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**Datasheet for the decision
of 21 February 2018**

Case Number: T 0879/16 - 3.3.05

Application Number: 02778769.6

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Language of the proceedings: EN

Title of invention:
DUAL-CELL MECHANICAL FLOTATION SYSTEM WITH INTERMITTENT
SKIMMING

Applicant:
Petreco International Limited

Headword:
Flotation system/Petreco

Relevant legal provisions:
RPBA Art. 13(1)

Keyword:
Late-filed auxiliary requests - request clearly allowable (no)

Decisions cited:

T 0064/03

Catchword:



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Case Number: T 0879/16 - 3.3.05

D E C I S I O N
of Technical Board of Appeal 3.3.05
of 21 February 2018

Appellant: Petreco International Limited
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 26 June 2015
refusing European patent application No.
02778769.6 pursuant to Article 97(2) EPC**

Composition of the Board:

Chairman E. Bendl
Members: G. Glod
R. Winkelhofer

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the examining division to refuse European patent application EP 02778769.6.
- II. In its communication of 8 May 2017 (under Rule 100(2) EPC) the board was of the opinion that the subject-matter of claim 1 of the main request and the auxiliary request then on file appeared not to be novel vis-à-vis D1 (WO 01/96026 A2).
- III. In its submission of 8 July 2017 the appellant refuted the board's arguments.
- IV. In its communication under Rule 15(1) RPBA of 8 September 2017 the board reiterated its objection and further raised the issue of Article 84 EPC.
- V. On 19 January 2018 the appellant submitted a first and a second auxiliary request, replacing the previous auxiliary request.
- VI. Oral proceedings took place on 21 February 2018. In the course thereof the appellant withdrew its main and first auxiliary requests and filed a new main request and a further request labelled third auxiliary request.
- VII. Claim 1 of the **main request** reads as follows:

"1. An apparatus for removing suspended matter from a liquid, comprising:

a) a vessel for receiving a flow of liquid having suspended matter therein;

b) a plurality of partitions sequentially dividing the vessel into an inlet chamber, at least a first

gasification chamber and a second gasification chamber, and an outlet chamber, each adjacent chamber fluidly communicating with one another;

c) a discharge chamber having a fluid communication with the outlet chamber;

d) an inlet to introduce the flow of liquid into the inlet chamber;

e) a mechanism for ingesting and mixing gas into the liquid of each gasification chamber for creating a turbulent area and for attracting the suspended matter and for carrying the suspended matter to an upper portion of the vessel, the interface of the gas and liquid being a liquid level;

f) a primary skim collection channel extending at least partially along the top of the partition between the first gasification chamber and the second gasification chamber for collecting suspended matter in the upper portion of both gasification chambers;

g) a controller for regulating the height of the liquid level in response to the excessive movement of the vessel; and

h) an outlet for removing clarified liquid from the discharge chamber."

In claim 1 of the **second auxiliary request**, step g) has been amended compared to the main request and reads as follows:

"g) a controller for: (i) maintaining the height of the liquid at an upper edge of the primary skim channel and intermittently lowering the height of the liquid level below an upper edge of the primary skim collection channel in response to the movement of the vessel; or (ii) maintaining the height of the liquid level below the upper edge of the primary skim channel and intermittently raising the height of the liquid level

to the upper edge of the primary skim channel in response to the movement of the vessel; and"

In claim 1 of the **third auxiliary request**, steps g) and h) have been amended compared to the main request and read as follows:

"g) a controller for regulating the height of the liquid level in response to the excessive movement of the vessel, wherein excessive movement of the vessel means clarified liquid is collected by the primary skim channel; and

h) an outlet for removing the clarified liquid from the discharge chamber."

VIII. The arguments of the appellant which are relevant to the present decision may be summarised as follows:

Claim 1 of the main request specified the movement of the vessel. The application as originally filed explained the meaning of the term "excessively" (page 9, line 30, to page 10, line 4); in view of this definition the term present in the claim was clear to the skilled person. No new issues were raised, so the request should be admitted.

The amendment made in step g) of claim 1 of the second auxiliary request was based on page 10, lines 14 to 21. It was evident from page 10, line 6, that the pitch and roll sensor was only an optional feature. Claim 1 was thus clearly allowable and should be admitted.

The amendment made in step g) of claim 1 of the third auxiliary request clearly defined what was to be understood by excessive, so said request should be admitted. Although the operation of the skim channel

depended on the type of skim to be collected and on the process conditions, the skilled person would understand what was meant by the amendments made in claim 1.

- IX. The appellant requests that the impugned decision be set aside and that a patent be granted on the basis of the main request filed during the oral proceedings on 21 February 2018, or alternatively on the basis of the second auxiliary request filed with the submission of 19 January 2018 or the third auxiliary request filed during the oral proceedings on 21 February 2018.

Reasons for the Decision

1. Article 13(1) RPBA
- 1.1 According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the board's discretion. This discretion is to be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.
- 1.2 According to established jurisprudence (Case Law of the Boards of Appeal of the EPO, 8th edition 2016, IV.E. 4.2.5, page 1133), a request filed after the grounds of appeal may be admitted and considered at the board's discretion
- (i) if sound reasons exist for filing it so far into the proceedings,
- (ii) if the amended request does not extend the scope of discussion as determined by the grounds of appeal,

(iii) if the amended request is clearly or obviously allowable.

1.2.1 Main request

In applying this approach to the main request, the board notes the following:

re (i)

The board issued two communications before the oral proceedings, and at the latest after the second communication it should have been evident that the "movement of the vessel" was not really limited to "excessive" movement, but included any type of movement of the vessel. Therefore the board does not see sound reasons for filing the request only during the oral proceedings before the board.

re (ii)

The original appeal and the board's first communication focused on the question of novelty vis-à-vis D1, while the introduction of the new feature taken from the description requires discussion of the clarity of the introduced feature (see below). As a consequence, the board considers that the scope of discussion is extended.

re (iii)

It is established jurisprudence (Case Law of the Boards of Appeal of the EPO, 8th edition 2016, II.A.3.1, page 270) that the wording of the claims must be clear as such when read by the person skilled in the art.

The term "excessive" introduced in claim 1 is a relative term that has no well-defined meaning, since the skilled person would not know how strong the movement of the vessel had to be to qualify as "excessive". The description provides some kind of definition based on the process for clarifying the water (page 9, line 30, to page 10, line 4); but independently of whether the definition given there is clear or not, it is not permissible to rely on the description to elucidate what is intended to be covered by the claim (T 64/03, reasons 3.6). An unambiguous definition of the movement is very critical, since it is the basis for defining when the controller is supposed to respond, which is highly relevant for evaluating novelty with respect to D1.

To summarise, the definition of the controller in step g) of claim 1 raises clarity issues, so the request cannot be considered clearly or obviously allowable.

Purely due to non-fulfilment of condition (iii), the main request is not to be admitted.

1.2.2 Second auxiliary request

re (i)

This request was filed about one month before the oral proceedings. There is no need to consider whether there are good reasons for the filing of the request at such a late stage, since at least point (iii) is not fulfilled (see below).

re (ii)

As already indicated above, the only point under debate in the board's first communication was novelty vis-à-vis D1. Although it is immediately apparent from which part of the originally filed description the wording introduced in claim 1 has been extracted, discussion on compliance with Article 123(2) EPC is required (see below), which goes beyond the initial grounds of appeal.

re (iii)

The features introduced in step g) of claim 1 are disclosed on page 10, lines 14 to 21, of the application as originally filed. However, it is evident that adaptation of the height is inextricably linked in both cases to a signal from the pitch and roll sensor. In the first case the pitch and roll sensor detects a sufficiently stable situation (page 10, lines 16 and 17), while in the second case the pitch and roll sensor detects an excessive pitch and/or roll situation (page 10, lines 20 and 21). It is not disclosed that adaptation of the liquid height according to embodiment i) or ii) on page 10 is simply performed in response to the movement of the vessel; all that is disclosed is that adaptation is performed in reaction to the pitch and roll sensor. This conclusion is not altered by the paragraph (page 10, lines 5 to 11) preceding the cited passage, since there too pitch and/or roll data are presented as the basis for controlling the height.

Thus the amendment, which does not require the presence of the pitch and roll sensor, raises problems with regard to the requirements of Article 123(2) EPC and can therefore not be considered clearly or obviously allowable.

Since at least condition (iii) is not fulfilled, the second auxiliary request cannot be admitted.

1.2.3 Third auxiliary request

Points (i) and (ii) are identical to points (i) and (ii) as set out above concerning the main request, since this request was also submitted during oral proceedings before the board at the latest possible point in time, namely after discussion of the main and second auxiliary requests.

re (iii)

The definition of the controller in step g) is rather unusual, since its capacity to regulate based on the movement of the vessel is defined with respect to the overall process, although claim 1 itself is not a process claim and does not contain any details of the process. Such a definition of an apparatus feature with reference to the process is acceptable only if the process referred to necessarily takes place, is clearly defined and does not give rise to ambiguities. That means that in such a case the skilled person can easily recognise which apparatus features the reference to the process implies.

In the present case, the movement of the vessel is considered excessive when clarified water can be collected by the primary skim channel. It is only in such cases of excessive movement that the controller would respond and regulate the height of the liquid. According to the description, such collection is caused by froth levels or fluid levels splashing over or sloshing over excessively into the skim channel (page 10, lines 2 to 4). The froth levels and fluid levels

are dependent on the process design (page 7, lines 28 to 30), while the motion of the liquid and the concomitant splashing or sloshing over can be dampened by baffles (page 8, lines 9 to 12). Further, the angle of a line between the upper edge of the skim channel and the distal edge of the baffle with respect to the horizontal plane of the vessel is relevant for the dampening of the motion of the liquid and the collection of oil and froth (page 8, lines 14 to 19). In other words, the process conditions define when an excessive movement of the liquid occurs. That means that the process conditions can be set such that clarified liquid is already collected when only a small movement is present, or they can be chosen such that only a larger movement of the liquid leads to the collection of clarified water. As a consequence, the definition of "excessive" is not constant, but can be set more or less arbitrarily by adapting the process. Therefore, there is no clear definition of when the controller has to respond. In view of these reasons, claim 1 cannot be regarded as clearly allowable.

Purely because condition (iii) is not fulfilled, the third auxiliary request cannot be admitted.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated