

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 20 January 2022**

Case Number: T 0415/19 - 3.2.04

Application Number: 13177484.6

Publication Number: 2829168

IPC: A01D34/66, A01D57/30, A01D75/30

Language of the proceedings: EN

Title of invention:
Mower

Patent Proprietor:
Kverneland Group Kerteminde AS

Headword:

Relevant legal provisions:

RPBA Art. 12(4)
EPC Art. 100(a), 54(2), 54(3), 111(1)
RPBA 2020 Art. 11
EPC R. 84(2)

Keyword:

Request withdrawn before the opposition division
Novelty - (yes)
Remittal - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0415/19 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 20 January 2022

Appellant: Kverneland Group Kerteminde AS
(Patent Proprietor) Taarupstrandvej 25
5300 Kerteminde (DK)

Representative: Higgs, Jonathan
Murgitroyd & Company Milton Keynes
Altius House
1 North Fourth Street
Milton Keynes MK9 1DG (GB)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 3 January 2019
revoking European patent No. 2829168 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
T. Bokor
C. Kujat
K. Kerber-Zubrzycka

Summary of Facts and Submissions

- I. The appeal was filed by the appellant patent proprietor against the decision of the opposition division to revoke the patent in suit.
- II. During the opposition proceedings, the opponent had raised the grounds for opposition under Article 100(a) EPC (lack of novelty and lack of inventive step).
- III. In an annex issued on 28 April 2021 to a summons to attend oral proceedings the Board set out its provisional opinion on the relevant issues.

Without making any submission in response to the Board's preliminary opinion, the opponent withdrew their opposition on 7 January 2022.

In a telephone conversation on 11 January 2022, the rapporteur informed the patent proprietor of the Board's intention to remit the case for further prosecution. The appellant declared their agreement with this course of action.

The Board thereupon cancelled the oral proceedings.

- IV. The appellant-proprietor requests that the decision under appeal be set aside and the patent maintained as granted (main request) or according to one of auxiliary request 1.0, 2.0, 3.0, 4.0, 5.0, 0.1, 1.1, 2.1, 3.1, 4.1, 5.1, 0.2, 1.2, 2.2, 3.2, 4.2, 5.2, 0.3, 1.3, 2.3, 3.3, 4.3, 5.3, all filed on 21 April 2019 with the statement of grounds of appeal.

V. Claim 1 of the main request reads as follows:

"A plain mower having a plurality of rotary cutters (8) for cutting a crop and a swathing unit (14) for forming cut crop material into a swath, the swathing unit (14) including an auger (16) that rotates about an axis (X) to transport crop material axially through the swathing unit, and at least one guide plate (26), characterised in that the swathing unit (14) can be configured in a first configuration in which the guide plate (26) extends around at least a part of the auger (16) to hold the crop material in contact with the auger and the crop material is ejected axially from the mower, and in a second configuration in which the guide plate (26) is displaced away from the auger (16) and the crop material is ejected radially from the mower."

VI. In the present decision, reference is made to the following documents:

- (D1) Prospectus BiG M II
- (D2) Prospectus BiG M 420
- (D12) EP 2 789 224 A1, application number 13163432.1

VII. The appellant's arguments can be summarised as follows:

The main request (patent as granted) is admissible. Its claim 1 is new over the cited prior art. The case should be remitted, if any request is found to be new over D12.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The invention relates to a plain mower. A plain mower is a mower without a conditioning unit, see specification paragraphs [0001]-[0002]. The mower has a plurality of rotary cutters for cutting a crop and a swathing unit including an horizontal auger with a guide plate to transport the cut crop material axially through the swathing unit. The main object of the invention is to obtain a mower that can alternatively be adapted to provide either a single swath or a number of separate swaths, according to the requirements of the operator. To this end, the mower has a first configuration where the guide plate extends around the auger to hold the cut crop material in contact with the auger for axial transport and the the crop material ejects axially from the mower, and a second configuration in which the guide plate is displaced away and the crop material is ejected radially from the mower, see specification paragraphs [0011]-[0012].

3. Main request - Admission

- 3.1 In the annex to the summons for oral proceedings, see paragraph 5, the Board gave its preliminary opinion regarding the admission of the main request as follows:

"5. Main request - Admission

The respondent-opponent objects that claim 1 of the main request in appeal (claims as granted) is not

admissible under Article 12(4) RPBA 2007 since it was withdrawn in first instance opposition proceedings. The Board however does not agree and considers this request to be admissible.

As stated in case law, there is neither an absolute right of the patent proprietor to revert in appeal to the patent as granted nor is he in principle hindered from doing so. If such a request is submitted, as is the case with the present main request, the board has to exercise its discretion under Article 12(4) RPBA 2007, see Case Law of the Boards of Appeal, 9th edition 2019 (CLBA) V.A.4.12.13. As regards Article 12(4) RPBA 2007 in respect of resubmission of requests withdrawn at opposition stage, an important criterion to be considered is whether the withdrawal of a request has prevented the department of first instance from giving a reasoned decision on the critical issues, see CLBA V.A.4.11.3.f).

As can be inferred from the impugned decision's finding of lack of novelty for the new main and further auxiliary requests, the critical issue for the Division's conclusion was whether D12 anticipated the feature that the crop material is ejected axially from the mower (see sections 2.2, 5.2, 8.1, 9.1, 10.1, 11.1 and 12.1), which appears to be also the critical issue for claim 1 as granted. Thus by withdrawing the granted claims as their main request, the appellant did not prevent the Opposition Division from giving a reasoned decision on the critical issue. By reverting to this claim the respondent is also not presented with a new case. The Board is thus inclined to hold the main request admissible under Article 12(4) RPBA 2007."

3.2 Absent any further submissions from the parties, the Board sees no reasons for deviating from its provisional opinion and decides that the main request is part of the proceedings, Article 12(4) RPBA 2007.

4. Main request - Novelty

4.1 In the annex to the summons for oral proceedings, see paragraph 6, the Board gave its preliminary opinion regarding novelty of the main request over D12 as follows:

"6. Main request - Novelty over D12

The Opposition Division based its lack of novelty finding over the intermediate document D12 on the conclusion that the area inside the central aperture 54 between guide plates 36 was considered as not being part of the mower, see figures 8 and 10 of D12. Thus, crop that is pushed axially into that area was considered by the Division to be axially ejected from the mower, see written decision sections 2.2 and 5.2. The Board is not convinced by the Division's arguments.

D12 describes a mower unit that has cutter heads 8, 8' continuously from end to end, with an auger 15 carrying opposite handed flightings 20 extending inwards from the (opposite) ends (paragraph 33, figures 5, 6) and which thus transports cut crop towards a central opening 56 where it is ejected to form a central swath. Cutting takes place along the entire width of the mower, including the whole width of the aperture 54 area. It can thus not be reasonably said that the whole area corresponding to that aperture ceases to be part of the mower, as held by the Division. Accordingly, the

crop can only be considered to be ejected from the mower when it exits the mower structure. In the mower of D12 this occurs through aperture 54, see also D12 abstract: "...a swathing aperture (54) through which cut crop material is ejected to form a swath" (emphasis added). Aperture 54 is a radial aperture formed in the ejector plates 30, 32 surrounding the auger. The crop thus exits the mower radially, as in comparable figure 2 of the patent. As in the mower of D12 ejection is only ever through the central aperture 54 where it is ejected radially, D12 does not therefore anticipate the claimed feature that the crop material is ejected axially from the mower.

Granted claim 1 appears therefore to be new over D12."

- 4.2 Absent any further submissions from the parties, the Board sees no reasons to deviate from its provisional opinion and holds claim 1 to be new over D12.
- 4.3 In their decision the Opposition Division also held that "plain mower" is commonly understood as a mower without conditioning means (see section 2.1 of the impugned decision), a view the Board shares. From this it follows that D1 and D2, which both concern conditioning mowers, cannot take away novelty.
- 4.4 The Board therefore concludes that claim 1 of the main request is new, Article 100(a) in combination with Article 54(2) and (3) EPC.

5. Remittal

Under Article 111(1) EPC the Board of Appeal may either decide on the appeal or remit the case to the department which was responsible for the decision appealed. Under Article 11 RPBA 2020 the Board may remit the case to the department whose decision was appealed if there are special reasons for doing so.

The appellant-proprietor requests remittal if any request is found to be new over D12, to have a two instances decision on the remaining matters, in particular patentability over the other cited prior art documents. In the present case the decision is entirely based on the Article 54(3) EPC document D12. The decision did not address the other raised opposition ground of inventive step, which issue *prima facie* does not appear to be trivial. Thus a special reason exists for remittal of the case. Therefore the Board concludes that the most appropriate course of action is to exercise its discretion under Article 111(1) EPC to remit the case for further prosecution. During the further prosecution the Opposition Division will first need to decide, in accordance with Rule 84(2) EPC, whether or not to continue the opposition proceedings of its own motion.

The appellant also declared their agreement to the remittal after the withdrawal of the opposition, see note of phone conversation held on 11 January 2022.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated