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**Datasheet for the decision
of 31 January 2014**

Case Number: T 0138/11 - 3.2.04

Application Number: 02749431.9

Publication Number: 1408730

IPC: A01D45/00, A01B77/00

Language of the proceedings: EN

Title of invention:

METHOD AND DEVICE FOR HARVESTING GRASSES, SUCH AS IN THE FORM
OF "SPRIGS" AND "PLUGS" FOR EXAMPLE

Patent Proprietor:

Rodenburg, Jacob Jacobus

Opponent:

Gebr. Kraaijeveld B.V.

Headword:

Relevant legal provisions:

EPC Art. 123(3)

Keyword:

Amendments - Extension of scope - omission (yes)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0138/11 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 31 January 2014

Appellant: Rodenburg, Jacob Jacobus
(Patent Proprietor) Toldijk 20
3211 BM Geervliet (NL)

Representative: Lips, Hendrik Jan George
HAAGSCH OCTROOIBUREAU
Breitnerlaan 146
2596 HG Den Haag (NL)

Respondent: Gebr. Kraaijeveld B.V.
(Opponent) Middelweg 1
NL-2992 SP Barendrecht (NL)

Representative: van Kooij, Adriaan
Arnold & Siedsma
Sweelinckplein 1
2517 GK Den Haag (NL)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 November
2010 revoking European patent No. 1408730
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman: A. de Vries
Members: P. Petti
O. Loizou

Summary of Facts and Submissions

- I. The European Patent EP-B-1 408 730 was revoked by the decision of the opposition division dated 12 November 2010.

In its decision the opposition division found that the subject-matter of amended claim 1 filed as auxiliary request 2 and the only request maintained contravened the requirements of Article 123 (3) EPC, inter alia because this amended claim 1, which was based upon a combination of granted claims 2 and 5, did not specify the feature contained in granted claim 2 "for applying the method according to [granted] claim 1".

- II. On 6 January 2011, the patent proprietor (hereinafter appellant) filed an appeal against this decision and simultaneously paid the appeal fee. The notice of appeal contains a statement setting out the grounds for appeal.

- III. The parties were summoned to oral proceedings scheduled to take place on 31 January 2014. A communication reflecting the preliminary opinion of the board was annexed to the summons. In this communication the board set out a preliminary opinion that the patent in suit had been amended in such a way as to extend the protection conferred, because claim 1 neither specified that the device was suitable for applying a method of harvesting grasses having all the features of granted claim 1, nor defined all the features which rendered the device suitable for applying such a method and, thus, also encompassed devices which were not suitable for applying the method according to granted claim 1.

IV. Oral proceedings were duly held on 31 January 2014. Because both parties had announced - with letters dated 10 January 2014 and 28 January 2014, respectively - that they would not attend the oral proceedings, pursuant to Rule 115 (2) EPC, these took place without them.

V. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the amended claims 1 to 5 filed with the notice of appeal.

No request was filed by the respondent, nor did he make any submissions.

VI. The wording of the claim 1 of the sole request is as follows:

"Device comprising a frame (1) which can be coupled to a tractor and is provided with means for rotatably and drivably supporting a shaft (2) and with means (13-19) for adjusting said shaft (2) at a desired height above the ground; said shaft being provided with supporting plates (7) being mutually spaced apart and extending square to it, at least a number of said supporting plates (7) carrying cutters (8), distributed across the circumference and extending almost parallel to said shaft (2) , a bent hood and a conveyor being provided for bringing the harvested material to a vehicle, characterized in that said device is executed such that when said shaft (2) is driven in a given direction (V) said shaft (2) is rotated in such a direction (R) that said cutters (8) at their lowest point are moving in the same direction as said shaft (2), said supporting plates (7) being also provided with aerating knives (24) being square to said shaft (2) apart from said

milling cutters (8) , in which said aerating knives can extend across a larger distance (25) outwards than said milling cutters (8) in relation to the axis of said shaft."

VII. The Appellant argued as follows:

Claim 1 now includes the features of the bent hood and a conveyor omitted from claim 1 considered in the decision under appeal. It was not necessary to retain in the device claim any reference to the method of granted claim 1 as that claim had been deleted.

Reasons for the Decision

1. The appeal is admissible.
2. Article 123 (3) EPC
 - 2.1 Amended claim 1 is directed to a device and is based upon a combination of features specified in granted claims 2 and 5. The granted patent contained two independent claims, namely claim 1, directed to a method, and claim 2, directed to a device "for applying the method according to claim 1 ...". Claim 5 is dependent on claim 2.
 - 2.2 Granted claim 1, which is directed to a "[m]ethod of harvesting grasses ... characterized in that use is made of a device" (emphasis added), refers to various structural parts of the device used, such as the milling cutters (8), the bent hood (10) and the conveyor (20), and also specifies a functional feature defining a result to be achieved by these structural

parts, namely the feature that "the material [is] loosened by said milling cutters being guided by a bent hood (10) and then being received by a conveyor (20) for bringing the harvested material to a vehicle".

2.3 In granted claim 2, the wording "device for applying the method according to claim 1" also represents a functional feature of the claimed device which defines the device as being suitable for applying the method according to granted claim 1. In particular, this wording implies, inter alia, that the device referred to in granted claim 2 is capable of achieving the result that "the material loosened by [the] milling cutters [is] guided by a bent hood (10) and then [is] received by a conveyor (20) for bringing the harvested material to a vehicle", as specified in granted claim 1. This indicates a functional relationship between cutters, hood and conveyor, which must be arranged accordingly. Consequently, there are functional and structural limitations implicit in the indication "device for applying the method according to claim 1" in granted claim 2. Therefore the indication that the device is "for applying the method according to claim 1" correspondingly limits the scope of protection of granted claim 2 to such devices. In this respect, it is noted that a device which is not capable of achieving this result (because cutters, hood and conveyor are differently arranged, say) would not be suitable for applying the method according to granted claim 1.

2.4 Claim 1 as amended according to the present sole request defines a device which now includes the features of cutters as well as a bent hood and a conveyor "provided for bringing the harvested material [i.e. the material loosened by the cutters] to a vehicle". Their omission, in the decision under appeal,

was held to violate Article 123(3) EPC. However, the amended claim 1 does not define - either explicitly or implicitly - the device as being capable of achieving the result that "the material loosened by the milling cutters is guided by the bent hood (10) and then received by the conveyor (20)". Therefore, amended claim 1 also encompasses devices which are not capable of achieving this result and, thus, are not suitable for applying the method according to granted claim 1. Consequently, amended claim 1 extends the scope of protection with respect to that of the granted patent.

- 2.5 In the notice of appeal (see particularly page 2, section 7) the appellant has essentially submitted that granted claim 1, which is directed to a method of harvesting grasses, had been deleted and that it was not necessary to mention the features concerning this method in an amended claim 1 which only relates to a device as such and not to a method.

The board does not share the appellant's argumentation, because - as explained above (see section 2.1) - the wording "device for applying the method according to claim 1" represents a functional feature concerning the device as such.

- 2.6 Therefore, amended claim 1 contravenes the requirement of Article 123 (3) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated