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Datasheet for the decision of 29 November 2007

Case Number: T 0627/06 - 3.4.02

Application Number: 96300120.1

Publication Number: 0722082

IPC: G01G 11/04

Language of the proceedings: EN

Title of invention:
Weighing apparatus

Patentee:
ISHIDA CO., Ltd.

Opponent:
Mettler-Toledo Garvens GmbH

Headword:
-

Relevant legal provisions (EPC 1973):
EPC Art. 56, 114(2)

Keyword:
"New facts and evidence submitted on appeal - admissibility (only partly)"
"Inventive step over alleged prior use (yes)"

Decisions cited:
T 0389/95, T 1248/03

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0627/06 - 3.4.02

D E C I S I O N
of the Technical Board of Appeal 3.4.02
of 29 November 2007

(Opponent) Mettler-Toledo Garvens GmbH
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 13 February 2006 rejecting the opposition filed against European patent No. 0722082 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: A. G. Klein
Members: F. J. Narganes-Quijano
B. Müller
M. Stock
C. Rennie-Smith

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division rejecting the opposition against European patent No. 0722082 (based on European patent application No. 96300120.1).

The opposition filed by the appellant against the patent as a whole was based on the grounds for opposition of lack of novelty and lack of inventive step (Article 100(a) EPC). The appellant referred, *inter alia*, to the prior use of the weighing apparatus VM allegedly sold by the appellant itself to Hoechst AG in the period 1989/90.

II. In the decision under appeal the opposition division referred to the documentary evidence submitted in support of the alleged prior use (documents E2 to E6) and comprising *inter alia*

E4: "Bedienungsanleitung Kontrollwaage VM", 4th ed., Garvens Automation GmbH (DE), September 1992

and to the minutes of the hearing of the witness Rolf Kreimeyer (in the following document EE), and held, *inter alia*, that

- it was doubtful that the alleged delivery to Hoechst AG took place in the period 1989/90,
- in any case, it was not proven beyond any doubt that the weighing apparatus VM had the features as stated by the witness, and
- there was no hint in the documentary evidence that the tachometric pulse generator of the weighing apparatus VM was used for measuring a distance as

claimed and, in addition, the generator was arranged at the discharge belt and not at the weighing belt as claimed so that, as the two belts may have a different speed, even using the generator for measuring a distance would still not necessarily lead to measuring the actual distance travelled by the object on the weighing belt, and accordingly the subject-matter of claim 1 of the patent as granted was novel and involved an inventive step with regard to the alleged features of the weighing apparatus VM (Articles 52(1), 54 and 56 EPC).

III. With the statement setting out the grounds of appeal the appellant filed new documentary evidence relating to the weighing apparatus VM (documents E7 to E12, document E7 including Annexes ("Anlagen") 1 to 7) and requested the re-hearing of the witness Rolf Kreimeyer and the hearing of Michael Schupp, Arno Strotmann-Dirks and Klaus Hätzel as further witnesses in connection with the issues submitted with regard to the new evidence. Among the new items of evidence, only the content of the following documents is relevant for the present decision:

E7 : witness declaration ("Eidesstattliche Versicherung") by Rolf Kreimeyer dated 21.06.2006
E8 : witness declaration ("Eidesstattliche Versicherung") by Michael Schupp dated 20.06.2006
Annex 7 : "VM-Schulung am 04.01.1990 und 05.01.1990" with the imprint "VM-Schulung 1990".

The respondent (patent proprietor) contested both the admissibility and the relevance of the documentary evidence filed by the appellant.

IV. The parties were summoned to oral proceedings. In a communication annexed to the summons the Board noted, *inter alia*, that it did not see at that time any compelling reason for hearing the witnesses and also noted the following:

"As regards documents E9 to E12, the Board notes that the statement of grounds of appeal is silent as to the reasons for the submission of these documents at this stage of the proceedings and also silent as to the possible pertinence of the content of the documents to the specific issues addressed in the present appeal. In addition, the declarations E9 and E10 are dated 21.06.2005 and therefore all these documents appear to have been in the appellant's possession already months before the oral proceedings before the opposition division were held on 11.11.2005. In view of the above considerations, the Board would be reluctant to admit documents E9 to E12 into the proceedings (Article 114(2) EPC together with Article 10a (4) of the Rules of Procedure of the Boards of Appeal). Similar comments apply to the offer by the appellant of Arno Strotmann-Dirks and Klaus Hätzel being heard as witnesses in connection with the issues reported in documents E9 to E12."

V. Oral proceedings were held before the Board on 28 and 29 November 2007 in the presence of the parties.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed.

The debate was closed by the Chairman on 28 November 2007 and the oral proceedings postponed until 29 November 2007 when the Board gave its decision.

VI. Claim 1 of the patent as granted reads as follows:

"A weighing apparatus comprising:

a weighing conveyor (C) with a conveyor belt (B) driven by a drive motor (M_1) for transporting and weighing an object (M) at the same time and outputting weight signals indicative of the weight of said object;

a data input means (22) for inputting a first length value (L_2) representing the length of said weighing conveyor over which the object is to be weighed in the direction of transportation of said weighing conveyor and a second length value (L_1) representing the length of said object in the direction of transportation of said weighing conveyor;

a filtering means (24) for filtering weight signals outputted by said weighing conveyor as representing the weight of said object; and

a timing setting means (31) for setting a timing program for processing said weight signals whereby the filtering means filters weight signals to generate a weight output only when an object is fully supported on the weighting conveyor characterized in that the apparatus further comprises a distance detecting means (18, 30) for detecting the distance travelled by said

object on said weighing conveyor from the angle of rotation of said drive motor (M_1); and in that the timing setting means (31) determines the timing program according to distance detected by said distance detecting means, said first length (L_2) value and said second length value (L_1)."

Dependent claims 2 to 7 all refer back to claim 1.

VII. The arguments of the appellant in support of its requests can be summarised as follows:

Point 1 of the declaration E7 together with Annexes 1 to 3 as well as point 2 of the declaration E8 prove the delivery of the weighing apparatus VM to Hoechst AG in the period 1989/90. This evidence overcomes the doubts expressed by the opposition division in respect of the delivery of the apparatus.

Points 2 to 4 of the declaration E7 prove that in the weighing apparatus VM the movement of the object along the conveyor belt is clocked by pulses from the tachometric pulse generator arranged in the discharge belt and that the path travelled by the object being weighed from the light barrier arranged at the entry of the conveyor belt is mapped into a shift register. The tachometric pulse generator was arranged in the discharge belt for reasons of stability and precision, the weighing conveyor belt being driven at the same speed as the discharge belt (document E7, point 2). The shift register therefore provided at any time a measurement of the distance of the object to the light barrier. This distance expressed in clock signals is converted into a value of the distance travelled by the

object (document E7, point 3). Thus, the tachometric pulse generator and the shift register constitute distance detecting means as claimed.

In addition, the distance between the ejector and the light barrier as well as the position of the end of the weighing conveyor are also expressed in clock signals, and all the weight signals between the moment at which the trailing edge of the object passes through the light barrier and the moment at which the leading edge of the object reaches the end of the conveyor are used by the filter for the determination of the object weight (document E7, point 4). The witness (document EE, page 7, second paragraph and page 9, first paragraph) confirmed that the operation of the filter is controlled according to the pulses from the tachometric pulse generator used to measure distances as also indicated in the declaration E7 (point 3) and that the weighing operation relied on the distance travelled by the object, independently of changes in the speed of the conveyor (document EE, page 2, first paragraph).

For each clock signal, the position of the object given by the shift register is compared with the ejection position. This comparison allows the determination of whether the object has reached the ejection position, and the object is then ejected when the measured weight is judged inappropriate (document E7, point 4).

On a trial basis this comparison approach was also applied to the end of the conveyor belt and the corresponding control of the filter (document E7, point 4, last paragraph). The weighing apparatus VM

delivered to Hoechst, however, deviated from this approach (document E7, penultimate paragraph of page 2); if the filter had to wait until the moment at which the object reaches the end of the conveyor is actually detected, the filtering operation would have been too slow, and for this reason in the delivered apparatus the filtering time was calculated as a function of the distance to be travelled by the object to the end of the conveyor belt. The claimed invention is therefore novel in this respect. Nonetheless, this deviation was not recognizable by the maintenance operator of the delivered apparatus (document E8, point 3) who was taught about the shift register clocked by means of the tachometric pulse generator (document E8, point 4). The maintenance operator, whose skills are not beyond those expected from the skilled person, concluded that both the ejection position and the end of the conveyor belt are determined by means of the shift register and the tachometric pulse generator, that the length of the object was measured with the tachometric pulse generator, and that the filter length was set to the distance that the object had to travel to reach the end of the conveyor belt (document E8, point 3). In addition, for the skilled person it was obvious to replace in the weighing apparatus VM the determination of the length of the object by the manual input of the same. Accordingly, the claimed invention does not involve an inventive step.

Point 5 of the declaration E7 and the Annexes 5 and 6 prove the delivery of the weighing apparatus VM to Langnese-Iglo GmbH at the end of 1989, and Annex 7 shows the features of the apparatus (sections 2.3 to 2.4). In particular, Annex 7 contains a description of

the shift register as a table of events in which a pointer indicates the instantaneous position of the object. As the pointer reaches a predetermined point in the table (the end of the weighing conveyor belt or the ejection point) associated with a predetermined operation, the operation is carried out. This involves the comparison of the measured distance with the distance of the predetermined points. The processes involved are in addition independent of the instantaneous speed. For the skilled person it is straightforward to consider relevant points such as the points at which the leading and then the trailing edges of the object pass through the light barrier and the point at which the leading edge of the object reaches the end of the conveyor, and to consider the time between the last two events as the filtering time.

Documents E9 to E12 are copies of documents filed in respect of the appeal proceedings of the parallel case T 1060/04 and relate to the delivery of the weighing apparatus VM to Langnese-Iglo GmbH.

VIII. The arguments of the respondent in support of its request are essentially the following:

The new items of evidence filed by the appellant relate to completely new evidence including an asserted prior public use. The new evidence relates to circumstances in which the appellant itself was involved so that it was able to file that evidence with the notice of opposition. For these reasons, the new evidence should not be admitted into the proceedings.

The new evidence is inconsistent and in substance not relevant enough to challenge the patentability of the claimed invention. The new evidence confirms in fact that the weighing apparatus VM relies on the speed of the conveyor, whereas the claimed invention relies on the determination of the distance travelled by the object. In the weighing apparatus VM, detection of the time points at which the leading and the trailing ends of the object pass through the light barrier allows for the determination of the length of the object; and then the time required by the object to reach the end of the conveyor belt is calculated according to the speed of the conveyor, and this time is just set as the filtering time (document EE, page 7, second paragraph, and document E7, point 4, last paragraph). The weigher VM does not take into account that the actual speed of the conveyor belt can change when the object reaches the conveyor, resulting in inaccuracies in the determination of the weight. The statements in point 3 of the declaration E8 reflect only the subjective appreciation of the then employee of Hoechst AG.

Reasons for the Decision

1. The appeal is admissible.

2. *New facts and documentary evidence*

With the statement setting out the grounds of appeal the appellant filed new documentary evidence and referred to new facts in support of its case. In particular, the appellant submitted

- points 1 to 4 of the declaration E7 and document E8 together with Annexes 1 to 3 as further evidence in support of the alleged delivery of the weighing apparatus VM to Hoechst AG in the period 1989/90 already considered during the first-instance proceedings,
- point 5 of the declaration E7 together with Annexes 4 to 7 in support of a new instance of prior use of the weighing apparatus VM by way of delivery to the company Langnese-Iglo GmbH in the period 1989/90 and in support of the features of the apparatus, and
- a further set of documents labelled E9 to E12.

In the following, the admissibility into the proceedings of these new facts and documentary evidence will be considered in turn together with the corresponding assessment of the appellant's case for the facts and evidence admitted by the Board into the proceedings.

3. *Points 1 to 4 of declaration E7, document E8 and Annexes 1 to 3 - Novelty and inventive step*

3.1 Points 1 to 4 of the declaration E7, document E8 and Annexes 1 to 3 were filed with the statement of grounds of appeal in response to the doubts expressed by the opposition division in its decision with respect to the alleged delivery of the weighing apparatus VM to Hoechst AG in the period 1989/90 and to the alleged features of the apparatus. Since the primary purpose of an appeal is to review the decision under appeal in order to give the losing party the possibility of challenging the decision on its merits and the

documents have been filed by the appellant to fill missing links objected to by the opposition division in its decision, the Board sees in the filing of the documents a legitimate reaction to the decision under appeal (decision T 1248/03, point 2.6 of the reasons).

In view of the above and of the potential relevance of the documents, and since during the oral proceedings held before the Board the respondent argued that the documents would in fact support its own position on the issues under discussion, the Board decided during the oral proceedings to admit points 1 to 4 of the declaration E7, document E8 and Annexes 1 to 3 into the proceedings. Nonetheless, as will become apparent below, neither the new evidence nor the arguments of the appellant suffice to outweigh the reasons for the opposition division's decision and therefore the Board did not consider it appropriate to remit the case for consideration of the new evidence.

The request by the appellant for the authors of the declarations E7 and E8, Rolf Kreimeyer and Michael Schupp, to be respectively re-heard and heard as witnesses was made conditional on the declarations E7 and E8 not being considered by the Board as sufficient evidence in support of the alleged facts. During the oral proceedings the Board found that - as will be apparent from the following - a decision could be taken without calling into question the alleged facts and therefore the request to hear the witnesses did not need to be considered by the Board.

3.2 The question of whether or not the new evidence and the arguments of the appellant are sufficient to challenge

the doubts expressed by the opposition division with respect to the delivery itself and to the features of the weighing apparatus VM allegedly delivered to Hoechst AG does not need to be decided by the Board since, as will be seen below, even assuming that all these doubts could be resolved in the appellant's favour, the claimed invention still involves an inventive step over the alleged features of the VM apparatus.

3.3 Claim 1 of the patent is directed to a weighing apparatus in which the object being weighed is transported along a weighing conveyor by means of a belt driven by a motor. According to the claimed invention, a timing setting means sets a timing program so that the weight signals are filtered only when the object is fully supported on the conveyor, and the timing program is determined according to the length of the conveyor, the length of the object in the direction of transportation, and the distance travelled by the object on the conveyor and detected by the apparatus on the basis of the angle of rotation of the drive motor.

According to the submissions of the appellant and the evidence on file, the weighing apparatus VM allegedly delivered to Hoechst comprised a weighing conveyor with a belt along which the object being weighed was transported and means for filtering the corresponding weight signals and determining the weight of the object (document E4, chapter 8, page 2). The apparatus further comprised a light barrier at the position at which the object reached the weighing conveyor. By means of the light barrier, the apparatus determined the time points at which the leading and then the trailing edges of the

object passed through the light barrier. On the basis of these time points, both the length of the object as a function of the speed of the conveyor and the time point at which the object was fully supported on the weighing conveyor were then determined (document EE, page 7, second paragraph, document E7, point 4, and document E8, points 2 and 3).

The appellant has also submitted that a shift register allowed the detection of events associated with the movement of the object along the weighing conveyor according to pulse signals delivered by a tachometric pulse generator arranged in a discharge belt, and that this allowed in particular the determination of the time point at which the object reached the end of the weighing conveyor so that the weight signals used for the determination of the object weight were taken into consideration and filtered only when the object was fully supported on the weighing conveyor between the time point at which the trailing edge of the object passed through the light barrier and the time point at which the object reached the end of the weighing conveyor (document EE, page 6, last paragraph, page 7, second paragraph and page 9, first paragraph, document E7, points 2 to 4, and document E8, points 2 and 4).

However, as acknowledged by the appellant, in the weighing apparatus VM delivered to Hoechst the time point at which the object reached the end of the weighing conveyor and which determined the end of the filtering process of the weight signals was not properly detected, but calculated on the basis of the conveyor speed and the length of the object (document EE, page 7, second paragraph, and document E7, point 4,

last paragraph). The allegation that the developers of the apparatus already considered the possibility of stopping the filtering process upon detection that the object reached the end of the weighing conveyor and the possible technical implementation of this approach on a trial basis (document E7, point 4, last paragraph) cannot, in the absence of any evidence as regards the public availability of the pertinent information before the priority date of the patent in suit, be considered in assessing the patentability of the claimed invention.

It follows that in the weighing apparatus VM allegedly delivered to Hoechst AG

a) the tachometric pulse generator was coupled to a discharge belt that followed the weighing conveyor (point 2 of each of the declarations E7 and E8) and not to the drive motor of the weighing conveyor belt as required by claim 1 of the patent, and

b) the time point at which the object reached the end of the weighing conveyor and which triggered the end of the filtering process of the weight signals was set according to the time required by the object to reach the end of the weighing conveyor ("Restlaufzeit") and calculated as a function of the length of the object and the speed of the conveyor belt (document E4, chapter 8, page 2, document EE, page 7, second paragraph, and document E7, point 4, last paragraph), so that, even assuming that the shift register and the tachometric pulse generator constituted means for detecting the distance travelled by the object on the weighing conveyor as submitted by the appellant, the timing program of the filtering process was not determined by these means and therefore was not

determined according to the detected distance travelled by the object as required by the claimed subject-matter.

Having regard to the above, the subject-matter of claim 1 of the patent in suit is novel over the alleged features of the weighing apparatus VM at least in features a) and b) identified above (Articles 52(1) and 54 EPC).

3.4 According to the disclosure of the patent, the main problem solved by the claimed subject-matter is to give account of changes in the rotational speed of the motor driving the weighing conveyor caused by changes in the load when the object reaches the weighing conveyor, these changes leading to shifts in the timing program and therefore affecting adversely the accuracy of the weight measurement (column 2, lines 4 to 12 and 46 to 48, and column 6, lines 5 to 12 of the patent specification).

The problem considered above is apparent in the weighing apparatus VM allegedly delivered to Hoechst AG. Firstly, in the latter apparatus the tachometric pulse generator is coupled to a discharge belt and not to the driving motor of the belt of the weighing conveyor, so that the tachometric pulse generator cannot detect changes in the speed of the weighing conveyor and in the actual speed of transportation of the object caused by the change in load when the object reaches the weighing conveyor belt. And, secondly, the time point at which the object reaches the end of the weighing conveyor is calculated, and therefore only estimated, on the basis of the expected speed of the

weighing conveyor belt, and not on the basis of its actual speed, so that in the apparatus VM the filtering of weight signals ends at an estimated time point, and not at the actual time point at which the object reaches the end of the weighing conveyor.

The claimed weighing apparatus solves the problem mentioned above in that the determination of the timing program for the filtering process of the weight signals is based on the detection of the distance of the object on the basis of the angle of rotation of the drive motor of the belt of the weighing conveyor, so that the filtering process is controlled on the basis of the detection of the actual speed of the weighing conveyor belt and therefore on the basis of the actual distance travelled by the object being weighed.

3.5 The question to be addressed now is whether, given the distinguishing features a) and b) identified in point 3.3 above, the subject-matter of claim 1 involves an inventive step over the alleged features of the weighing apparatus VM in view of the problem considered in point 3.4 above.

According to a first line of argument of the appellant, the developers of the weighing apparatus VM already considered the possibility of arranging the tachometric pulse generator in the weighing conveyor belt but, for reasons of stability and precision, they chose to arrange it in the discharge belt which is driven to the same speed as the conveyor belt. In the Board's view, however, this line of argument precisely points away from the claimed weighing apparatus. The developers considered that arranging the tachometric pulse

generator in the weighing conveyor belt would have adversely contributed to the stiffness of the coupling between the weighing conveyor and the weight detector (document E7, point 2). Thus, by following this approach and coupling the tachometric pulse generator to the discharge belt it was assumed that the weighing and the discharge belts both would run at the same speed, i.e. no consideration was given to the fact that the actual speed of the weighing conveyor belt might well deviate from the expected speed when the object reached the conveyor belt, so that the determination of the weight was then based not on the actual but on the expected speed of the weighing conveyor belt and of the object, with consequent detriment to the accuracy of the weight determination. Consequently, this line of argument fails to address the problem solved by the claimed invention and in fact points away from the claimed solution relying on the detection of the motor driving the weighing conveyor belt and therefore relying on the detection of the actual distance travelled by the object on the weighing conveyor.

According to a second line of argument of the appellant, although in the weighing apparatus VM delivered to Hoechst AG the end of the filtering time was not properly determined according to the detection of the object reaching the end of the weighing conveyor, both the operator of the apparatus, in view of the operation of the apparatus and of the information taught to him, and the skilled person would have considered it obvious to operate the apparatus by bringing the filtering process to an end upon the shift register and the tachometer pulse generator detecting that the object had reached the end of the weighing

conveyor. This view was endorsed by the then maintenance operator of Hoechst AG, Michael Schupp, in the declaration E8. This line of argument, however, relies on hindsight knowledge of the claimed invention and in any case on an assumption not supported by any factual evidence. As acknowledged by the appellant and confirmed by the declaration of Rolf Kreimeyer (document E7, point 4, last paragraph), the approach involving filtering weight signals and stopping the filtering process when the object reached the end of the weighing conveyor was considered at that time to give rise to problems in the controlling speed of the process and therefore was considered as unsuitable. In addition, the operation of the shift register according to the pulse signals from the tachometric pulse generator would have allowed the estimation of events such as the time point at which the object is expected to reach the end of the weighing conveyor, but there is no evidence that these means would have also allowed the detection of the actual time point at which the object reached the end of the weighing conveyor, let alone the detection of the distance being actually travelled by the object as required by the claimed subject-matter.

No other argument or prior art disclosure has been submitted by the appellant during the appeal proceedings in support of its view on lack of inventive step of the claimed subject-matter.

Accordingly, in the absence of evidence or convincing arguments to the contrary, the Board considers that neither the approach defined in claim 1 and consisting in setting the measuring time and thus the weight

filtering timing program according to the detection of the actual distance travelled by the object instead of setting it according to the expected position of the object as a function of the expected speed of the conveyor (document E4, chapter 8, page 2), nor the improved weight determination accuracy achieved with the claimed approach are suggested or rendered obvious by the available prior art.

3.6 The Board concludes that the subject-matter of claim 1 involves an inventive step (Article 56 EPC) over the alleged features of the weighing apparatus VM.

The same conclusion applies to dependent claims 2 to 7 by virtue of their dependence on claim 1.

4. *Point 5 of declaration E7 and Annexes 4 to 7 - New instance of prior use - Admissibility*

The new instance of prior use of the weighing apparatus VM by way of delivery to Langnese-Iglo GmbH alleged by the appellant and the corresponding evidence (point 5 of declaration E7, and Annexes 4 to 7) filed in support of the new allegation were submitted by the appellant in response to the finding of the opposition division that there was no sufficient evidence that the features of the weighing apparatus VM delivered to Hoechst AG could challenge the patentability of the claimed invention.

However, although the new evidence, and in particular the disclosure of Annex 7, may clarify or complement the allegations of the appellant with regard to the features of the weighing apparatus VM, none of the new

evidence and none of the arguments based thereon would affect the line of reasoning followed by the Board in point 3 above. In particular, Annex 7 contains a description of the operation of the software of the weighing apparatus VM in terms of a sequence of events detected by means, *inter alia*, of the light barrier and the tachometric pulse generator of the apparatus (sections 2.2 to 2.4 on pages 13 and 14), but there is no disclosure in the new evidence relating to the distinguishing features a) and b) identified in point 3.3 above that would change the facts upon which the Board's reasoning in points 3.3 to 3.5 above is based or that would affect the reasoning itself. Accordingly, the new evidence submitted and the new facts alleged by the appellant have no impact on the conclusion drawn in point 3.6 above.

It follows that that part of the declaration E7 relating to the delivery of the weighing apparatus VM to Langnese-Iglo GmbH (point 5 of the document) and the Annexes 4 to 7 submitted by the appellant in support of the new instance of prior use of the weighing apparatus VM are not sufficient to challenge the conclusion in point 3.6 above and therefore are *prima facie* not relevant for the outcome of the case brought by the appellant before the Board (see decision T 389/95, point 2.14 of the reasons). For this reason, notwithstanding the fact that the corresponding submissions were made in response to the findings of the opposition division in the contested decision, the Board decided during the oral proceedings not to admit into the proceedings the new alleged instance of prior use and the evidence filed in its support pursuant to Article 114(2) EPC.

5. *Documents E9 to E12 - Admissibility*

In the communication accompanying the summons to oral proceedings the Board informed the parties of its negative preliminary opinion on the admissibility of documents E9 to E12 and on the offer of hearing of the witnesses Arno Strotmann-Dirks and Klaus Hätzel in connection with the issues reported in the documents as recorded in point IV above.

During the oral proceedings the appellant did not dispute the preliminary opinion of the Board.

Accordingly, the Board decided during the oral proceedings not to admit into the proceedings documents E9 to E12 and consequently also refused to hear witnesses in connection therewith for the reasons already communicated to the parties and reproduced in point IV above.

6. In view of the above considerations and conclusions, the Board decided at the end of the oral proceedings that the case brought forward by the appellant during the appeal did not prejudice the maintenance of the patent as granted (Article 102(2) EPC) as already concluded by the opposition division and that, accordingly, the appeal was to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Kiehl A. G. Klein