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Datasheet for the decision of 25 August 2017

Case Number: T 0173/13 - 3.2.04

Application Number: 01270702.2

Publication Number: 1356205

IPC: F03D11/04, B63B35/00, B63B9/06, E02B17/00

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR PLACING AT LEAST ONE WIND TURBINE ON OPEN WATER

Patent Proprietor:
Mammoet Marine B.V.I.O.

Opponents:
Hochtief Construction AG
Vestas Wind Systems A/S

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)

Keyword:
Amendments - added subject-matter (yes), all requests

Decisions cited:

Catchword:

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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 0173/13 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 25 August 2017

Appellant: (Patent Proprietor)	Mammoet Marine B.V.I.O. Karel Doormanweg 5 3115 HK Schiedam (NL)
Representative:	V.O. P.O. Box 87930 2508 DH Den Haag (NL)
Respondent: (Opponent 1)	Hochtief Construction AG Opernplatz 2 45128 Essen (DE)
Representative:	Rohmann, Michael Andrejewski - Honke Patent- und Rechtsanwälte An der Reichsbank 8 45127 Essen (DE)
Respondent: (Opponent 2)	Vestas Wind Systems A/S Alsvej 21 8940 Randers (DK)
Representative:	Inspicos P/S Kogle Allé 2 2970 Hørsholm (DK)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 23 November 2012 revoking European patent No. 1356205 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	J. Wright
	C. Heath

Summary of Facts and Submissions

I. The appellant-proprietor lodged an appeal, received 22 January 2013, against the decision of the opposition division posted on 23 November 2012 revoking European patent No. 1356205 pursuant to Articles 101(2) and 101(3)(b) EPC. The appeal fee was paid at the same time. Their statement setting out the grounds of appeal was filed on 28 March 2013.

II. Opposition, by three opponents, covered inter alia, Article 100(a) EPC (novelty and inventive step) and Article 100 (c), with 123(2) EPC (added subject matter). The opposition division found that granted claim 20 met the requirements of Article 123(2) EPC, that it contained no added subject matter, but that the subject matter of claim 1 according to all the requests admitted lacked inventive step, so they revoked the patent.

III. Summons to oral proceedings were issued on 14 December 2016. In a communication of 6 April 2017 the Board raised, inter alia, the issue of added subject matter, Article 123(2) EPC.

Thus in section 4.3.2 it stated for claim 20: "It may be relevant to consider whether or not there is a basis in the application as filed for a vessel according to claim 20, without claiming it as suitable for carrying a stage/an assembled windmill when placing windmills in open water (cf. published application, page 1, lines 25-26, page 2, line 24 to page 3, line 5, page 4, lines 4 to 13)".

In relation to the combination of granted claims 20 and 21 in auxiliary request 6 (section 6.2) it stated

"Auxiliary request 6 combines granted claims 20 and 21. Neither of these were originally filed, so the issue of added subject matter may need examining, cf. published application page 9, lines 3 to 24 and figure 7."

IV. With a letter received 9 January 2017, the opponent III withdrew their opposition, so they are no longer party to the proceedings.

With a letter of 7 June 2017 the appellant-proprietor informed the Board that they would not attend the oral proceedings scheduled for 25 August 2017. Likewise, in a letter of 19 May 2017, the respondent-opponent I announced their intention not to attend the scheduled oral proceedings.

V. Oral proceeding before the Board were duly held on 25 August 2017 without the appellant-proprietor and respondent-opponent I, in accordance with Rule 115(2) EPC and Article 15(3) RPBA.

At the oral proceedings the Board gave its opinion that granted independent claim 20 of the main request was to a vessel for placing windmills on water and was added upon entry into the European phase. However, there was no mention in the claim of stages for supporting assembled windmills, which is a central feature of the invention. This meant that the claim was not limited to vessels that are provided with such stages or are suitable for receiving such stages, contrary to the original disclosure.

The Board further opined that the problem was not resolved by the amendment to claim 20 of the 1st auxiliary request, which allows for stages for windmills in any state of assembly or disassembly. Nor

was it resolved by the amendments added in the 6th auxiliary request which concern only details of the legs for lifting the vessel.

Further, these findings applied also to auxiliary requests 2 to 5 which include a claim 20 as granted or as in the 1st auxiliary request. In the case of auxiliary request 5 it could include either.

VI. The appellant-proprietor requests that the decision under appeal be set aside and that the patent be maintained based on a main request (as granted), or in the alternative, according to one of Auxiliary requests 1 - 6, all filed with the grounds of appeal.

Respondent-opponent I and respondent-opponent II both request that the appeal be dismissed.

VII. Claim 20 of the main request and second, third and fourth auxiliary requests reads as follows:

"A vessel for placing windmills on open water, comprising a hoisting device and means for supporting and stabilizing the vessel on the floor of said open water, comprising a number of legs with which the vessel can be supported on said floor, which legs are arranged for lifting the vessel out of the water at least partly and preferably completely".

Claim 20 of the first auxiliary request reads as for the main request except that after the words "comprising a hoisting device" the words ", at least one stage for windmills" is added.

The fifth auxiliary request recites only a new claim 11 and states (section III.5 of the statement of grounds)

that this claim "may be combined with any of the main and first to fourth auxiliary requests".

Claim 20 of the sixth auxiliary request reads as for the main request, except that after the final words of that claim "preferably completely", the following words are added: ", wherein at least a number of said legs is provided with guide pulleys near a top and a bottom end, cables extending around said pulleys, which cables are connected to a winch and/or to the vessel, such that by operating said winch the cables can be manipulated for lifting said vessel relative to said respective leg".

VIII. The appellant-proprietor argued as follows:

The opposition division found claim 20 of the main request to be compliant with Article 123(2) EPC so it should be allowable.

IX. The respondent-opponent II argued as follows:

In all requests, granted claim 20, which was not present in the application as filed, adds subject matter extending beyond the application as filed as it fails to specify a stage. The entire patent is directed to the notion of transporting a windmill with a stage, which is an essential part of the invention. The application as filed solely relates to a vessel and stage combination. Granted claim 20 is however to a vessel without a stage, and is not limited to a vessel that is suitable for transporting a substantially assembled windmill, but also covers vessels which are not suitable for receiving a stage, i.e. have no space therefore, or which cannot operate in accordance with

the procedure of placing windmills in open water by use of the stage.

X. The respondent-opponent I submitted no arguments.

Reasons for the Decision

1. The appeal is admissible.

2. Background of the invention

The patent concerns the placing of windmills on open water (patent specification paragraph [0001]). According to the invention, windmills are assembled, at least for the larger part, on or close to land and supported by stages, arranged on a vessel, with which they are transported to the set-up position. This simplifies assembly and involves fewer shipping movements (specification, paragraph [0004]).

3. Added subject matter, Article 123(2) EPC

In deciding the question of allowability of amendments under Article 123(2) EPC, the Board, following well established practice (CLBA - section II.E.1), must consider whether the amendments in question are directly and unambiguously derivable by the skilled person from the application as filed, that is from the original description, claims and drawings, using normal reading skills and supplemented by their general knowledge.

3.1 Claim 20 of the main request and second, third and fourth auxiliary requests (as granted)

The patent was filed as an international application (see published application WO02/48547). This application had claims 1 to 19, none being directed at a vessel as such. Claim 20, filed on 14 July 2003 at entry into the regional phase, is directed at a vessel for placing windmills on open water.

3.1.1 In the impugned decision (reasons, point 22.1, in particular the last two paragraphs) the opposition division considered that claim 20 as granted met the requirements of Article 123(2) EPC because a vessel without any stage and suitable for carrying windmills was disclosed in the application as filed. In this respect they referred, by way of example, to the originally filed claim 1 and the figures. With regard to added subject matter, the appellant-proprietor has merely stated that they agree with the decision's positive findings in respect to, inter alia, granted claim 20 (grounds of appeal, page 3, point II.1.1).

3.1.2 For the following reasons, the Board disagrees with this aspect of the impugned decision. Unless otherwise stated, references are to the application as published.

First of all, the Board sees no basis for claim 20 in claim 1 as originally filed. Original claim 1 is directed at a method for placing at least one windmill on open water. According to the method, "the windmill is built up at least for the greater part...and is supported by a stage;
- the windmill with the stage is placed on a vessel and is transported with the vessel to a set-up position..."

The method steps of claim 1 therefore define chronologically ordered steps which start with the windmill being built up, that is assembled, at least

for the greater part, whilst being supported in a stage. In the following step, windmill and stage are placed on the vessel and transported to the set-up position. Whether or not here the term "stage" means something that may eventually be placed on the sea bed, it is in any case a structure in which the windmill is substantially completely assembled and which is placed on the vessel with the thus substantially complete windmill (cf. page 2, lines 4 to 7).

3.1.3 Therefore, in the Board's opinion, the only vessel implied by the method of original claim 1 is one capable of receiving at least a substantially assembled windmill with the stage in which it was supported during assembly, and furthermore, a vessel capable of transporting the same. Thus original claim 1 does not provide a direct and unambiguous disclosure of the more broadly defined vessel of claim 20, which is not limited to any particular load carrying capability, let alone limited to being capable of receiving and transporting a substantially assembled windmill nor the stage in which it was assembled.

3.1.4 Furthermore, contrary to the impugned decision, the Board finds no disclosure of such a broadly defined vessel in the original drawings.

Figures 1 to 3 show windmills 10 being assembled in stages 1 on a quay 2 (see, page 5, lines 26 to page 10) but they do not show a vessel.

Figures 4, 5 and 6 show a vessel 20. Here, vessel 20 is shown carrying substantially assembled windmills 10, with their generators 14 and vanes 16 already in place at the top of their towers 12 (cf. page 6, lines 6 to 7). Furthermore each windmill 10 is held in a stage 1.

Thus, consistent with claim 1, these figures only show a vessel capable of transporting a substantially assembled windmill 10 and the stage 1 in which it was built up. Lastly figures 7 to 9 show only details of legs 24 for supporting the vessel on the seabed (cf. page 5, lines 7 to 12), so nothing can be concluded from these figures as to what may or may not be transportable on the vessel itself.

3.1.5 Therefore the Board does not follow the decision in considering that orignal claim 1 and the drawings directly and unambiguously disclose the subject matter of claim 20.

3.1.6 Following the approach outlined above, the Board must also examine whether a basis for claim 20, with its broad definition of a vessel in respect of the load it can carry, is to be found in the remainder of the application as filed. The Board considers this not to be the case.

3.1.7 As argued by the respondent opponent II the Board finds that the description paints a consistent picture of all the originally disclosed vessels being adapted to transport a substantially assembled windmill in a stage.

3.1.8 The description opens by describing the prior art, in particular the problems associated with assembling wind-mills from sub-components at an off-shore set-up site, using a so called jack-up platform (page 1, lines 4 to 20). It then describes the invention in general terms, in particular presenting the invention's central idea of avoiding the disadvantages of assembling windmills off-shore by "using a vessel for shipping windmills to one or more set up locations, which

windmills have already at least for the larger part... been assembled prior to shipping" and that "the windmills are already for the large part built up on or near land and, supported by stages arranged on the vessel" (page 1, line 25 to page 2, line 16). Thus, here,the skilled person is left in no doubt that the vessel must be capable of transporting a largely pre-assembled windmill in a supporting stage.

3.1.9 The original description then goes on to describe possible refinements to the vessel, with reference to various claims, for example improvements to the vessel's stability on open water and its ability to accommodate more than one windmill in a stage (page 2, line 17 to page 4, line 23). However, nowhere does this part of the description suggest a vessel in the broad sense of one that is not necessarily adapted to transport an assembled windmill and its supporting stage. On the contrary, here windmills and a hoisting device (on the vessel) can be transported to the set-up location simultaneously (page 3, lines 13 to 14) and windmills, with their stages, can be wheeled on to the deck of the vessel (page 3, lines 19 to 28).

Further in this part of the description (paragraph bridging pages 3 and 4), an apparatus for placing a windmill on open water is described with reference to claim 11. The apparatus is said to achieve the advantage of simply and rapidly placing the windmills. The Board notes that original claim 11 includes a vessel having at least one stage for carrying at least one substantially assembled windmill, thus neither this part of the description nor original claim 11 directly and unambiguously disclose a vessel in a more general load-carrying sense.

The following paragraph (page 4, lines 4 to 13) describes "a vessel according to the invention" that is "preferably provided with...[certain means for supporting it on the sea floor]". The passage ends by explaining that it thus "becomes possible to take up and place the at least substantially assembled windmills..."

Thus the end of the passage reiterates that the vessel of the invention must be able to accommodate substantially assembled windmills. In any case, the skilled person reads this paragraph in the context of the preceding description, as a "preferable" refinement of the vessel they already understand as being necessarily capable of transporting a pre-assembled windmill, in its supporting stage, to a set-up site.

3.1.10 Lastly, nothing in the detailed description of embodiments, which refers to the figures, suggests a vessel more general than one capable of carrying substantially assembled windmills in stages. Here, in an opening statement (page 5, lines 17 to 19), the skilled person is presented with the underlying concept that "in the embodiments shown, the windmills are built up and transported in substantially vertical, upright position [so that] use can be made of the deck space of the vessel". Alternatively the windmills can be transported in the stages in "wholly or partly horizontal positions" (page 5, lines 21 to 25). Thus it is against the backdrop of using a vessel to transport substantially pre-assembled windmills, carried in stages, that the skilled person reads the subsequent description of the detailed embodiments. Since, at best the figures described in this section show a vessel carrying pre-assembled windmills with stages (see above, point 3.1.4), also in this part of the

description, the Board finds no basis for a vessel of a generic load carrying capability, as defined in present claim 20.

3.1.11 The Board concludes that there is no direct and unambiguous disclosure in the application as filed of a vessel broadly defined in respect of what it is adapted to carry, in particular one not specified as being adapted to carry a substantially assembled windmill in a supporting stage. Therefore there is no basis in the application as filed for claim 20 of the main request, which thus adds subject matter. For the same reasons, identically worded claim 20 of auxiliary requests 2 to 4 also adds subject matter extending beyond the application as filed.

3.2 Auxiliary request 1, claim 20

Claim 20 is directed at a vessel that has "at least one stage for windmills". However, the stage in question is not defined as being for a substantially assembled windmill. Thus it covers, for example, a stage merely for sub-components of windmills. The stage defined is thus broader than those originally disclosed which, as explained above (section 3.1), are adapted to hold substantially completely assembled windmills.

Furthermore, as with claim 20 of the main request, the claim is silent as to whether the vessel is adapted to transport a substantially fully assembled windmill. Since the application as filed only describes vessels capable of so doing (section 3.1 again), also for this reason, claim 20 of auxiliary request 1 adds subject matter that extends beyond the application as filed.

3.3 Auxiliary request 5

Auxiliary request 5 recites only one claim, namely claim 11. From its numbering alone, it is clear that this claim is intended as one of a set of claims, not as the request's only claim.

Indeed, the appellant-proprietor explains in their grounds of appeal of 28 March 2013, page 20, that the recited claim is to be combined with "any of the main and first to fourth auxiliary requests". Whatever particular combination might have been intended in this request, since each of the requests proposed for combination includes a claim 20 which adds subject matter extending beyond the application as filed (see above), the Board can but conclude that the fifth auxiliary request must contain added subject matter, for the same reasons as apply to (one of) the main and first to fourth auxiliary requests.

3.4 Auxiliary request 6, claim 20

This claim combines granted claims 20 and 21, thereby adding certain details of the vessel's supporting legs vis-à-vis granted claim 20. However, the vessel claimed is just as broad as original claim 20 with regard to what the vessel can carry. In particular it neither specifies that the vessel is for transporting a substantially assembled windmill nor its supporting stage. Thus for the same reasons as apply to claim 20 of the main request (see above, section 3.1), this claim adds subject matter extending beyond the application as filed.

4. In conclusion, the Board holds that the main request and auxiliary requests 1 to 6 all contain subject matter that extends beyond the application as filed,

Article 123(2) EPC. Although in their grounds of appeal (sentence bridging pages 20 and 21), the appellant-proprietor speculates about filing further requests, inter alia without claim 20, no such request has actually been filed.

Since all the requests on file fail, the Board confirms the decision of the opposition division to revoke the patent.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated