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**Datasheet for the decision
of 6 March 2014**

Case Number: T 0883/12 - 3.2.06

Application Number: 04798253.3

Publication Number: 1680329

IPC: B66B23/10, B65D19/42, B65G17/34

Language of the proceedings: EN

Title of invention:
PALLET ARRANGEMENT FOR CONVEYOR

Patent Proprietor:
Kone Corporation

Opponent:
Otis Elevator Company

Headword:

Relevant legal provisions:
RPBA Art. 12(4), 13(1)
EPC 1973 Art. 56
EPC Art. 123(2)

Keyword:
Inventive step - main request (no)
Auxiliary request - admitted (no)

Decisions cited:

Catchword:



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Case Number: T 0883/12 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 March 2014

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(Patent Proprietor)

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
10 February 2012 concerning maintenance of the
European Patent No. 1680329 in amended form.**

Composition of the Board:

Chairman: M. Harrison
Members: M. Hannam
R. Menapace

Summary of Facts and Submissions

I. An appeal was filed by the appellant (opponent) - hereafter referred to simply as the opponent - against the interlocutory decision of the opposition division in which it found that European patent No. 1 680 329 in an amended form met the requirements of the EPC.

II. A further appeal was filed against this interlocutory decision by the appellant (proprietor) - hereafter referred to simply as the proprietor. The proprietor requested that the patent be maintained as granted, or according to one of its auxiliary requests 1 or 2. In support of its requests it made reference *inter alia* to:

D9 European Standard EN 115 : 1995 E

III. The opponent submitted *inter alia* the following documents:

D1 US-A-5 697 487

D2 DE-A-40 03 490

D3 WO-A-00/66476

D7 GB-A-2 299 316

IV. In reply to the opponent's appeal, the proprietor submitted further auxiliary requests numbered 3 - 19.

V. The Board issued a summons to oral proceedings including a communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request seemingly lacked an inventive step over the disclosure of D2 in combination with the common general knowledge of the skilled person. It further indicated that compliance

with the requirement of Article 123(2) EPC could be a topic of discussion in relation to the auxiliary requests.

VI. Oral proceedings were held before the Board on 6 March 2014, during which the proprietor deleted the words 'or equivalent' from claim 1 of its main request and filed a (new) auxiliary request 1 comprising an amendment to claim 1 of auxiliary request 3 previously on file. All other auxiliary requests were withdrawn.

The proprietor requested finally that the decision under appeal be set aside and the patent be maintained as granted with deletion of the words 'or equivalent' or in accordance with auxiliary request 1 as filed during the oral proceedings before the Board.

The opponent requested that the decision under appeal be set aside and that the European patent No. 1 680 329 be revoked.

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

'A pallet arrangement for a travelator, in which arrangement a pallet (1) moving on wheels (7) forms a part of a moving track, said pallet (1) consisting of at least a pallet body (2) and a surface part, and that the body (2) is provided with one or more surface plates (3-5) forming a wearing surface, whereby the body (2) is provided with wheels (7) mounted at either end of it and with a fastening element (8) at at least one end, preferably at either end, characterised in that the pallet body is a structure of predetermined size made from a profiled bar and that the fastening element is mounted between the wheels at the end of the pallet body, for coupling the pallet (1) to an endless

cogged belt, chain or equivalent actuating means.'

VIII. Claim 1 of auxiliary request 1 reads:

'A pallet arrangement for a travelator, in which arrangement a pallet (1) moving on wheels (7) forms a part of a moving track, said pallet (1) consisting of at least a pallet body (2) and a surface part, such that the pallet body (2) is a structure of predetermined size made from a profiled bar and that the body (2) is provided with one or more surface plates (3-5) forming a wearing surface, characterized in that the body (2) is provided with wheels (7) mounted at either end of it and with a fastening element (8) for the transmission of the driving power needed to move the pallets at at least one end, preferably at either end, between the wheels (7) mounted at the end of the pallet, for coupling the pallet (1) to an endless cogged belt, chain or equivalent actuating means, and in that the profiled bar is provided with fastening points both for the mounting of the wheels and for the fastening element.'

IX. The opponent's arguments may be summarised as follows:

Regarding the main request, this should not be admitted under Article 12(4) of the Rules of Procedure of the Boards of Appeal (RPBA) since a number of intermediate requests, of similar scope to the present request, had been withdrawn before the opposition division thus preventing a decision being taken on these by the department of first instance. If the main request were admitted, then D7 was also to be admitted to the proceedings, since this was clearly relevant for questioning the presence of an inventive step in the subject-matter of claim 1.

Claim 1 lacked an inventive step (Article 56 EPC) starting from D7 when combined with the teaching in D1. Claim 1 differed from the pallet arrangement in D7 solely through the feature that the pallet body was made from a profiled bar. The objective technical problem was to be seen as providing an appropriate pallet construction, the solution for which was provided by the extruded profile pallet body disclosed in D1, which also discussed the advantages of using such an extruded member compared to a cast member. The skilled person was only looking for an appropriate pallet construction in D1 and so was not concerned with specific wheel fastening arrangements disclosed therein; he would have chosen the specific extrusion design according to the needs of the pallet arrangement of D7.

Auxiliary request 1 should not be admitted into the proceedings, as claim 1 failed to meet the requirement of Article 123(2) EPC since a profile bar having fastening points was not disclosed in the application as filed (see page 3, lines 18-22 of the A-publication). Similarly to claim 1 of the main request, the subject-matter of claim 1 of this request also did not involve an inventive step starting from D7, as a pallet with fastening points was already known from D7.

X. The proprietor's arguments may be summarised as follows:

Regarding the main request, D7 failed to disclose a pallet body and a separate surface part, which was a clear requirement in claim 1 when interpreted in the light of the description (see para. [0007]). The surface parts forming a wearing surface were also not

disclosed in the arrangement of D7. Furthermore, the pallet body of D7 was not made from a profiled bar, instead comprising a meshing comb structure and thus clearly being of a cast construction.

D7 disclosed a surface mounted travelator for which the overall height of the pallets was of utmost importance in order to keep the entry and exit ramps at a shallow angle. This necessarily required a cast pallet structure since an extruded structure had a much greater height for a given strength, as could be seen by comparing the pallets of D7 and D1. The skilled person would thus not have combined D7 with D1 without exercising inventive skill.

It was also to be noted that the combs on the stepping off plate 5 of D7 (see Figs. 2 and 3) were themselves of a significant height relative to the pallet height; this was corroborated by D9 which in 8.2.3 detailed minimum dimensions of the combs and grooves. It was therefore clear that the pallets of D7 were of a relatively small height, as required by surface mounted travelators. The corrugated surface of the pallets in D7 were also integrally cast with the pallet body, thus increasing pallet rigidity at a minimal pallet height.

Further, when trying to optimise the height of the travelator, a cast construction was the obvious choice for the skilled person as this allowed variable pallet body material thicknesses and variable pallet heights to be incorporated according to structural needs. Such freedom of design was not available for extruded profiles.

Regarding auxiliary request 1, the basis for the amended claim 1 was found on page 3, lines 18-22 and

Fig. 2 of the A-publication. It was clear that Fig. 2 essentially showed all that was claimed in claim 1. Any problems associated with the specific expressions used to describe the features of claim 1 might find their basis in the translation into English from the originally filed Finnish application.

Reasons for the Decision

1. Main request

1.1 Admittance

1.1.1 According to Article 12(4) of the Rules of Procedure of the Boards of Appeal (RPBA), a Board has the power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first instance proceedings. A claim of similar scope to that of claim 1 of this request was included as an auxiliary request before the opposition division, yet was withdrawn without a decision being taken on it. The opponent argued that this withdrawn request could have been presented for decision in the first instance proceedings and should thus be held as inadmissible by the Board under Article 12(4) RPBA in accordance with the established case law of the Boards of Appeal.

1.1.2 The Board however finds that the main request is not inadmissible. The subject-matter of claim 1 of the request, confirmed also by the opponent, is not identical to that of one of the withdrawn requests before the opposition division. Thus, first, no direct conclusion regarding a request that could have been presented can thus necessarily be drawn from the fact that a particular request was withdrawn before a

decision during first instance proceedings. Although the request was indeed very similar to a request which was withdrawn, the proprietor argued convincingly why it had not been unreasonable to withdraw a number of the auxiliary requests before the opposition division without a decision having been taken on them, namely because the opposition division had deemed with respect to a higher ranking request that a particular feature was required in order to allow an inventive step to be recognised in the subject-matter of the claims; the claims of the withdrawn auxiliary requests did not include this feature.

1.1.3 For these reasons the present request is not one which could reasonably have been filed in the first instance proceedings (i.e. in the sense of being both submitted and maintained, such that a decision on it would be taken by the department of first instance). The Board thus found no reason to exercise its discretionary power to hold the main request inadmissible (Article 12(4) RPBA).

1.1.4 No objections were raised against the amended main request under Article 84 EPC 1973 or Article 123 EPC. The Board itself also sees no reason to find that the requirements of these Articles are not met in the main request.

1.2 Inventive step

1.2.1 The opponent requested that D7 be admitted. In view of the amended main request having been introduced during the appeal proceedings, the Board finds it equitable to allow the filing of a document by the opponent in response to this. The proprietor also consented to the admittance of D7.

D7 was thus admitted into the proceedings.

1.2.2 The subject-matter of claim 1 lacks an inventive step (Article 56 EPC 1973) at least when starting from D7 and combining this with the teaching of D1 to a skilled person.

1.2.3 Using the wording of claim 1 and references from D7 in parentheses, D7 discloses:
a pallet arrangement for a travelator (see page 1, first paragraph), in which arrangement (see Figs. 2 and 3) a pallet (4) moving on wheels (page 4, second paragraph) forms a part of a moving track, said pallet (4) consisting of at least a pallet body (see Fig. 2; platen 4 has a height thus implying a 'body') and a surface part (implicitly present on a travelator pallet), and that the body is provided with one or more surface plates (at least one surface plate must implicitly be present on a pallet in order to form the surface on which the user stands) forming a wearing surface (any plate on which a user stands will be subject to wear), whereby the body is provided with wheels (page 4, second paragraph) mounted at either end of it (see Fig. 2) and with a fastening element (8) at at least one end, wherein the pallet body is a structure of predetermined size (the word 'predetermined' is not qualified in the claim such that the pallet body of D7 may also be seen as a structure of predetermined size) and wherein the fastening element (8) is mounted between the wheels at the end of the pallet body (see Fig. 2), for coupling the pallet (4) to a chain (6).

The subject-matter of claim 1 thus only differs from the pallet arrangement of D7 in that the pallet body is

a structure made from a profiled bar.

The objective technical problem to be solved when starting from D7 as the closest prior art may thus be seen as how to construct a suitable pallet body for the travelator disclosed therein.

In solving this problem, the skilled person would find a teaching to extruded pallet body constructions in D1. In order to overcome disadvantages associated with a die cast pallet construction, col. 1, lines 38-49 of D1 suggests an extruded profile construction which is appropriate for use in pallets for passenger conveyors (i.e. travelators). Since it is solely a suitable pallet body construction which is sought according to the objective problem, the extruded profile construction taught in D1 would be adopted for the pallet according to D7, thus solving the objective technical problem and reaching the subject-matter of claim 1 without involving an inventive step (Article 56 EPC 1973).

- 1.2.4 The proprietor's argument that claim 1 clearly included a separate surface part or separate surface plates from the body of the pallet is not persuasive. The claim is drafted in such a manner that the surface part is, or the surface plates are, either part of the pallet body itself or separate entities therefrom. The general way in which this portion is drafted allows for either interpretation. Whilst para. [0007] of the patent indeed specifies that the surfacing parts are fastened to the body, this feature only appears in dependent claim 5, such that claim 1 is not so restricted in scope. The feature of claim 1 reading 'the pallet consisting of at least a pallet body and a surface part, and that the body is provided with one or more

surface plates' is thus known from D7, as indicated in point 1.2.3 above.

- 1.2.5 Regarding the proprietor's argument that a surface mounted travelator necessitated a cast pallet structure in order to minimise its height, the Board finds differently.

The travelator disclosed in D7 makes no mention of a requirement to minimise the pallet height, instead concentrating on reducing the end roller diameter sufficiently to avoid the necessity of pits. Any comparison between the pallet dimensions in the Figures of D7 and D1 is not considered relevant for alleging a greater height in the extruded pallets of D1 over those of D7; schematic drawings are merely figurative, thus not allowing dimensions to be extracted from them. Even when taking pallet height as an issue to be considered, the proprietor has provided no evidence that an extruded profile for a pallet body could not meet acceptable height restrictions for a surface mounted travelator. The rigidity, or ability of a pallet to carry load, is dictated by the construction material used and the ability of the designed structure to withstand bending stresses. No arguments were presented by the proprietor as to why, for a low height travelator, it was not possible for a suitable pallet cross-section of an extruded profile to be designed meeting desired strength and height requirements. Precisely this would be one of the skills of the skilled person in the field of travelators.

It is further noted, contrary to the opinion of the proprietor, that D7 contains no disclosure restricting it to a cast pallet construction. D7 is in fact silent on the specific pallet construction applicable to the

invention therein, rather concentrating on the elimination of pits at the ends of the travelator through reducing the end roller diameters. The pallet construction in D7 is left to the design selection of the skilled person, even if a cast construction might in some cases be the preferred form of pallet in such applications.

- 1.2.6 The proprietor's argument that the combs on the stepping off plate 5 of D7 were of a significant height relative to the pallet height, thereby indicating a cast construction of the pallets does not alter the Board's conclusion on inventive step. Only Fig. 3 of D7 provides any indication of the relative dimensions of the comb with respect to the pallet surface. However, as already indicated in point 1.2.5, a schematic drawing is not suited for extracting any unambiguous teaching regarding dimensions of specific components depicted. Furthermore, Fig. 3 is a plan view onto a travelator pallet and so is inherently unsuited to provide any information at all regarding the height of the comb relative to that of the pallet. This argument of the proprietor thus equally fails to convince that the travelator pallets in D7 must be of a cast construction such that a combination with the extruded pallets of D1 would not be possible.

The proprietor's reference to D9 also fails to change the Board's conclusion in this respect. A minimum groove or comb height dictated by a European standard does not necessarily imply that such a feature will be accurately represented in D7, in which the invention is directed to a technically unrelated aspect of the travelator (elimination of pits). D9 thus in no way enables any conclusion to be drawn relating to the pallet height in D7 and thus equally not to a cast

construction of the pallets in D7.

1.2.7 Regarding the proprietor's further argument that a cast construction provided much more design flexibility for the skilled person when trying to optimise the height of the travelator, the Board finds that this argument addresses a different problem. The objective technical problem to be solved when starting from D7 is to construct a pallet body for a travelator, notably not to optimise the pallet height for a travelator. The skilled person, when faced with the objective problem, is not concerned with constructing a pallet with a minimal height, optimising the structural design in order to achieve this. The problem guides the skilled person simply to finding a suitable pallet body construction, which is to be found in D1. The extruded profile construction in D1 is suggested to have advantages in terms of manufacturing costs over cast constructions and so would doubtless be considered by the skilled person as a suitable construction for the pallet arrangement known from D7.

1.2.8 The subject-matter of claim 1 is thus found to lack an inventive step (Article 56 EPC 1973) when starting from D7 and considering the teaching provided by D1 to a skilled person in light of the objective problem to be solved.

1.3 Auxiliary request 1

1.3.1 The subject-matter of claim 1 fails to meet the requirements of Article 56 EPC 1973 and of Article 123(2) EPC. The Board thus exercised its discretion under Article 13(1) RPBA not to admit the request into the proceedings.

- 1.3.2 According to Article 13(1) RPBA, any amendments to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. As is established practice before the Boards of Appeal, such amended requests should at least be *prima facie* allowable in order to be admitted.
- 1.3.3 The subject-matter of claim 1 of auxiliary request 1 was amended during this oral proceedings relative to claim 1 of auxiliary request 3 on which it was based. Auxiliary request 1 is thus an amendment to the proprietor's case falling under Article 13(1) RPBA.
- 1.3.4 The proprietor's argument that page 3, lines 18-22 in combination with Fig. 2 provided the basis for the amendment to claim 1 is not accepted. This referenced passage discloses that the 'profile shape is provided with fastening points' rather than the profiled bar being so provided as claimed. Nor is it unambiguous that the profile shape corresponds to the term profiled bar. Fig. 2 shows no detail of fastening points, simply indicating a particular positioning of wheels relative to a pallet according to a single embodiment. These parts of the application as originally filed thus provide no unambiguous disclosure of the (amended) subject-matter of claim 1.

Regarding the proprietor's argument that the specific terminology used in claim 1 may result from an inaccurate translation from the originally filed application in Finnish, this is not persuasive. Provision for correction of a translation is available under Article 14(2) EPC, yet the proprietor did not avail itself of this possibility for correction of the application at any stage of the proceedings. The specific language used in claim 1 is thus exclusively

that on which a decision of the Board can be taken.

The subject-matter of claim 1 thus fails to meet the requirement of Article 123(2) EPC.

- 1.3.5 The amendment to claim 1 of this request over claim 1 of the main request also at least *prima facie* fails to overcome the objection to lack of inventive step in view of D7 in combination with D1. The provision of fastening points on the pallet both for the mounting of the wheels and for the fastening element is known from D7 (see Fig. 2 and page 3, last paragraph to page 4, second paragraph) such that the objective technical problem and its solution in D1 are unchanged in this request relative to the main request.

The subject-matter of claim 1 thus *prima facie* does not involve an inventive step (Article 56 EPC 1973).

- 1.3.6 The Board thus exercised its discretion under Article 13(1) RPBA in deciding not to admit auxiliary request 1.
2. In the absence of any allowable request for maintenance of the patent, the decision under appeal must be set aside and the patent revoked.

Order

For these reasons it is decided that:

The patent is revoked.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated