/proprietor argued that the amendments in the main request were a reaction to objections arising out of the discussion during the oral proceedings. However, the Board finds this unconvincing. As explained in the foregoing, the issue was already raised in the Board's communication.

Further the appellant/proprietor argued that it had understood the Board's statement differently and that the Board's opinion was anyway felt to be incorrect. This argument is also unconvincing, since if the appellant/proprietor had felt the Board's opinion was incorrect, it should have given a reasoned statement to this effect in its reply, especially as it had been invited to. It should not instead expect to receive a further opportunity to address the issue by way of an amendment filed during the oral proceedings. The appellant/proprietor's contention that it had understood the Board's statement differently also fails to overcome the appellant/proprietor's complete silence on the issue in its response. Additionally, it cannot go unnoticed that the appellant/opponent, on page 3, first item of its reply of 1 August 2008, did indeed provide comments on this exact issue.

The appellant/proprietor also argued that the filing of requests during oral proceedings was normal practice and thus its request should be admitted. This argument is not accepted by the Board. Whilst the Board can indeed envisage many situations where the filing of amended requests during oral proceedings might be considered normal practice, this does not outweigh the requirement of the parties and the Board to observe the Rules of Procedure of the Boards of Appeal (RPBA) and of this Board to apply these as appropriate with regard to the particular circumstances of the case.

The appellant/proprietor's further argument that the amendment made in the main request was minor and thus should not have surprised the opponent, is not agreed

by the Board, since the issue of Article 123(2) EPC and in particular the objection to the alleged generalisation of several features of the specific embodiment of Figure 2 had been a central aspect of both the appellant/opponent's grounds of appeal and its response to the appellant/proprietor's appeal. Whilst the amendment was relatively short, its consideration with respect to the requirements of Article 123(2) EPC in the context of the objections already made, could hardly be considered to rate the amendment as "minor".

The appellant/proprietor's further argument that neither the position of the rotating wings nor their function needed to be defined more precisely, because these would be implicit for a skilled person, is not accepted. The rotating wings in the specific embodiment of Fig. 2 have a specific placement in relation to the forming head and the perforated base. They also have the specific function of distributing powder and fibres over the perforated bottom. Without defining the function of the wings for example, the claim includes within its scope rows of rotating wings which may be positioned for different purposes such as for example specifically directing powder, possibly even without fibres, to particular areas of the base. No reason for technically excluding such arrangements can be seen. It should in this regard be noted that the claims are also not implicitly limited merely because specific embodiments showing rows of rotating wings arranged for distributing powder and fibres are disclosed in the application.

The appellant/proprietor's contention that the wording "blown ... over said perforated bottom" merely means

that the powder is blown from a position somewhere above the perforated bottom, as would be apparent from the general teaching of the application to a skilled person, does not, even if the contention were correct, change the fact that the claim includes some features already taken from a specific embodiment and thus no longer relates to general aspects allegedly apparent in the filed application. In the specific embodiment, a set of combined features is disclosed, including rows of rotating wings placed above the perforated bottom for distributing the powder and fibres along it. Additionally, it should be noted that the wording "blown ... over said perforated bottom" does not apparently exclude arrangements where powder is blown from e.g. somewhere at the side of the forming head (i.e. the amended wording now covers embodiments which were not disclosed originally in combination with the divided finer air flows blown into the forming head).

2. *Auxiliary request*

The single claim of the auxiliary request also includes the feature "blown ... over said perforated bottom". The remaining features in the claim however emanate from the Figure 2 embodiment. The inclusion of this generalised terminology into claim 1 without including the specific arrangement and function of the rotating wings which are disclosed in combination with the finer air flows into the forming head of Figure 2, results in subject matter which is an unallowable intermediate generalisation of the disclosure in the application as originally filed, contrary to Article 123(2) EPC.

The subject matter of the claim of the auxiliary request thus suffers from the same underlying deficiency as applies to the main request in relation to Article 123(2) EPC.

The auxiliary request is therefore not allowable.

## **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:

D. Sauter

P. Alting van Geusau