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D E C I S I O N
of 12 February 2002

Case Number: T 1037/99 - 3.2.3

Application Number: 91302089.7

Publication Number: 0450775

IPC: B22D 11/06

Language of the proceedings: EN

Title of invention:
Strip casting

Patentee:
Castrip, LLC

Opponent:
VOEST-ALPINE Industrieanlagenbau GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 104, 111(1), 114

Keyword:
"Examination of own motion"
"Decision re appeal - remittal (yes)"
"Costs - apportionment - (no)"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1037/99 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 12 February 2002

Appellant: (Opponent)
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Representative:
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Respondent: (Proprietor of the patent)
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Representative:
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office dated 7 July 1999, posted on 27 September 1999, rejecting the opposition filed against European patent No. 0 450 775 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: C. T. Wilson
Members: F. Brösamle
J. P. Seitz

Summary of Facts and Submissions

I. In the oral proceedings of 7 July 1999 the opposition division rejected the opposition against European Patent No. 0 450 775 whereby the written decision was posted on 27 September 1999.

In its decision the opposition division came to the result that

(D1-US)= US-A-2 058 448

is the closest prior art and that claim 1 of the main request defines subject-matter which is based on an inventive step.

II. Claim 1 of the **main request** (claims as granted) reads as follows:

"A method of casting metal strip of the kind in which molten metal is introduced between a pair of parallel casting rollers (16) via a tundish (18) and a metal delivery nozzle (19), characterised in that at the commencement of a casting operation, the metal delivery nozzle (19) and the tundish (18) are preheated at preheating locations spaced from the rollers, the preheated delivery nozzle (19) and tundish (18) are moved into positions above the rollers, and molten metal is poured into the tundish to flow through the delivery nozzle to the rollers within a time interval no more than three minutes from the first of the movements of the delivery nozzle and the tundish from their preheating locations."

III. Against the above decision of the opposition division

the opponent - appellant in the following - lodged an appeal on 12 November 1999 paying the fee on the same day and filing the statement of grounds of appeal on 26 January 2000 in which statement the appellant cited (D5)= DE-C-3 311 090 corresponding to (D5-US)= US-A-4 544 018 being in the language of the proceedings.

Relying on Article 114(1) EPC the appellant requested that this document be allowed into the appeal procedure and based on Article 111(1) EPC auxiliary requested to remit the case to the first instance for further prosecution.

IV. The patentee - respondent in the following - in his letter dated 11 January 2002 responding to the board's Communication pursuant to Article 11(2) RPBA agreed to consider (D5-US) and to withdraw a request for oral proceedings before the board.

V. The requests of the parties can be summarized as follows:

(a) appellant

- to set aside the impugned decision and to revoke European patent No. 0 450 775 to the extent of claims 1 to 5 as granted

- by way of auxiliary petitions oral proceedings and remittal of the case to the first instance (last paragraph of page 4 of the statement of grounds of appeal).

(b) respondent

- to dismiss the appeal

- by way of an auxiliary request to remit the case to the first instance to have decided the relevance of prior art at two levels and

- an apportionment of costs in the event that the board allows (D5-US) into the proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. *Prior art to be considered*

2.1 In the proceedings before the opposition division (D1-US) clearly was the nearest available piece of prior art. With the citation of (D5) ^ (D5-US) by the appellant this document has, however, to be acknowledged as the nearest prior art document of the (appeal) proceedings for the following reasons:

2.2 From (D5-US) a **horizontal** strip casting apparatus/process is known whereby the strip is formed between **endless belts** "20,20". Apart from these features (D5-US) discloses the features of granted claim 1 including the restriction of the starting time to less than three minutes since all motions of the tundish and delivery nozzle of (D5-US) are carried out mechanically and no substantial difference in operation between the apparatus/process according to granted claim 1 and (D5-US) can be seen. Moreover casting rollers and endless belts as well as the orientation

thereof either vertically or horizontally have to be seen as **equivalents.**

2.3 With respect to the arguments brought forward by the respondent (letter dated 16 June 2000) it is observed by the board that the tundish of (D5-US) is merely a part of the metal distribution system conveying liquid metal to the nozzle and is **empty** when in its preheating - position which is different from the casting - position, see (D5-US) Figure 5, reference signs "2, 46, 49 and 54" as well as "9 and 53". The casting apparatus according to (D5-US) is not restricted to the use of a **dummy bar or bolt** during startup and to **sequence casting**, respectively.

Under these circumstances the board holds that (D5-US) is of crucial importance and has to be allowed into the proceedings, Article 114(1) EPC, since this document - contrary to the findings of the respondent - discloses **no** "*in situ*" preheating system rather the parts to be preheated are brought into positions which are **spaced** from the rollers and which are **not in the casting position** when being preheated, see granted claim 1.

3. *Requests of the parties*

3.1 The request of the appellant can be read as being to revoke the patent or to send it back with (D5-US), see statement of grounds of appeal page 4, last paragraph ("hilfsweise... an die Einspruchsabteilung zurückzuverweisen") and only lastly to have oral proceedings (before the board), see notice of appeal, page 1, last paragraph.

3.2 The board holds that these requests have to be considered in a **logical way** ie the request for remittal by the appellant and the respondent - see letters dated 16 June 2000, page 3, third paragraph and page 4 request (iv) and of 11 January 2002 responding to the board's Communication pursuant to Article 11(2) RPBA - **before** the request for oral proceedings which therefore becomes superfluous (**before the board**).

3.3 Summarizing, both parties to the proceedings request remittal of the case so that the board by applying its discretion under Article 111(1) EPC decides to remit the case for further prosecution without deciding on the validity of the patent itself and without carrying out oral proceedings (before the board).

4. *Apportionment of costs*

Respondent's request for an apportionment of costs "in the event that the late-filed document is to be admitted into the proceedings" - see reply to the statement of grounds of appeal, page 3, third paragraph and page 4, request (iii) - has to be refused since according to Article 104(1) EPC each party to the proceedings shall meet the costs he has incurred. At present the board sees no basis to order an apportionment of costs, the burden on the respondent being limited since there is a document in English, namely (D5-US), corresponding to (D5) so that extra costs for translation did not arise for the respondent, and both parties have requested remittal to the first instance. Moreover, there is no suggestion that there has been any abuse of procedure.

Order

For these reasons it is decided that:

1. The case is remitted to the first instance for further prosecution.

2. The request for an apportionment of costs is refused.

The Registrar: The Chairman:

A. Counillon C. T. Wilson