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Datasheet for the decision of 14 March 2013

Case Number: T 1859/10 - 3.2.04

Application Number: 04100946.5

Publication Number: 1457121

IPC: A24C 5/00, A24C 5/31

Language of the proceedings: EN

Title of invention:
Method of controlling and automatically restarting an automatic machine for processing tobacco articles

Patent Proprietor:
G.D SOCIETÀ PER AZIONI

Opponent:
Hauni Maschinenbau AG

Headword:
-

Relevant legal provisions:
EPC Art. 100(a)

Keyword:
"Main request - novelty (no)"
"Auxiliary requests 1 to 14 - not admitted into the proceedings"

Decisions cited:
-

Catchword:
-

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Case Number: T 1859/10 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 14 March 2013

Appellant: (Opponent)
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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted 28 July 2010 concerning maintenance of European patent No. 1457121 in amended form.**

Composition of the Board:

Chairman: A. de Vries
Members: C. Scheibling
C. Heath
J. Wright
T. Bokor

Summary of Facts and Submissions

I. In its interlocutory decision posted 28 July 2010, the Opposition Division found that, taking into consideration the amendments made by the patent proprietor, the European patent and the invention to which it relates met the requirements of the EPC. On 3 September 2010 the Opponent (Appellant) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 25 November 2010.

II. The patent was opposed on the grounds of Articles 100(a), (b) and (c) EPC.

III. The following evidence played a role in the present proceedings

D3-1: Operating manual "Filtromat 3FS", edition 4/2002

Minutes of the testimony of Mr. Schreck as witness during the oral proceedings before the Opposition division on 1 February 2010.

IV. Oral proceedings before the Board took place on 14 March 2013.

V. The Appellant (Opponent) requests that the decision under appeal be set aside, and that the patent be revoked.

The Respondent (Proprietor) requests that the appeal be dismissed, i.e. that the patent be maintained as held allowable by the Opposition division (main request), alternatively that the decision under appeal be set

aside and that the patent be maintained on the basis of one of the auxiliary requests 1 to 4 filed with the response to the grounds of appeal of 31 March 2011 or of one of the auxiliary requests 5 to 14 filed with letter dated 23 January 2013.

VI. The Appellant mainly argued that D3-1 among others discloses filter rod feed stations which are part of a filter assembly machine. Moreover, these operating manuals in conjunction with the testimony of the witness disclose a control method comprising the steps of stopping the machine when an error signal is detected and initiating a cleaning cycle. After this cleaning cycle the sealing element of the feed drum is raised and the drum motor speed regulator is turned on. These operations are part of a restart procedure of the machine. After this restart, it is checked whether the error signal has disappeared, if yes the machine enters production, if not a second cleaning cycle and a second restart are initiated. The machine is definitely stopped if the error signal has not disappeared after the second restart. Thus the subject-matter of claim 1 of the main request lacks novelty.
The auxiliary requests 1 to 4 were filed without explaining why they should overcome the novelty and inventive step objections, although claim 1 of these requests was attacked in the statement of opposition and in the appeal proceedings.

The Respondent mainly submitted that claim 1 of the main request is limited to a method of controlling a manufacturing machine, a filter assembly machine or a packing machine. A filter rod feed station as disclosed in D3-1 is none of these.

The aim the invention is to restart the machine after a stoppage due to an error signal, irrespective of whether the signal has disappeared during the shutoff time or not. In the prior art the machine is solely restarted if the error signal has disappeared during the shutoff time, the machine is not restarted if the signal is still present.
The auxiliary requests 1 to 4 were filed to overcome the novelty and inventive step objections raised against claim 1 of the main request. There was no need to provide beforehand reasons why these requests should be allowable as it was the duty of the Opponent to demonstrate that these requests are not allowable. Only then is the Patentee in a position to counter the Opponent's arguments.

VII. Claim 1 as of the main request reads as follows:

"A method of controlling a machine for processing tobacco articles, namely a manufacturing machine (2), a filter assembly machine (3) or a packing machine (4); the method comprising the steps of:

cyclically checking the status of the machine (2, 3, 4) to determine any error signals (ES), and

stopping the machine (2, 3, 4) in the event of an error signal (ES);

and the method being characterized in comprising the following steps:

restarting the machine (2, 3, 4) independently and automatically a given number of times following stoppage of the machine (2, 3, 4) due to an error signal (ES); and

stopping the machine (2, 3, 4) definitely if the error signal (ES) does not disappear during one of the restart steps."

Claim 1 of auxiliary request 1 adds to claim 1 of the main request the step of "comparing the error signal (ES) with a given set of error signals (ES)", and that the machine is only restarted "if the error signal (ES) falls within said set".

Claim 1 of auxiliary request 2 adds to claim 1 of auxiliary request 1 the step of "determining a given set of error signals (ES) which contains error signals (ES) generated when at least one processing characteristic of the articles is outside a respective acceptance range with a frequency above a relative threshold value".

Claim 1 of auxiliary request 3 adds to claim 1 of the main request, that the number of times the machine is restarted "depends on the type of error signal (ES) responsible for stopping the machine (2, 3, 4)".

Claim 1 of auxiliary request 4 adds to claim 1 of the main request "allowing before the machine (2, 3, 4) is restarted a given time interval which depends on the type of error signal (ES) responsible for stopping the machine (2, 3, 4)".

Reasons for the Decision

1. The appeal is admissible.

2. *Novelty of the subject-matter of claim 1 of the main request*

2.1 D3-1 is an operating manual for a filter rod feed station. The Respondent argued that claim 1 is limited to a method of controlling a manufacturing machine, a filter assembly machine or a packing machine and that a method of controlling a filter rod feed station would not fall under the scope of and therefore cannot anticipate claim 1.
However, a filter assembly machine cannot work without at least one filter rod feed station. Therefore a filter rod feed station is a necessary part of the filter assembly machine. In D3-1 the latter indeed transmits its demand signals to the filter rod feed station (see D3-1, page 74, section "Feed rate"). Thus, the control unit of the filter assembly machine also controls the production of the filter rod feed station. Consequently, how the filter rod feed station is run can be considered an integral part of the method of controlling the filter assembly machine.

2.2 The main components of the filter rod station D3-1 are shown on page 76, and its operation is described on page 75. Filter rods are fed evenly into grooves of a rotating feed drum, and transported into a sealing element that under the action of pneumatic cylinders seals off the lower section of the drum. There the filter rods are ejected by compressed air into a conveying pipeline. As describe on page 77, see first three sections, a light barrier B1 at the ejection outlet in conjunction with a proximity switch B2 at a (diametrically) opposite reference point on the drum monitor whether the filter rods are properly ejected

into the conveying pipeline. This monitoring of proper rod ejection as the grooves of the rotating drum pass the ejection outlet one after the other is inherently cyclical and corresponds to the step in claim 1 of *cyclically checking the status of the* (filter rod feed station as integral part of the) *machine to determine error signals.* The error signal in this case is the signal generated by the light barrier B1 when it registers a filter rod in the conveying pipeline and which sets off automatic cleaning, see section "Signal generation" on page 77. In that event, see section "Automatic cleaning sequence", the feed drum is stopped immediately. This corresponds to the step in claim 1 of *stopping the machine in the event of an error signal.*

2.3 During the cleaning phase the sealing element is lowered and cleaning operation is performed, section "Cleaning phase". If the light barrier detects no more filter rods the ejection outlet is clear, section "Ejection outlet clear". As stated there the sealing element of the feed drum is then raised (as described also in the witness' testimony, page 3, lines 34 to 40) and the feeding operation which was stopped, see above, is again continued. As explained in the witness' testimony last paragraph of page 12, this means that the drum motor speed regulator is switched on (… "Sollwertfreigabe für die Drehzahl"…). The drum is thus ready to rotate. The Board views this as a *restart of the machine* in the sense of the first characterising feature of claim 1.

2.3.1 The Respondent argued that these operations need not be part of the restart procedure, meaning that they could also be independent of the restart procedure which

might only start later on, when these operations are already completed.

2.3.2 However, claim 1 does not specify when the restart procedure of the machine begins, in other words it is not specified what conditions must be fulfilled or what actions must have been performed to ascertain that a restart has been launched. Therefore, the Board holds that any possible action which is needed to bring the machine from its stopped condition back into its production configuration is part of the restart procedure in the meaning of claim 1.
Consequently, the action of raising the sealing element, as well as that of switching on the drum motor speed regulator, which are necessary to bring the machine in its production configuration are actions which can be considered to denote that a restart has been triggered and that the machine is thus restarting.

2.3.3 The Respondent further submitted that in D3-1 the drum is solely restarted if the error signal disappears during the shutoff time and that the drum is not restarted if the signal is still present after cleaning, as stated in the testimony page 12, paragraphs 4 and 5. This however is not the point. As stated by the witness (see testimony, page 3, lines 36 to 40 and page 12, 3rd and last paragraph), once the cleaning cycle is finished, the sealing element is raised and the drum motor speed regulator is enabled, in order to be able to accelerate the drum motor to a target drum speed. If the error signal has then disappeared the target speed is input, and the drum motor accelerated, if the error signal is still present, the target speed is not input and the drum motor is not accelerated. However, as

stated above, the restart is not linked to the rotation of the drum. It is launched as soon as the sealing element is raised or the drum motor speed regulator is switched on. What matters is that these two operations which are part of the restart procedure are carried out even if at this moment the error signal is still present.

2.4 Finally, it is stated in D3-1 that "automatic cleaning is repeated if a message is received from [light barrier] B1" and that "if B1 still detects a filter rod after two cleaning sequences … the module is stopped". The automatic cleaning cycle *including a restart* as described above is thus *repeated* a maximum of two times in an attempt to clear the filter rod from the ejection outlet. These repeated attempts to clean/restart are effected *independently and automatically*, that is without the intervention of an operator by the machine itself (hence "automatic cleaning"). This corresponds to *restarting the machine* (the filter rod feed station and thus the filter assembly machine of which it is an integral part) *independently and automatically a given number of times* (twice) *following stoppage of the machine due to an error signal* (from the light barrier B1), that is the first characterising feature of claim 1.

If the second repeated attempt is unsuccessful the feed station is stopped and a fault message is displayed, final sentence of page 77 of D3-1. Stoppage of the feed station must necessarily result in a shutdown of the entire filter assembly machine as filter rods are no longer being fed, so that D3-1 read in conjunction with the witness' testimony also discloses the final feature of claim 1, *stopping the machine definitely if the*

error signal does not disappear during one of the restart steps.

2.5 Accordingly, the subject-matter of claim 1 of the main request lacks novelty with respect to the prior use documented in D3-1 read in conjunction with the witness' testimony and therefore, the main request must fail.

3. *Auxiliary requests 1 to 4*

3.1 These requests were filed with the grounds of appeal. However, there is no explanation why the subject-matter of claim 1 of these requests should be novel and imply an inventive step with respect to the cited prior art.

3.2 According to Article 12 (2) of the Rules of Procedure of the Boards of Appeal (RPBA) "the statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should specify expressly all the facts, arguments and evidence relied on."
This means that arguments have to be clearly and concisely presented to enable the Board and the other party to understand immediately why the new claims are alleged to be novel and inventive and why the conclusions of the Appellant are incorrect, without first having to make investigations on their own, see e.g. the Case Law of the Boards of Appeal, 6th edition, 2010, VII-E-7.6.1 and the case law cited therein. Such conduct naturally benefits transparency of the proceedings as well as overall procedural economy.

3.3 The Respondent argued that it is the duty of the Appellant first to demonstrate why the independent claim of the auxiliary requests is not allowable and that only then the Respondent has to present his counter arguments.
This point of view is clearly at odds with the underlying purpose of Article 12 (2) RPBA stated above.

3.4 Moreover, in the present case, claim 1 of each of the auxiliary requests is a combination of claim 1 as found allowable by the first instance with one or more dependent claims as granted.
All dependent claims as granted were attacked in the notice of opposition and the Appellant (opponent) already then provided facts and arguments against the patentability of each individual dependent claim.
Again, in its response dated 20 June 2012, the Appellant attacked claim 1 of each auxiliary request inter alia on the ground of lack of novelty and inventive step and indicated the relevant facts and arguments.
The Respondent was thus aware at an early stage, or should have been, of the case it had to answer regarding the auxiliary requests. Indeed following the Respondent's approach, the Appellant has discharged itself of its duty already in the first instance and it was therefore incumbent on the Respondent from that point of time to state its case. Leaving it to the very last possible moment - at the oral proceedings before the Board - to state its case in support of these auxiliary requests puts the Respondent at a disadvantage and puts undue pressure on all.

3.5 The Board comes therefore to the conclusion that the Respondent did not comply with the requirements of Article 12(2) RPBA.
Therefore, in accordance with Article 12(4) RPBA which states that the Board shall take into account anything "if and to the extend it … meets the requirements in [paragraph] 2", the Board decided to exercise its discretion not to admit the auxiliary requests 1 to 4 into the proceedings.

4. *Auxiliary requests 5 to 14*

4.1 These requests which are said to have the same scope as auxiliary requests 1 to 4, were filed with letter dated 23 January 2012 in order to overcome possible issues of clarity and/or unallowable extension of subject-matter, however without any explanation why the subject-matter of claim 1 of these requests should be novel and involve an inventive step with respect to the cited prior art. Thus, these requests suffer from the same flaw as auxiliary requests 1 to 4 and are also not admissible for the same reasons as mentioned above with respect to auxiliary requests 1 to 4.

4.2 Moreover, it is stated in the accompanying letter that these requests "should be considered **only if** the appeal division decides to reject the … request under Article 123(2) EPC or under Article 84 EPC".
Since this has not been the case, for this reason alone these requests need not be considered.
The Board therefore decided not to admit these requests into the proceedings.

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:

M. Cañueto Carbajo A. de Vries