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**Datasheet for the decision  
of 2 July 2019**

**Case Number:** T 1300/15 - 3.2.07

**Application Number:** 09706659.1

**Publication Number:** 2238055

**IPC:** B65G17/38, B65G17/06

**Language of the proceedings:** EN

**Title of invention:**

CONVEYOR BELT

**Patent Proprietor:**

Frans Bakker Beheer B.V.

**Opponent:**

Ashworth Bros., Inc.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54(1), 54(3)  
RPBA Art. 12(2), 12(4)

**Keyword:**

Novelty - main request (no)  
Auxiliary requests - admitted (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1300/15 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 2 July 2019**

**Appellant:** Ashworth Bros., Inc.  
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**Respondent:** Frans Bakker Beheer B.V.  
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**Representative:** 't Jong, Bastiaan Jacob  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 30 April 2015  
rejecting the opposition filed against European  
patent No. 2238055 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** A. Pieracci  
K. Poalas

## **Summary of Facts and Submissions**

- I. The opponent lodged an appeal in the prescribed form and within the prescribed time limit against the interlocutory decision of the opposition division rejecting the opposition against European patent No. 2 238 055.
  
- II. The opposition had been filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and inventive step) and on Article 100(b) EPC (insufficiency of disclosure). The opposition division considered the grounds of opposition under Article 100 (a) and (b) EPC not to be prejudicial to the maintenance of the patent in suit and rejected the opposition.
  
- III. With the statement setting out the grounds of appeal, the appellant (opponent) requested  

that the appealed decision be set aside and  
that the patent be revoked.
  
- IV. With the reply to the statement setting out the grounds of appeal, the respondent (patent proprietor) requested  

that the appeal be dismissed (main request) or,  
in the alternative, that when setting aside the  
decision under appeal the patent be maintained in  
amended form on the basis of one of the auxiliary  
requests I to III filed by letter dated 6 January  
2016.
  
- V. In the present decision reference is made to the following document:

D5: WO 2009/073 166 A1

which uncontestably is a PCT application having validly entered the European phase and, thus, is part of the state of art under Article 54(3) EPC.

VI. To prepare the oral proceedings scheduled upon all parties' requests, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA. The Board indicated that the subject-matter of claim 1 appeared not to be new in view of document D5 and that it foresaw not to allow auxiliary requests I to III in the proceedings for lack of substantiation in accordance to Article 12(2) and 12(4) RPBA.

VII. Oral proceedings before the Board took place on 2 July 2019.  
At the end of the oral proceedings the parties confirmed their requests from the written proceedings as final (see points III and IV above), with the exception of the respondent's auxiliary request I, which had been withdrawn during the oral proceedings.

The decision was given at the end of the oral proceedings.

VIII. The appellant argues that the subject-matter of claim 1 is not new in view of document D5 since the securing of the connecting rod in D5 corresponds to the disputed feature of claim 1 of the "substantially fixed relative position" of the pin. The appellant also contests the admittance into the proceedings of auxiliary requests II and III.

The respondent argues that the objected feature of claim 1 related to the "substantially fixed relative position" cannot be directly and unambiguously derived from D5 and that auxiliary requests II and III should be admitted into the proceedings.

The lines of arguments of the parties are dealt with in detail in the reasons for the decision.

IX. Independent claim 1 according to the main request, i.e. according to the patent as granted, reads as follows:

Conveyor belt (17) with a main plane and a longitudinal direction defined in this main plane and corresponding to the transporting direction of the conveyor belt, which conveyor belt (17) comprises a number of coupling elements (1), each comprising:

two links (2) which are each present on a side of a coupling element (1) and which are each coupled to a corresponding link (2) of a longitudinally adjacent coupling element (1);

a pin (3) which extends at least over a straight central part in transverse direction relative to the coupling elements (1) and is connected to the outer two links (2), and which has a part (20) which protrudes beyond the outer surface (18, 19) of a link (2) and is bent through at least 90°;

at least one of which outer links (2) has a general U-shape, which U extends in the main plane of the conveyor belt (17) and has a form widening toward the open end (4), such that the relatively narrow zone (5) at the closed end (6) fits into the relatively wide zone (7) at the open end of an adjacent link (2);  
each of which pins (3) extends from the straight central part of the pin (3) in a substantially fixed relative position through two first continuous holes

(8, 9) in the end zones (10, 11) of the legs (12, 13) of the U of a link, and without fixed relative position through two second continuous holes (14, 15) in the legs (12, 13) at the position of the relatively narrow zone (5) of a preceding link (2), which second holes (14, 15) are embodied as slotted holes extending in longitudinal direction (16); such that two mutually adjacent coupling elements (1) can be moved out of the main plane and are mutually rotatable in the main plane; characterized in that at least the most outward lying leg (12, 13) of a link (2) has a third hole (29); the pin (3) is inserted with its free end (21) into the third hole (29) of the link (2) or a link (2) of an adjacent coupling element (1); and the pin (3) is substantially fixed relative to each link (2) on the sides of the conveyor belt (17), i.e. is locked against substantial sliding and rotation.

- X. Independent claim 1 according to auxiliary request II reads as follows (the features added with respect to claim 1 of the patent as granted are underlined, the features deleted are struck through)

Conveyor belt (17) with a main plane and a longitudinal direction defined in this main plane and corresponding to the transporting direction of the conveyor belt, which conveyor belt (17) comprises a number of coupling elements (1), each comprising:

two links (2) which are each present on a side of a coupling element (1) and which are each coupled to a corresponding link (2) of a longitudinally adjacent coupling element (1);

a pin (3) which extends at least over a straight central part in transverse direction relative to the

coupling elements (1) and is connected to the outer two links (2), and which has a part (20) which protrudes beyond the outer surface (18, 19) of a link (2) and is bent through at least 90°;

at least one of which outer links (2) has a general U-shape, which U extends in the main plane of the conveyor belt (17) and has a form widening toward the open end (4), such that the relatively narrow zone (5) at the closed end (6) fits into the relatively wide zone (7) at the open end of an adjacent link (2);

each of which pins (3) extends from the straight central part of the pin (3) in a substantially fixed relative position through two first continuous holes (8, 9) in the end zones (10, 11) of the legs (12, 13) of the U of a link, and without fixed relative position through two second continuous holes (14, 15) in the legs (12, 13) at the position of the relatively narrow zone (5) of a preceding link (2), which second holes (14, 15) are embodied as slotted holes extending in longitudinal direction (16);

such that two mutually adjacent coupling elements (1) can be moved out of the main plane and are mutually rotatable in the main plane;

characterized in that

at least the most outward lying leg (12, 13) of a link (2) has a third hole (29);

the pin (3) is inserted with its free end (21) into the third hole (29) of the link (2) or a link (2) of an adjacent coupling element (1); ~~and~~

the pin (3) is substantially fixed relative to each link (2) on the sides of the conveyor belt (17), i.e. is locked against substantial sliding and rotation; and the ratio between the radius of curvature of the neutral bend line and the diameter of the pin (3) is smaller than 1.5.



XI. Independent claim 1 according to auxiliary request III reads as follows (the features added with respect to claim 1 of the patent as granted are underlined):

Conveyor belt (17) with a main plane and a longitudinal direction defined in this main plane and corresponding to the transporting direction of the conveyor belt, which conveyor belt (17) comprises a number of coupling elements (1), each comprising:

two links (2) which are each present on a side of a coupling element (1) and which are each coupled to a corresponding link (2) of a longitudinally adjacent coupling element (1);

a pin (3) which extends at least over a straight central part in transverse direction relative to the coupling elements (1) and is connected to the outer two links (2), and which has a part (20) which protrudes beyond the outer surface (18, 19) of a link (2) and is bent through at least 90°;

at least one of which outer links (2) has a general U-shape, which U extends in the main plane of the conveyor belt (17) and has a form widening toward the open end (4), such that the relatively narrow zone (5) at the closed end (6) fits into the relatively wide zone (7) at the open end of an adjacent link (2);

each of which pins (3) extends from the straight central part of the pin (3) in a substantially fixed relative position through two first continuous, circular holes (8, 9) in the end zones (10, 11) of the legs (12, 13) of the U of a link, and without fixed relative position through two second continuous holes (14, 15) in the legs (12, 13) at the position of the relatively narrow zone (5) of a preceding link (2), which second holes (14, 15) are embodied as slotted holes extending in longitudinal direction (16);

such that two mutually adjacent coupling elements (1) can be moved out of the main plane and are mutually rotatable in the main plane;  
characterized in that  
at least the most outward lying leg (12, 13) of a link (2) has a third hole (29);  
the pin (3) is inserted with its free end (21) into the third hole (29) of the link (2) or a link (2) of an adjacent coupling element (1); and  
the pin (3) is substantially fixed relative to each link (2) on the sides of the conveyor belt (17), i.e. is locked against substantial sliding and rotation.

### **Reasons for the Decision**

1. Novelty of the subject-matter of claim 1 of the patent as granted (Articles 100(a) and 54 EPC)
- 1.1 The appellant argues that the disputed combination of features, which according to the opposition division and the respondent distinguishes the subject-matter of claim 1 from the embodiment of figures 8 to 11 of D5, is disclosed by this embodiment of D5.

The disputed combination of features of claim 1 is the following:

"...each of which pins (3) extends from the straight central part of the pin (3) in a substantially fixed relative position through two first continuous holes (8,9) in the end zones (10, 11) of the legs (12, 13) of the U of a link, and without fixed relative position through two second continuous holes (14, 15) in the legs (12, 13) at the position of the relatively narrow zone (5) of a preceding link (2)...".

What is disputed is that "...the pins extends...in a substantially fixed relative position through the two first continuous holes...", which the opposition division did not consider as being disclosed in D5 (see point 14.5 of the impugned decision).

According to the appellant, these features are shown in the embodiment of figures 8 to 11 of D5 in which the corresponding passage of paragraph [0033] of the description indicates that the rod (202) is secured after mounting and is therefore "...in a substantially fixed relative position...".

The appellant contests the argument of the opposition division, that the expression "substantially fixed" in claim 1 means that only a small amount of play is allowed once the pin is mounted into the link (see point 14.4 of the impugned decision). According to the appellant, there is no basis for this narrow interpretation since the patent in suit does not provide a "...certain grade of how firmly fixed it should be...". The appellant contests further the argument of the opposition division that "...even though the rod is secured at its tip, nothing in D5 hinders a potential substantial pivot movement of the rod along the holes 214...", as not having any technical meaning and considers moreover that in practice there is no exerting force which might cause such a pivot movement.

The appellant argues that the fact that D5 indicates that the rod is secured to the link in paragraph [0033] anticipates the feature of claim 1 that the pins extend in a substantially fixed relative position.

The appellant further contests the argument of the respondent that the expression "secure the rod" in D5 means to secure it only against rotational movement. The appellant also argues that the tilting movement indicated by the appellant, if any, has still to be interpreted as falling within the meaning of "substantially fixed" of claim 1.

- 1.2 The respondent contests the argument of the appellant and considers that using slotted holes alone, as shown in D5, does not result in that "...each of which pins extends...in a substantially fixed relative position..." since without any other measures, the pins are free to move within the slotted holes. The respondent also argues that D5 does not specify what is exactly meant by securing the rod. According to the respondent, it is possible to bend the outermost end of the link around the rod, while the rod is still movable within the slot shaped opening and therefore is not in a fixed relative position.

The respondent argues that the "substantially fixed relative position" in claim 1 is to be read in comparison to the expression "without fixed relative position" also used in the claim in relation to the slotted holes. Thus, it would have been clear to the person skilled in the art that "substantially fixed relative position" meant that only minor movements corresponding to a small amount of play were possible compared to major excursions which allowed the conveyor belt to be curved and which corresponded to the feature "without fixed relative position".

In case of doubt, the person skilled in the art would have referred to the description of the patent in suit and have found in paragraph [0032] and [0033] confirmation of this interpretation.

Since major pivoting movements are possible for the rod (202) of figures 8 to 11 of D5, this cannot be seen as being substantially fixed.

The respondent also underlines that when D5 refers in its paragraph [0003] to the prior art document US 6 354 432, it indicates that "...welds are provided to secure the link to the button head and to the rod, thereby preventing rotational movement of the links on the transverse rods...".

When discussing the embodiment of Figures 8 to 11 of D5, reference is made again to document US 6 354 432 (see paragraph [0032]). Thus, the person skilled in the art would have understood that in the context of the example of figures 8 to 11 the term "secure" meant to prevent only rotational movement but not to prevent any other kind of movements.

The respondent acknowledged at the oral proceedings that the rod (202) of figures 8 to 11 of D5 was secured and thereby substantially fixed at the hole (218). However, the respondent argues that the rod (202) can pivot within a certain range with respect to the slot (214) of the inner leg of element (210) and, therefore, it is not substantially fixed as required by claim 1.

The respondent concludes that it cannot be directly and unambiguously derived from D5 that the rods (202) that it discloses are provided with a "substantially fixed relative position".

- 1.3 The Board cannot accept the argument of the respondent and substantially concurs with the appellant for the following reasons.

Paragraph [0033] of D5 states:

"...Referring also to FIGS. 10 and 11, when the rod 202 is disposed completely through the links 210, the j-shaped ends 204 are hooked or snapped into the holes 218 on the end 216 of the link 210, generally by hand. Thereafter, the link ends 216 are bent upwards around the end of the rod using of a simple pair of pliers **in order to secure the rod**. Upon the upward bending of the terminal end of the link, the splice is thereby complete...".

This passage would have been interpreted by the person skilled in the art as meaning that the ends of the rod were secured, i.e. were kept in their position, by the link ends being bent upwards.

The argument of the respondent that the person skilled in the art would have understood the expression "secure the rod" as meaning to secure only the rotational movement of the rod because of the reference to document US 6 354 432 in both paragraphs [0003] and [0032] cannot be accepted.

The fact that paragraph [0003] of D1 states:

"...welds are provided to secure the link to the button head and to the rod, thereby preventing rotational movement of the links on the transverse rods...",

does not necessarily imply that only rotational movement is prevented since the reference to welds automatically implies that also any other movement is prevented.

Hence, the person skilled in the art would have understood the expression "secure the rod" in paragraph [0032] according to the common meaning of the term, i.e. to maintain the rod in its position.

The appellant acknowledged at the oral proceedings that the rod (202) of D5 was "substantially fixed" at the hole (218) but argued that pivoting movements were still possible and, therefore, rod (202) was not "substantially fixed" as in claim 1.

The possibility that such a pivoting movement takes place is not disclosed in D5. Furthermore, even if such pivoting movements actually took place, there is nothing in the wording of claim 1 which would allow distinguishing such "pivoting movements" from the "small movements" that the respondent agrees would fall under the expression "substantially fixed" used in claim 1.

The Board is thus of the opinion that by securing both ends of the rod (202) of the embodiment of figures 8 to 11 of D5 by bending the link ends upwards, the rod "...extends...in a substantially fixed relative position...".

Therefore, the contested combination of features of claim 1 is shown in D5.

Since the disclosure in D5 of the other features of the claim is uncontested by both parties, there is no need to address them.

As a consequence, the subject-matter of claim 1 is not new in view of D5 within the meaning of Article 54(1) and (3) EPC.

2. Admittance into the proceedings of auxiliary requests II and III.

Auxiliary requests II and III were filed together with the reply to the statement setting out the grounds of appeal and corresponded to auxiliary requests II and III already filed in opposition proceedings.

When submitting the auxiliary requests together with the reply to the statement setting out the grounds of appeal, the respondent did not indicate any reason why these requests would provide patentable subject-matter should the appeal be allowed on the basis of the substantiated arguments submitted by the appellant with the appeal.

- 2.1 In its communication according to Article 15(1) RPBA (point 8), the Board indicated that it foresaw not to admit the auxiliary requests according to Article 12(2) and 12(4) RPBA for lack of substantiation. The respondent did not respond to the Board's communication.
- 2.2 At the oral proceedings the respondent argued as follows.

Given the positive outcome of the opposition proceedings, the respondent could not have predicted all the possible arguments the Board could have used against the main request and the auxiliary requests, and was therefore not in the position to substantiate the auxiliary requests when filing the reply to the statement setting out the grounds of appeal.



Since arguments were provided with respect to the patentability of claim 1 as granted and because the independent claim 1 of auxiliary request II corresponded to the combination of claims 1 and 11 of the patent as granted and independent claim 1 of auxiliary request III contained the additional feature that the first holes were circular, this feature being rather a clarification and having its basis in the drawings of the application as originally filed, these auxiliary requests were also implicitly substantiated at least to the extent that they contained the same features of claim 1 as granted.

The subject-matter of claim 1 of these auxiliary requests is thus new and the arguments already brought forward for the main request with respect to inventive step would still apply.

After receiving the communication according to Article 15(1) RPBA, the respondent was not invited to file comments and therefore did not respond to the communication.

The respondent also argues that the appellant's objections with respect to the auxiliary requests are very brief and that the respondent cannot be required to provide a greater level of detail than the appellant when dealing with the same issues.

- 2.3 The appellant argues that auxiliary requests II and III should not be admitted into the proceedings since they are unsubstantiated. Substantiated objections with respect not only the patent as granted but also with regard to the current auxiliary requests, which correspond to those filed during the opposition proceedings, were raised when filing the statement of

the grounds of appeal to which the respondent did not respond until the oral proceedings.

2.4 The Board is of the following opinion.

The argument that defending the patentability of the main request implicitly provides substantiation for the auxiliary requests cannot be accepted. The auxiliary requests are meant to provide a fall-back position in case the main request is not allowable. If the basis for maintaining the auxiliary requests are only that of the main request, then it is of no use if the main request falls since then the auxiliary requests would fall for the same reasons.

The argument that a substantiation is not possible before knowing the objections of the Board can also not be accepted, as each party should make its own case and should not wait for direct input from the Board. The respondent, knowing the substantiated objections to the claimed subject-matters raised by the appellant already at the outset of the appeal proceedings, should have provided the reasons as to why the auxiliary requests provided patentable subject-matter in case the Board accepted the position of the appellant.

Objections of lack of novelty in relation to granted claim 11, thus relevant for auxiliary request II, and of added subject-matter for auxiliary request III were presented by the appellant with the statement setting out the grounds of appeal (see page 19 and 20), and the respondent has not taken a position with respect to these objections.

The argument that the absence of response after receiving the communication of the Board is due to

having not been invited to comment on the communication under Article 15(1) RPBA cannot be successful since, as mentioned above, it is up to each party to put forward its case.

The Board cannot therefore follow accept the arguments of the respondent for not substantiating its requests when filing the reply to the statement setting out the grounds of appeal and after having received the communication under Article 15(1) RPBA.

The Board does not consider that the auxiliary requests have been substantiated at the oral proceedings either.

The mere statement that claim 1 of auxiliary request II corresponds to the combination of granted claims 1 and 11 does not give any indication as to why amended claim 1 should provide patentable subject-matter in particular in view of the objection of lack of novelty with respect to document D5 raised by the appellant already with the statement setting out the grounds of appeal.

The mere indication that the amendment introduced in claim 1 of auxiliary request III, that the first holes are circular, is based on the teaching of the drawings and description as a whole is not considered sufficient substantiation of the basis of that amendment in particular in view of the fact that the word "circular" is admittedly not used at all in the application as originally filed.

The argument that the respondent cannot be asked to provide a greater level of detail in dealing with the objections of the appellant than that used by the

appellant itself in formulating its attacks cannot be accepted at least in the present case.

It is the respondent who amended the claims and chose not to respond until the oral proceedings and, in view of the Board's conclusion that, in accordance with the appellant's submissions in appeal, the subject-matter of claim 1 of the patent as granted underlying the decision under appeal is not novel, it is thus up to the respondent to convince the Board that the amendments carried out are appropriate to solve the issues at stake and would not raise any further issue. As indicated above, this is not presently the case.

In accordance with Article 12(1) RPBA, appeal proceedings shall be based on the notice of appeal and the statement of grounds of appeal filed pursuant to Article 108 EPC. Under Article 12(2) RPBA, the statement of grounds of appeal shall contain a party's complete case, setting out clearly the reasons why it is requested that the decision under appeal be reversed, amended or upheld, and should expressly specify all the facts, arguments and evidence relied on. Article 12(4) RPBA, in its pertinent part, provides that everything presented under Article 12(1) RPBA shall be taken into account by the Board if and to the extent it meets the requirements of Article 12(2) RPBA. In accordance with Article 12(4) RPBA, the Board therefore does not need to take into account anything which does not meet the requirements of Article 12(2) RPBA.

Since the respondent has not properly substantiated auxiliary requests II and III, either at the outset of the appeal procedure or after receiving the preliminary opinion of the Board with the communication under

Article 15(1) RPBA, or even at the oral proceedings, the Board considers it appropriate to not admit auxiliary requests II and III into the proceedings according to Article 12(2) and 12(4) RPBA.

## 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:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated