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**Datasheet for the decision
of 2 May 2019**

Case Number: T 1844/15 - 3.2.04

Application Number: 05730091.5

Publication Number: 1747136

IPC: A01K1/02, B62B3/06, B66C23/48

Language of the proceedings: EN

Title of invention:
TRANSPORTATION CART PRIMARILY FOR USE IN AN ANIMAL BARN

Patent Proprietor:
Conception Ro-Main Inc.

Opponent:
Waardse Vastgoed B.V.

Headword:

Relevant legal provisions:
EPC Art. 54(2), 56, 111(1)
RPBA Art. 15(6)

Keyword:

Novelty - (yes)

Inventive step - (yes)

Appeal decision - remittal to the department of first instance
(no)

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1844/15 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 2 May 2019

Appellant: Conception Ro-Main Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 24 July 2015
revoking European patent No. 1747136 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
C. Heath

Summary of Facts and Submissions

- I. The Appellant-Proprietor lodged an appeal, received on 17 September 2015, against the decision of the Opposition Division of the European Patent Office posted on 24 July 2015 revoking European patent No. 1747136 pursuant to Article 101(3)(b) EPC, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 3 December 2015.
- II. Opposition was filed under Article 100(a) based on lack of novelty and of inventive step.

The Opposition Division decided to revoke the patent as amendments to the claims according to a main and 2nd auxiliary request added subject-matter, a first auxiliary was not admissible and the subject-matter of the patent as granted (3rd auxiliary request) was not novel.

The following documents had been cited in opposition:

- (D1) US 3,458,074
- (D2) US 4,431,363
- (D3) US 4,700,852
- (D4) US 3,178,048
- (D5) EP 0 940 364 A2
- (D11) US 4,435,115
- (D12) US 4,052,080
- (D13) US 5,029,884
- (D14) US 6,604,749 B2
- (D15) US 6,250,483 B1

Enclosure I filed with Opponent's letter of 22 May 2015: photos retrieved by Google for "transportation cart" as search term.

Enclosures II and III filed with Opponent's letter of 22 May 2015, related to the file history before the USPTO of the US counterpart application.

III. The Respondent-Opponent filed with their reply to the statement of grounds the following further evidence:

(D6) GB 10,801

IV. The Appellant-Proprietor requests that the decision be set aside and the opposition be rejected (maintenance of the patent as granted), auxiliarily they request maintenance of the patent according to auxiliary requests 1-8 filed with the statement of grounds on 3 December 2015, or further auxiliarily according to a ninth auxiliary request of 1 May 2017. The Appellant-Proprietor requests a final decision that the patent should be maintained as granted but, in the unlikely event that the Board of Appeal sees that there might be any concerns remittal of the case to first instance for any issue beyond novelty of the main request.

V. The Respondent-Opponent requests that the appeal be dismissed. They also request remittal to first instance for the issue of inventive step and, if the case is remitted on the basis of any auxiliary request, apportionment of costs.

VI. The Board duly summoned the parties to oral proceedings, to take place on 2 May 2019. With communication dated 7 February 2019 it made provisional observations on the relevant issues.

With letters of 1 and 2 April 2019, the Respondent-Opponent and the Appellant-Proprietor respectively stated that they would not attend the oral proceedings.

Oral proceedings before the Board were held on 2 May 2019 in the absence of both parties.

VII. The independent claim 1 according to the main request (as granted) reads as follows:

"A transportation cart comprising:
a cart frame (10);
ground wheels (16, 50) for carrying the frame over a ground surface;
at least one of the wheels (50) being steerable for directing the cart to a required location; a lifting mechanism (20) on the frame for lifting an object from the ground to a raised position; characterized in that there is provided a slide panel (45) below the lifting mechanism over which the object can be pulled to a lifted position and on which the object can be carried where the lifting mechanism (20) and the slide panel (45) are mounted on a lift support (21) which is rotatable relative to the cart frame with the lifting mechanism (20) and the slide panel (45) about an upstanding axis to allow lifting of the object from different positions around the frame."

VIII. The Appellant-Proprietor argues as follows:

Granted claim 1 is new over the cited prior art documents D1-D5. New document D6 should not be admitted into the proceedings. It is a clear-cut situation that the subject-matter of the granted claim 1 is not obvious and the Board should thus decide that the main request involves an inventive step. As the opposition division in its preliminary opinion only objected to novelty over D4 for the granted claims, but held that the patent otherwise complied with the EPC, the case could be finally decided. However, should the Board have any other concerns against the patent as granted the case should be remitted to first instance.

IX. The Respondent-Opponent argues as follows:

New document D6 should be admitted. Granted claim 1 is not new over any of the documents D1-D6. If the Board holds that granted claim 1 is new, the case should be remitted for the issue of inventive step so that this ground can be examined at two levels of jurisdiction. The subject-matter of granted claim 1 is not inventive in the light of documents D1-D5, D11-D15 and common general knowledge.

Reasons for the Decision

1. The appeal is admissible.
2. The invention relates to a transportation cart primarily designed for use in animal barns, especially for lifting and transportation of an animal carcass, see patent specification, paragraph [0001]. Accordingly, the cart has ground wheels, at least one being steerable, and a lifting mechanism for pulling an object from the ground over a slide panel, on which panel the object can be carried. The main object of the claimed invention is improving ease of operation in areas where space is limited, as is typically the case in a barn, see specification paragraph [0002]. With this purpose, the lifting mechanism and the slide panel are mounted on a support which is rotatable about an upstanding axis relative to the cart frame so as to allow lifting from different positions around the frame, see patent specification, paragraph [0007].
3. Main request - novelty - admissibility of D6
 - 3.1 The Respondent-Opponent cites new evidence D6 as novelty-destroying. As indicated in section 2.2 of the Board's communication of 7 February 2019, the admission of such new evidence is at the discretion of the Board, Article 12(4) RPBA. One crucial criterion is whether the late filed evidence is prima facie highly relevant, see Case Law of the Boards of Appeal, 8 Edition 2016 (CLBA), IV.C.1.3.7. In particular, in the context of novelty, the relevant features should be clearly and unambiguously derivable from the new evidence, i.e. with little investigative effort. In the present case, it appears that the structure of D6 does not allow

lifting from different positions relative to the cart frame as required by the contested claim, but only from one side. D6 therefore appears not to be highly relevant for novelty. Absent any further submissions from the Respondent-Opponent, the Board sees no reason to change its point of view. It thus decided not to admit D6.

3.2 The Appellant-Proprietor argues that the subject-matter of granted claim 1 is new over documents D1-D5.

3.3 As outlined in its communication of 7 February 2019, section 2.1, the Board considers that none of the documents D1-D5 discloses a transportation cart, as required by granted claim 1. In more detail, the Opposition Division, see written decision, point 2.5.1.4, and the Respondent-Opponent interpret the claimed term "cart" in a broad sense as anything that has wheels, and thus also including the boat trailer of D1, the articulated crane of D2, the recovery vehicle of D3, and the portable elevators or hoists for buildings materials of D4 and D5. However, the Boards stated in several decisions that terms used in patent documents should be given their normal meaning in the relevant art, unless the description gives them a special meaning, see Case Law of the Boards of Appeal, 8th edition 2016 (CLBA), II.A.6.3.3. Moreover, the skilled person when considering a claim should try to arrive at an interpretation of the claim which is technically sensible and takes into account the whole disclosure of the Patent, see CLBA, II.A.6.1. Therefore, in the Board's view the skilled person when reading the feature "transportation cart" would give the term "cart" its usual meaning of "a small wheeled vehicle" (Merriam-Webster), thus excluding larger devices as boat trailers, trucks and portable building

works elevators. This is also supported by the patent specification that is generally directed to a transportation cart primarily designed for use in an animal barn, see paragraphs [0001] and [0002], and thus of limited dimensions.

3.4 The Respondent-Opponent submits in this respect that the term "cart" also has meanings other than merely a "small wheeled vehicle", and that interpreted thus, the claim wording would also encompass the devices of D1-D5. In support they referred to photo's retrieved by Google for "transportation cart" as search term (enclosure I) and a USPTO examination report (enclosures II and III) citing a wide variety of movable apparatus against novelty. Without insight into the reputedly complex search algorithms employed by Google, their search results can hardly be considered authoritative for establishing the true meaning of terminology. The Board is also not privy to examination practice in the USPTO or the considerations that may have motivated the US examiner to go so far as to cite as novelty destroying any wheeled structure including e.g. a shipyard crane - which in the Board's view no skilled person would reasonably consider subsumed under the term "cart". The Board is therefore unable to draw any convincing argument from this evidence that would change its opinion in respect of the scope of the term "transportation cart" in the sense of the contested claim.

3.5 The Respondent-Opponent has argued that interpreting "cart" as "small wheeled vehicle" would result in a lack of clarity due to the relative term "small", and that this aspect would be unsuitable to differentiate from the prior art. Though relative terms may be potentially unclear, it is perfectly clear to the

Board, in particular when reading the term "cart" in the context of the whole disclosure what is meant and what is not, cf. CLBA, 8th edition 2016, II.A.3.6 penultimate paragraph and the prior art cited therein.

- 3.6 Additionally, regardless of the meaning of the term cart, the subject-matter of granted claim 1 also differs from the above documents in further features as follows, as already intimated in section 2.1 of the Board's communication of 7 February 2019.
- 3.6.1 D1, concerning a boat trailer, does not disclose a steerable wheel and also does not describe a slide panel, as also held by the Opposition Division (see point 2.5.1.3.1), since the boat is slid over rollers 58, 64 and 66, see column 3, lines 54-60. The Board is also not convinced that the skilled person would identify the relatively small pads 74, 76 as a panel in the proper sense of that term, which implies a relatively large flat (often rectangular surface) cf. OED or Merriam-Webster. Nor is it clear that the boat frame 120 slides over the pads 74, 76, which rather seems to be the function of rollers 58, 64 and 66.
- 3.6.2 Top surface 90 of the articulated crane of D2 may be used for supporting loads, see D2, column 5, line 59 ff, but there is no disclosure of loads being pulled over it to a raised position from the ground. Nor is this part of the articulated machine rotatable about a frame as required by the claim.
- 3.6.3 Similar remarks concern the recovery vehicle disclosed in D3. Extension 4 of the folding boom 3 is not a panel but "... an extension to which may be fitted a yoke with forks or a grid" (column 1, lines 17-20).

3.6.4 As for the portable elevators or hoists of documents D4 and D5 (which are manifestly not "transportation carts", being neither carts nor serving to transport goods from one location to another), these are not able to lift an object from the ground. The carrying platform (12 of D4, 43 of D5) does not descend down to the ground, since the bottom positions are above the frame supporting wheels, see e.g. figure 4 of D4 or figure 3 of D5. Nor do these platforms which are an integral part of the actual lifting mechanism serve as panels over which objects are pulled to a lifted position.

3.7 In view of the above, the Board concludes that the subject-matter of claim 1 is new over D1-D5.

4. Remittal

The Opposition Division has left the further substantive issue of inventive step undecided.

The Respondent-Opponent requests remittal under Article 111(1) EPC so that the issue of inventive step can be examined at by two instances.

As variously stated in case law, there is no absolute right to have an issue decided at two instances, see CLBA, IV.E.7.6.1. Various decisions, see CLBA, IV.E.7.2.1, 7.2., 7.2.4 and 7.2.6, and the decisions cited therein, e.g. T1913/06, T1060/96, T402/01, T111/98, and T1600/06, when deciding remittal or not, take into account such factors as public interest, procedural efficiency, complexity of the matter, whether the right to be heard is observed, and whether the legal and factual framework is fundamentally changed.

In the present case - with non-admission of D6 - the legal and factual framework remains unchanged with all grounds, documents and main lines of argument having been on file since the notice of opposition. Both parties have moreover also presented their full case regarding inventive step upon appeal so that the Board is in principle in a position to finally decide the matter. Furthermore, the division in its annex to the summons dated 26 February 2015 had already given a relatively detailed, positive view of inventive step. Even if only a preliminary view, the outcome of examination of this remaining ground upon remittal appears reasonably likely.

The Board also noted in its written preliminary opinion in preparation for the oral proceedings that the issue of inventive step may be discussed and decided during the appeal proceedings and also made the parties aware of the central points of this discussion. The Respondent-Opponent and the Appellant-Proprietor then presented further comments in this respect with letter of 1 April 2019 and of 2 April 2019 respectively, also communicating their intention not to attend the oral proceedings scheduled for 2 May 2019, so relying on their written arguments and waiving their right to be heard at oral proceedings under Article 116(1) EPC. Both parties have thus had ample opportunity to present their case in respect of inventive step of granted claim 1 and to take appropriate positions in respect of any counter argument. The Board is thus satisfied that their right to be heard has been properly observed.

Finally, the Board notes that the patent, claiming a priority of April 2004 is in the final quarter of its life span; a remittal at this late stage would further prolong legal uncertainty, possibly until expiry of the patent, which cannot be in the public interest.

Weighing all these factors, the Board decided in the exercise of its discretionary power under Article 111(1) EPC in favour of the Appellant-Proprietor not to remit the case to the department of first instance but to finally decide the case itself.

5. Main request - inventive step

5.1 Documents D11-D14 describe transportation carts in the proper sense of the term (see above) and they are thus seen by the Board as a suitable starting point for the inventive step assessment, as also do both parties to the appeal. They describe different dollies or carts for transportation of dead animals or carcasses at livestock facilities with different types of lifting mechanisms and slide surfaces.

5.1.1 It is undisputed that none of the above documents describes a slide panel and lifting mechanism that are rotatable relative to the cart frame about an upstanding axis to allow lifting of the object from the ground from different positions around the frame. The transportation cart can thus more successfully address the difficult situation of lifting objects in confined areas where space is limited, as in the raising of animals in a barn. Indeed, the alleyways where the cart is circulated generally have a width just to allow the walking of animals so that manoeuvring of the cart is hindered, while a dead animal may need to be raised

from one of the adjacent pens, see specification paragraphs [0002],[0003].

- 5.1.2 In respect of formulation of the objective technical problem, the Board notes that the correct procedure for formulating the problem in the context of the problem-solution approach as developed by the Boards of Appeal case law is to choose a problem that does not contain elements or pointers to the solution, see CLBA, I.D. 4.3.1. The Respondent-Opponent identified the problem as making the hoisting of the object easier, since in the known carts this may require steering of the dolly as a whole in order to properly position the lifting mechanism. Yet such problem is incorrectly formulated since it contains a focus on positioning the hoisting mechanism, which already points to the solution. In the Board's view and having regard to the above described effects, the technical problem can be more accurately formulated as how to improve ease of operation of the known transportation carts in areas where space is limited.
- 5.1.3 Applying the problem-solution approach, the critical question (cf. section 4 of the Board's communication) is whether it would be obvious for the skilled person in the light of the cited prior art to modify any of the transportation carts taught by D11-D14 in the manner claimed so as to improve ease of operation in areas where space is limited. In this framework, it appears that documents D1-D5 and D15 teach lifting mechanisms mounted on supports that are rotatable about an upstanding axis.

- 5.1.4 In the Board's view, and as argued by the Appellant (e.g. letter of 2 April 2019, sections 1 and 2), D11-D14 teach the transportation of dead animals or carcasses at livestock facilities with hand carts. The skilled person starting from any of these documents would not as a matter of obviousness consider teachings in the rather different fields of D1-D5, namely launching and retrieving boat hulls, moving heavy loads with a crane truck, vehicle recovery with a crane boom or lifting building materials with a portable elevator, to modify any of the above cited hand carts for dead animals. These documents furthermore do not address the problem of operation in areas where space is limited.
- 5.1.5 The further combination document D15 is concerned with a field hoist for big game. The known hoist may be assembled to a truck or to an all terrain vehicle for suspending the animal carcass. D15 teaches dressing the carcass while freely suspended from the hoist, and transferring it by means of the pivoting hoist onto the vehicle. In D15, therefore, the carcass is freely suspended while hoisting, and the hoist does not include a slide panel or similar feature over which the carcass might be pulled into a lifted position. Thus, even if it were obvious for the skilled person to consider the teachings of D15 to modify any of the carts taught by D11-D14, they would not arrive at the subject-matter of claim 1, as may also be inferred from e.g. section 3 of the Appellant's letter of 2 April 2019.
- 5.1.6 The Respondent-Opponent also submits that the skilled person would simply draw on common general knowledge to provide the pivoting lifting mechanism and slide panel on any of the known hand carts. Without substantiating evidence, the Board is unable to conclude that these

features, which it does not consider trivial per se, would belong to common knowledge of the relevant skilled person, an engineer involved in the design and development of implements for use on farms and in animal husbandry.

5.2 As regards the further objection that starting from document D1, the skilled person would add the missing front steerable wheel to the boat trailer as a matter of obviousness, the Board notes that even with such a modification, the resulting device would still not meet the claimed limitation of being a transportation cart in the sense of the contested patent and would also not have a slide panel, as explained above under the novelty heading. Thus, the skilled person would also not arrive at the subject-matter of claim 1 after this allegedly obvious modification.

5.3 In conclusion, the cited prior art does not suggest the provision of a transportation cart also having a lifting mechanism and a slide panel mounted on a pivoting lift support about an upstanding axis. In the Board's view, such modification to the simple structures of the known carts in order to improve ease of use in areas of limited space goes beyond the average skills and knowledge of the skilled person and confers the necessary inventive step required by Article 56 EPC to claim 1 of the main request.

6. The Board therefore holds that none of the submitted grounds for opposition prejudices the maintenance of the European patent as granted, Article 101(2) EPC.

7. Apportionment of costs

This request is conditional on the case being remitted to first instance on the basis of any of the auxiliary requests. Since the Board decided on the main request and furthermore without remittal, this request becomes moot.

8. Oral proceedings

The oral proceedings before the Board took place in the absence of the parties, who were duly summoned but chose not to attend. According to Rule 115(2) EPC, oral proceedings may continue in the absence of a duly summoned party. Further, pursuant to Article 15(3) RPBA, the Board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned, who may then be treated as relying only on its written case. Hence, the Board was in a position to announce a decision at the conclusion of the oral proceedings, in accordance with Article 15(6) RPBA.

Moreover, taking into consideration that the facts and evidence on which the present decision is based were known to the parties from the written proceedings and that they consequently had sufficient opportunity to present its comments, the Board is satisfied that the requirements of Article 113(1) EPC have been met.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated