

PATENTS ACT 1977

IN THE MATTER OF an application by FMC Corporation
for the revocation of patent no 2101950
in the name of KMG Systems Ltd

DECISION

This application for revocation was filed on 13 January 1986 by Aseco Corporation; this company was taken over in 1988 by FMC Corporation, and in accordance with a request on their behalf, and in the absence of objection from the patentees, I have allowed this application to proceed in the name of FMC Corporation.

The grounds on which the application is based are that:

- (a) the invention is not a patentable invention, and
- (b) the specification does not disclose the invention clearly enough and completely enough for it to be performed by a person skilled in the art.

On 3 September 1987, the patentees proposed unconditional amendments which were advertised in the Official Journal (Patents) on 23 December 1987 in accordance with Section 75. The applicants have not objected to the amendments per se, but in a further statement of case, allege in effect that they would leave the patent invalid on the same grounds as they have already pleaded.

I am satisfied that the amendments do meet the requirements of Section 76 in that no matter would be added, and the amendments would not enlarge the scope of the protection conferred by the patent. Accordingly, the issue that came before me at a hearing on 14 November 1990, was whether the patent as notionally amended was invalid for the reasons given by the applicants.

At the hearing Mr Ian Purvis appeared as counsel for the patentees, and Miss Denise McFarland appeared as counsel for the applicants for revocation.

Claim 1 of the patent, as proposed to be amended, reads thus:

A distribution system for conveying flowable material from a source downstream to a plurality of successive user locations, comprising:

- (a) a conveyor means having a plurality of successive, elongate primary conveyor sections,
- (b) each of which is vibratable for conveying said material towards a respective one of said locations,
- (c) each conveyor section having product-carrying surface tilted relative to the horizontal about the longitudinal axis of the conveyor section whereby said product tends to gravitate towards the lower side edge region of said surface as the product travels along said section and a side wall upstanding on said lower side edge region for retaining the product on the conveyor section,
- (d) and wherein each side wall has an opening for allowing product to fall from said conveyor section
- (e) and a plurality of vibratable secondary conveyor sections for receiving the fallen product and conveying said product to each said user location;
- (f) and wherein each of said secondary conveyor sections is independently operable
- (g) and said primary conveyor sections are cumulatively operable in a downstream direction.

The applicants first ground of objection, set out in their statement of 13 January 1986, is that claim 1 was not novel, relying on a combination of the disclosure of UK patents 1319669 and 1487448 with the fact that tilted conveyors were known before the priority date of the patent.

Taking first UK 1319669, this specification shows a distribution system having successive elongate vibratory primary conveyors, each substantially horizontal, but sloping upwardly slightly in the direction of travel, there being a gate between adjacent conveyor sections, through which material can fall vertically to an end use machine, eg a packaging machine. In my view, features (a), (b), (f) and (g) of the amended claim 1 above are disclosed in this document.

UK 1487448 discloses a distribution system of the type shown in 1319669, above, except that instead of a gate through which material falls, a substantially horizontal vibratory conveyor is used to carry material away from the junction between primary conveyors. I consider that this specification discloses features (a), (b), (e), (f) and (g) of claim 1. This specification discloses at page 2 lines 47–51 and in connection with Fig 6 (page 6 lines 33–37) a transversely inclined secondary conveyor, which nevertheless is not a tilted conveyor in the sense of (c), in claim 1.

Thus, neither of these specifications discloses features (c) and (d) of claim 1, that is, the use of a conveyor tilted in a direction transverse to the conveying direction, with a side wall having an opening for allowing product to fall from the conveyor.

Evidence filed by the applicants to show what was known at the priority date of the patent consists of statutory declarations by Mr Vaughn Gregor, former President of Aseco Corporation, by Mr Peter Kenford, the present President of Aseco and by Mr Peter F Vermeulen, Director, European operations for FMC Corporation (UK) Ltd.

Mr Gregor, in a declaration dated 15 September 1986, declares that he saw, on 15 May 1975, in Germany,

".. a vibrating system using a tilted conveyor with side gates. Such equipment included all the integers specified in claim 1 [of the patent as granted].."

and he goes on to say that

"The installation consisted of 8 or 10 scales over packaging machines. These scales were being supplied with potato crisps from an overhead vibrating conveyor system. The conveyor had a tilted tray or pan and had multiples of side opening gates for discharging crisps to the scales. The tilt on the bottom of the trays was approximately 5° to 10° , the purpose being to force the crisps toward the opening gates which were all on the lower side of the tilt.

Any crisps not discharged out were recirculated back into the starting point."

A schematic drawing is attached to his declaration. It is to be noted that even though a drawing is attached, there is no indication of the presence of either a plurality of primary conveyor sections, or of vibratable secondary conveyors.

Mr Peter Kenford, in a declaration dated 27 March 1987, states that

"I would advise that on March 2, 1981 at the premises of Smiths Foods Ltd in Paulsgrove, Portsmouth, Hants, I viewed a conveying system using tilted trays with side penetrations. Such system included each of the integers specified in claim 1 of the above numbered patent and as referred to in paragraph 4 of the Statement."

In a statutory declaration dated 12 April 1989, in response to the proposed amended claims, Mr Vermeyley states that

"In this connection, I recollect a visit I made in my former capacity as Managing Director of Wright Machinery Limited, to the factory of Golden Wonder Crisps in Corby on 9th October 1981. At such visit, I was accompanied by legal representatives acting for Aseeco Corporation, now part of the FMC Group, as well as representatives of Driver-Southall. Such visit was in connection with an application for infringement of UK Patent No. 1319669. At such visit, I viewed a conveyor arrangement which had been installed at Golden Wonder Crisps by Driver-Southall Ltd., prior to 11th May 1979. Accordingly, such arrangement was installed well before the earliest date attributable to UK Patent No. 2101950.

The conveyor arrangement viewed comprised a plurality of primary conveyor sections which could either operate independently or cumulatively. For instance, when product was required at the end user location in a downstream direction, then the primary conveyor sections were cumulatively operable.

A secondary conveyor section was located beneath each corresponding primary conveyor section. Plain crisps were supplied to each secondary conveyor section which then passed the crisps to a flavouring unit. Depending upon which flavour of crisps was being supplied, or where there was a short fall in any particular secondary conveyor section, each secondary conveyor section was independently operable to remedy the situation."

At the hearing I expressed misgivings about accepting evidence of this kind. I suggested to Miss McFarland that it would have been reasonable to expect these eye witness accounts to be corroborated, for example, by evidence from the manufacturers of the machines. Miss McFarland accepted the limitations of the evidence and said that commercial considerations had prevented better evidence from being gathered.

I am quite clear that the evidence is insufficient to prove prior use of the invention. Taking the primary facts alone (and ignoring the witnesses' opinions as to whether the machines had all the features of claim 1, and ignoring the dangers of accepting eye witness evidence without independent corroboration) the machine that Mr Gregor saw had only features (c) and (d) of claim 1; Mr Kenford described only a machine having tilted trays with side penetrations, and Mr Vermeyleen described only a machine having features (a), (f) and (g) of claim 1. Mr Vermeyleen, it should be noted, only saw the machine after the priority date.

Quite clearly the evidence does not establish lack of novelty. There is also no evidence to indicate that the features that are missing from the three witnesses' evidence would strike the skilled person at the date of the patent as being obvious features to include in a distribution system. In any case I would have grave reservations about revoking a patent on the basis of eye witness evidence that was not independently corroborated.

Since claim 1 has survived the attack upon it, and all other claims are appendant thereto either directly or indirectly, they stand also. In particular, UK Patents 1270076 and 1448362, which were said to be relevant only to original subsidiary claims 9 and 10, now proposed to be re-numbered as claims 8 and 9, are not relevant to the validity of claim 1.

The applicants' second ground of objection is that the specification does not disclose the invention clearly enough and completely enough for it to be performed by a person skilled in the art. Specifically, the applicants say in their statement that there is no teaching of the manner in which each of the individual primary conveyor sections is caused to stop and start, and in what order, and as to how the secondary conveyor sections each operate.

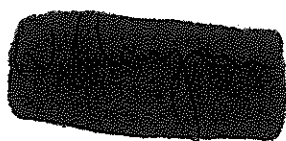
No evidence has been filed by either party on this aspect of the case. Mr Purvis submitted that a consequence of that was that this objection to the patent should be struck out. While I accept that the onus is on the applicants to satisfy me that they have a valid objection, it does not follow that evidence on the point is necessary; there can be examples of insufficiency that are apparent on the face of the specification to a technically-qualified tribunal. I therefore left the point at the hearing by saying that I would read the specification again and decide for myself. I have now done that and cannot find an omission which would have the result that a man skilled in the art, faced with the instructions in the specification, would be unable to make the apparatus work. Page 11 et seq of the specification, coupled with Figure 5, which is a control circuit diagram, go to some lengths to explain how the apparatus is controlled.

Accordingly, I reject both the grounds on which the application for revocation is based.

I accept the patentees' application to amend, subject to their filing a clean copy of the specification complying with Rule 40(7) of the Patents Rules 1990 within two months from the date of this decision.

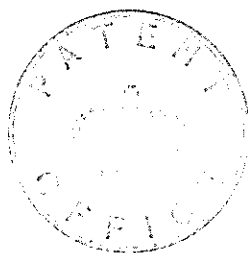
In the circumstances of this case, where the application for revocation resulted in the specification being amended, but where the applicants persisted in their attack after the amendments were offered, I consider it appropriate to make no order as to costs.

Dated this 29th day of January 1991



W J LYON

Superintending Examiner, acting for the Comptroller



PATENT OFFICE