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**Datasheet for the decision
of 18 September 2007**

Case Number: T 1505/06 - 3.2.07

Application Number: 97918428.0

Publication Number: 1009695

IPC: B65G 47/84

Language of the proceedings: EN

Title of invention:

Method and device for supplying, discharging and transferring
of objects, like fruits

Patentee:

De Greef's Wagen-Carrosserie- en Machinebouw B.V.

Opponent:

FPS Food Processing Systems B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 111(1), 113(1)
EPC R. 67, 68(2)

Keyword:

"Reasons for refusing postponement of oral proceedings - not
included in decision of opposition division"
"Right to be heard - Board unable to review that it was
respected by the opposition division"
"Substantial procedural violation - yes"
"Remittal to department of first instance - yes"

Decisions cited:

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Catchword:

Reasons points 1 and 2.



Case Number: T 1505/06 - 3.2.07

D E C I S I O N
of the Technical Board of Appeal 3.2.07
of 18 September 2007

Appellant: FPS Food Processing Systems B.V.
(Opponent) Burg. G.J.F.
Tijdemanstraat 13
NL-2631 RE Nootdorp (NL)

Representative: Prins, Adrianus Willem
Vereenigde
P.O. Box 87930
NL-2508 DH Den Haag (NL)

Appellant: De Greef's Wagen-
(Patent Proprietor) Carrosserie- en Machinebouw B.V.
No. 62, Nieuwsteeg
NL-4196 AM Tricht (NL)

Representative: Land, Addick Adrianus Gosling
Arnold & Siedsma
Advocaten en Octrooigemachtigden
Sweelinckplein 1
NL-2517 GK Den Haag (NL)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
3 August 2006 concerning maintenance of the
European No. 1009695 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
I. Beckedorf

Summary of Facts and Submissions

I. Opposition was filed against European patent No. 1 009 695 as a whole.

Oral proceedings were appointed by the opposition division for 9 June 2006.

With fax of 6 June 2006 a representative working in the same partnership as the appointed representative of the proprietor informed the opposition division that the appointed representative had become ill with influenza and had been advised by his doctor not to travel. A postponement of the oral proceedings was requested.

With fax of 8 June 2006 the opposition division informed the parties that the oral proceedings would not be postponed.

At the start the oral proceedings before the opposition division the replacement attorney for the proprietor requested that the oral proceedings be postponed due to the illness of the appointed representative. The opposition division refused the request.

At the end of the oral proceedings the opposition division decided to maintain the patent in amended form.

II. The proprietor (hereinafter appellant/proprietor) and the opponent (hereinafter appellant/opponent) each filed an appeal against that decision.

III. The appellant/proprietor requested that the decision under appeal be set aside and that the case be remitted

to the opposition division. The refund of the appeal fee was requested.

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

- IV. The arguments of the appellant/proprietor may be summarised as follows:

The sudden illness of the appointed representative was an unforeseeable circumstance that would warrant a postponement of the oral proceedings. The appointed representative had three preparatory meetings in preparation for the oral proceedings and his presence at the oral proceedings could have influenced the outcome of the proceedings. It was unreasonable for the proprietor to have to bear the extra costs of changing to another attorney.

Since the decision of the opposition division does not deal with the postponement request the case should be remitted to the opposition division and the appeal fee should be refunded.

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

The opponent had been fully prepared for the oral proceedings and would have been disadvantaged by a postponement. The attorney of the proprietor who attended the oral proceedings presented well the case for the proprietor. If additional costs were incurred by the proprietor then those costs could have been absorbed by the partnership to which the representatives of the

proprietor belonged. A remittal of the case would not be in the interests of procedural economy.

Reasons for the Decision

1. *Request for postponement of the oral proceedings before the opposition division*

1.1 Three days before the oral proceedings before the opposition division the appointed representative of the proprietor became ill and a request for postponement of the oral proceedings was made. On the day before the oral proceedings the opposition division informed the parties that the oral proceedings would not be postponed.

1.2 In the Notice of the Vice-Presidents of Directorate-General 2 and 3 concerning oral proceedings (OJ EPO 2000, 456) a list of examples of reasons which could justify a postponement of oral proceedings is given (see paragraph 2.3 thereof). This list includes a serious illness. Influenza is a contagious illness which would normally prevent a person from working so that the request fulfilled this requirement.

It is also indicated in the notice that any request for postponement should indicate why another representative from the same partnership cannot take over the case (see paragraph 2.5 thereof). The request contained such an indication.

The request therefore contained the elements necessary to allow the opposition division to decide whether or not to postpone the oral proceedings.

- 1.3 When deciding whether or not to postpone an oral proceedings the opposition division may have to take into account a number of factors. These factors may include the closeness of the filing of the request to the oral proceedings, the complexity of the case, the availability of an alternative representative capable of preparing the case in the remaining time available and the effects of a postponement on any other party. The opposition division will have to weigh up these factors when exercising its discretion in coming to a decision.

- 1.4 Given this discretion of the opposition division the principal task of the Board of Appeal is to consider whether the opposition division exercised its discretion reasonably. In order to carry out such a review it is necessary that the Board has available the reasons of the opposition division for coming to its decision.

- 1.5 In the minutes of the oral proceedings in the present case it is indicated in point 1 that the proprietor, at the oral proceedings, again requested postponement of the oral proceedings and that the opposition division did not accept the request. The minutes contain no statement regarding the reasons of the opposition division for not accepting the request.

The communication dated 8 June 2006, notifying the parties that the date of the oral proceedings of 9 June 2006 is maintained, also does not mention any reason.

In the decision under appeal neither the written nor the oral request of the proprietor for postponement of the oral proceedings are mentioned. Correspondingly, the

decision gives no indication as to the reasons why the request was refused.

The decision thus does not comply with Rule 68(2) EPC in this respect.

- 1.6 As indicated above the Board needs to have available the reasons of the opposition division in order that it may consider whether it exercised its discretion reasonably.

In the present case the Board is faced with reviewing a decision of the opposition division on an issue in respect of which it does not know the reasons for the decision. The appellant/proprietor has mentioned in its appeal grounds that during the oral proceedings the chairman of the opposition division stated that one day was more than sufficient time for preparation of an oral proceedings. Such a possible statement of the chairman of the opposition division, however, even if given orally, still requires a proper statement of reasons in the name of the opposition division as a whole in the written decision.

The Board concludes therefore that in the present case no review of the decision of the opposition division in this respect is possible.

2. *Right to be heard - Article 113(1) EPC*

- 2.1 The present case is not just a simple case of a dispute about dates of oral proceedings but is fundamentally related to the right of a party to be heard in the sense of Article 113(1) EPC. The right to be heard if it is to have any sense must include the party having sufficient

time to exercise the right. If a party is placed in such a position that its representative does not have sufficient time to prepare its case then the right to be heard has not been respected. If the Board were to consider that this meant that the right to be heard of the proprietor had not been respected then this would have been a substantial procedural violation.

However, the lack of reasoning in the decision under appeal means that the Board is not able to decide whether the right to be heard of the proprietor had been respected and hence whether or not a substantial procedural violation had been committed.

3. *Remittal to the department of first instance*

3.1 The Board is unable to review the decision of the opposition division not to postpone the oral proceedings and is unable to ascertain whether the right to be heard of the proprietor/appellant has been respected. It therefore has no choice but to remit the case to the opposition division for further prosecution pursuant to Article 111(1) EPC.

3.2 In this respect it may not be sufficient that grounds for the postponement are simply added to the decision of the opposition division. Since there is the possibility that the right to be heard of the proprietor was not respected it is necessary that the proprietor has a renewed opportunity to present its case at oral proceedings.

4. *Refund of the appeal fees*

The failure of the opposition division to include the reasons for the refusal of the request for postponement in the reasons for its decision is a substantial procedural violation which required immediate remittal of the case.

A reimbursement of the appeal fees of both the proprietor and the opponent is therefore justified pursuant to Rule 67 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. The appeal fees of both the proprietor and the opponent are to be reimbursed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders