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**Datasheet for the decision
of 31 May 2022**

Case Number: T 0173/19 - 3.2.07

Application Number: 11778126.0

Publication Number: 2566670

IPC: B26D7/06

Language of the proceedings: EN

Title of invention:
HIGH SPEED SLICING MACHINE

Patent Proprietor:
Formax, Inc.

Opponents:
GEA Food Solutions Germany GmbH
Weber Maschinenbau GmbH Breidenbach

Headword:

Relevant legal provisions:
EPC Art. 54(2), 111(1)
RPBA 2020 Art. 11, 12(2)

Keyword:

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 0173/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 31 May 2022

Appellant: Formax, Inc.
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Appellant: Weber Maschinenbau GmbH Breidenbach
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Representative: Grünecker Patent- und Rechtsanwälte
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 December 2018 concerning maintenance of the
European Patent No. 2566670 in amended form.**

Composition of the Board:

Chairman A. Pieracci
Members: V. Bevilacqua
 R. Cramer

Summary of Facts and Submissions

- I. Appeals were filed by opponent 2 and by the patent proprietor against the decision of the opposition division maintaining European patent number 2 566 670 in amended form on the basis of the then auxiliary request 3.
- II. The two oppositions filed by opponent 1 and opponent 2 were directed against the patent in its entirety, whereby all grounds for opposition pursuant to Article 100(a) to (c) EPC were raised.
- III. The present decision is based on the following documents which were also mentioned in the appealed decision:

D1: US 5,628,237 A;
D3: US 2009/120 256 A1;
D3': WO2010/011237 ;
D7: DE 103 53 114 A1;
whereby D3 and D3' have the same technical content.
- IV. The Board gave its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020, indicating that both appeals were likely to be dismissed.
- V. The patent proprietor (with letter dated 17 December 2021) and opponent 2 (with letter dated 28 January 2022) reacted to the above communication.
- VI. Oral proceedings before the Board took place on 31 May 2022. For further details of the course of the

oral proceedings, reference is made to the minutes thereof.

At the beginning of oral proceedings the parties confirmed their requests as follows:

The patent proprietor requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or alternatively be maintained in amended form on the basis of the claims of one of auxiliary requests A-Q as listed on page 2 of their statement of grounds of appeal, whereby auxiliary request C corresponded to the claims as upheld by the opposition division.

Opponent 2 requested that the decision under appeal be set aside and that the patent be revoked.

Opponent 1 requested that the appeal of the patent proprietor be dismissed.

During oral proceedings the question of remittal was discussed with the parties, whereby the opponents expressed themselves in favour of a remittal, while the patent proprietor preferred to address the issue of inventive step at the oral proceedings.

At the conclusion of the oral proceedings the parties confirmed that their final requests were the same as those read out at the start of the oral proceedings and then the decision was announced.

VII. Independent claim 1 of the patent as granted (main request) reads as follows:

"A food article slicing machine (100) comprising:

- a) a slicing station (124) comprising a knife blade (125) and a knife blade drive driving the blade (125) along a cutting path in a cutting plane;
- b) a food article loading apparatus (108);
- c) a food article feed apparatus (120) disposed over said food article loading apparatus (108),
- d) said food article feed apparatus (120) having a conveyor assembly (530) with independently driven endless conveyor belts (802, 804, 806),
- e) wherein each of the conveyor belts (802, 804, 806) is connected to a food article gripper (894) for moving a food article along a food article feed path,

characterized in that

- f) the conveyor assembly (530) is an upper conveyor assembly (530)."

VIII. The wording of the claims according to the auxiliary requests is not given here as these requests are not relevant for the decision.

Reasons for the Decision

1. Main request - Novelty over D7 (Article 54(2) EPC)

1.1 Review of the appealed decision

1.1.1 The opposition division came to the conclusion (appealed decision, point 20.1) that the subject-matter of claim 1 of the main request lacks novelty over the content of the disclosure of document D7.

- 1.1.2 The patent proprietor contested the above conclusion identifying feature b) of claim 1 of the main request as one of the features distinguishing the subject-matter thereof from the slicing machine disclosed in D7 (statement of grounds of appeal points G.1 and G.2, letter of 17 March 2020, point 2.1, letter of 17 December 2021, point 2.1a).

The opposition division's assessment that figure 2a of this document and the corresponding part of the description discloses a food article feed apparatus disposed over a food article loading apparatus is not correct and rather artificial, so the patent proprietor, because the upper and lower conveyor belts 4 depicted therein, being operated synchronously, clearly belong to the same feed apparatus, as explained in paragraphs [0061] and [0064] of D7.

- 1.1.3 Opponents 1 and 2 replied that the analysis of the content of the disclosure of D7 at the basis of the appealed decision is correct.

As claim 1 of the main request refers to a "loading apparatus" without any further specification thereof, this feature is anticipated by any apparatus having a loading or transporting function.

The opposition division correctly identified the lower conveyor belt 4 as a food article loading apparatus, because it clearly has a surface upon which the food article is loaded and rests, while being transported, while the upper conveyor belt 4 clearly misses such a loading surface and can only perform a feeding function, pushing the food article towards the cutting plane 6.

Figure 1 of D7 also confirmed the above interpretation because it shows that the upper conveyor belt 4, used for feeding has no loading function because is arranged above the lower loading conveyor belt 4.

As a consequence of the above the opposition division correctly decided that figure 2a of D7 discloses a food article feed apparatus (the upper conveyor 4) disposed over a food article loading apparatus (the lower conveyor 4).

The arguments of the patent proprietor were not to be followed because there is no mention in D7 that the upper conveyor belt 4 and the lower conveyor belt 4 have to be operated synchronously, on the contrary paragraph [0064] clearly states that they are independently operated ("individuell antreibbar") and even if such a synchronous operation was implicitly disclosed, as suggested by the patent proprietor, still a clear functional distinction between a lower loading conveyor and an upper feeding conveyor was to be made.

Paragraphs [0064] and [0061], to which the patent proprietor refers, would only confirm that the interpretation of the opposition division was correct, because they even disclose a clear separation between a loading phase and a feeding phase.

In this respect, opponent 1 referred to paragraph [0064], figures 3a to 3c, and argued that the first (loading) phase ends when the food article loaded upon the lower conveyor belt 4 contacts the stop element (Anschlag) 16, and that the second (feeding) phase only begins when the food article starts to be sliced.

Opponent 2 on the other hand referred to paragraphs [0060] and [0061], figure 2a and argued that the second (feeding) phase begins as soon as the food article is clamped between two conveyor belts 4 (the upper and the lower conveyor belts 4).

- 1.1.4 The Board is convinced by the argument of the patent proprietor that a skilled person would not have understood this document as the opposition division did, artificially separating the feeding device disclosed therein (4, see paragraphs [0061] and [0064]) into a loading apparatus (lower conveyor belt 4) and a feed apparatus (upper conveyor belt 4).

Paragraphs [0064] to [0061] do not support the interpretation of D7 made by the opposition division because they do not make any clear distinction between the function and structure of the upper and lower conveyors 4.

The presence of a loading apparatus distinct from a feeding apparatus cannot be derived from the fact that the methods derivable from figures 2a and 3a to 3c can be divided, a posteriori, in two phases (before and after the food article contacts the stop element 16, as opponent 1 argues, or before and after is clamped between two conveyor belts, as opponent 2 puts forward).

As the function of this apparatus 4 is to push the food article towards the cutting path of the slicing station (6, "Schneidebene", see paragraph [0061]) the Board concurs with the patent proprietor that a skilled reader would conclude that the upper conveyor belt 4 and the lower conveyor belt 4 together form a food article feed apparatus. This is even more the case

since a loading function is described in D7 (paragraph [0064]) as taking place other than through the elements of the slicing machine described therein.

The opposition division therefore erroneously concluded (appealed decision, 20.1) that the lower conveyor belt 4 shown in figure 2a of D7 was a food article loading apparatus according to claim 1 of the main request (feature b).

- 1.2 Further novelty objection of opponent 2 (Article 54(2) EPC)
 - 1.2.1 Opponent 2 argued that the subject-matter of claim 1 of the main request also lacks novelty over D7 because paragraph [0064] of this document mentions that food articles can be loaded by a machine ("maschinell") and therefore discloses a food article loading apparatus (feature b of claim 1), and such an apparatus could, technically speaking, only be positioned at a lower level with respect to the food article feed apparatus (feature c of claim 1).
 - 1.2.2 The Board disagrees. D7 could not be considered as novelty destroying even if a food article loading apparatus (feature b of claim 1) may be seen as being disclosed through the expression "maschinell" used in paragraph [0064]. This is because the allegation of opponent 2 that such a food article loading apparatus could only be positioned at a lower level with respect to the food article feed apparatus clearly has no basis in the content of the disclosure of D7 and cannot be derived directly and unambiguously therefrom.

As a consequence of the above, as there is no mention at all in D7 of any detail on the position of any

apparatus which could be seen as having a food loading function, the Board concludes that claim 1 of the main request is new over D7 because at least feature c thereof is missing.

2. Main request - Novelty over D1 (Article 54(2) EPC)

2.1 Both opponents argued that D1 is novelty destroying, in particular because this document discloses feature c of the claim since the food article feed apparatus 75 is disposed over the food article loading apparatus 85 (feature c, letter of opponent 2 dated 9 September 2019, point 1.2.1, letter of opponent 1 dated 24 September 2019, point c. at page 11).

The opponents base their novelty objection on the interpretation that the expression "disposed over" used in feature c of claim 1 of the main request only requires that the food article feed apparatus has to be arranged at a higher level with respect to the food article loading apparatus, no further restrictions, and in particular no overlap in the vertical direction being required.

This interpretation is corroborated, so opponent 2, by the meaning of "over" given in the Merriam-Webster dictionary (letter of 9 September 2019, point 1.1.1) as "used as a function word to indicate motion or situation in a position higher than or above another".

Feature c would be disclosed in D1 because the article feed apparatus of D1 consists of several elements and figures 1 to 3 show that elements of the feed apparatus 75 are in a higher position than the tray of the loading apparatus 85.

2.2 The Board disagrees and notes that the interpretation of the expression "disposed over" to which both opponents refer when formulating their novelty objection is not in agreement with the stance taken by the opposition division, according to which (see point 20.1 of the appealed decision, fourth paragraph at page 6) "over" means only that the feed apparatus is disposed above the loading apparatus.

The Board sees no reason to deviate from this interpretation and considers that this corresponds to the understanding of a person skilled in the art when reading feature c in the specific context of the claim. The fact that the only and single dictionary cited by opponent 2 might be seen as providing a different interpretation is irrelevant in this respect.

The feature "food article feed apparatus disposed over said food article loading apparatus" therefore specifies that the food article feed apparatus is arranged above the food article loading apparatus.

As a consequence of the above the opponents failed to convincingly show that the claim interpretation made by the opposition division is not correct.

2.3 Based on the interpretation of the opposition division of feature c of claim 1 of the main request followed by the Board, D1 is also not novelty destroying. The figures of D1 show that the food article feed apparatus of D1 is not disposed over the food article loading apparatus, but, as argued by the patent proprietor, at the side thereof.

This is shown in figures 5 and 13 of D1, and explained at column 8, starting from line 6, as well as at column 23, lines 31 to 60 of D1.

As a consequence of the above the subject-matter of claim 1 of the main request is new over the content of the disclosure of D1.

3. Main request - Novelty over D3 and D3' (Article 54(2) EPC)

Opponent 1 argued during the written procedure that claim 1 of the main request lacks novelty, referring in particular to figure 1 of D3 (corresponding to figure 1 of D3'), allegedly showing that the food article feed apparatus 120 of the slicing machine disclosed in this document is disposed over the food article loading apparatus 108 (letter of 24 September 2019, pages 8 to 10).

Opponent 2 argued during the written procedure that D3' is novelty destroying, in particular because figures 1-4 thereof (corresponding to figures 1-4 of D3) disclose that the food article feed apparatus 120 is disposed over the food article loading apparatus 108 (point 1.2.2 of the letter dated 9 September 2019).

3.1 The Board disagrees, and follows, in this respect, the arguments of the patent proprietor (statement of grounds of appeal, point I. at page 16).

The feature "food article feed apparatus disposed over said food article loading apparatus", upon a proper interpretation thereof, as discussed above (see point 2.2) is not disclosed in these documents because figure 4 (corresponding to figure 4 of D3') shows that the food article loading apparatus 108 is at the side of the food article feed apparatus 120.

This is also confirmed by paragraph [0134] of D3, corresponding to the passage at page 16, lines 10 to 17 of D3', explaining that the food article has to be transferred laterally from the lift tray assembly 220 of the loading apparatus 108 onto the food article feed apparatus 120.

The Board therefore concludes that feature c is neither disclosed in D3 nor in D3', and that therefore the subject-matter of claim 1 of the main request is new over the content of the disclosure of these documents.

4. Conclusion

Since the patent proprietor has convincingly demonstrated the incorrectness of the appealed decision as far as the alleged lack of novelty of the subject-matter of claim 1 of the main request with respect to D7 is concerned, and the opponents have not convincingly demonstrated that any of D1, D3 and D3' deprives the subject-matter of claim 1 of the main request of novelty, the appealed decision cannot be upheld and should be set aside.

5. Remittal of the case to the opposition division -
Articles 111(1) EPC and 11 RPBA 2020

5.1 The Board is aware that, according to Article 11 RPBA 2020 a remittal for further prosecution should only be undertaken exceptionally, when special reasons apply.

5.2 The Board notes that the decision under appeal on the main request, after having discussed the objections of sufficiency of disclosure (Article 100 b) EPC) and unallowable extension (Article 100 (c) EPC), only dealt with one of the grounds of opposition according to

Article 100(a) EPC, namely lack of novelty, and only discussed the content of the disclosure of document D7.

Noting that the opposition division has not addressed the issue of inventive step of the subject-matter claimed in the main request the Board cannot come to a decision regarding this patentability requirement by reviewing the decision under appeal in a judicial manner as set out in Article 12(2) RPBA 2020.

Moreover, although the patent proprietor has indicated its preference for dealing with the issue of inventive step at the oral proceedings before the Board, both opponents have expressed themselves in favour of a remittal referring to the complexity of the case and to the need for the parties to re-assess the case in view of the Board's conclusions on novelty.

Against this background, after considering all the relevant circumstances of the case at hand, the Board, noting that Article 11 RPBA 2020 cannot be seen as limiting the discretionary power of the Board provided by Article 111(1) EPC, considers it appropriate to remit the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



G. Nachtigall

A. Pieracci

Decision electronically authenticated