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**Datasheet for the decision
of 26 April 2021**

Case Number: T 2350/19 - 3.2.04

Application Number: 07866893.6

Publication Number: 2101591

IPC: A22C17/00, A22B5/00

Language of the proceedings: EN

Title of invention:

Puller and method for use in animal carcass boning or cutting

Patent Proprietor:

Robotic Technologies Limited

Opponent:

Frontmatec B.V.

Headword:

Relevant legal provisions:

EPC Art. 100(c), 123(2), 123(3)

Keyword:

Amendments - added subject-matter (yes) - intermediate
generalisation

Decisions cited:

Catchword:



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Case Number: T 2350/19 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 26 April 2021

Appellant: Robotic Technologies Limited
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 4 July 2019
revoking European patent No. 2101591 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: C. Kujat
P. Guntz

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division of the European Patent Office, posted on 4 July 2019 concerning revocation of the European Patent No. 2 101 591 pursuant to Article 101 (3) (b) EPC.
- II. The opposition division held that the patent according to the main request, fourth and seventh auxiliary requests did not meet the requirements of Articles 100(c), 123(2) or 123(3) EPC, and thus revoked the patent.
- III. The appellant proprietor lodged an appeal, received on 20 August 2019, against this decision and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 13 November 2019.
- IV. In preparation for oral proceedings the board issued a communication dated 11 December 2020 setting out its provisional opinion on the relevant issues. Oral proceedings were duly held as a videoconference on 26 April 2021.
- V. The appellant proprietor requests that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, in the alternative, in amended form on the basis of one of first to third auxiliary requests as submitted with their statement of grounds of appeal.
- VI. The opponent as respondent requests that the appeal be dismissed.

VII. Independent claim 1 according to the relevant requests reads as follows:

Main request (patent as granted)

"An apparatus (1; 14) for pulling a section of an animal carcass from a carcass (6) during a boning or cutting operation wherein the carcass (6) is held using means for holding, the apparatus (1; 14) comprising:
i. means for anchoring (3; 19) to the section of the carcass (6) via a linkage (2; 21) constrained to move substantially in one plane;
ii. means for forcibly separating (7; 17) the means for anchoring (3; 19) from the means for holding and thereby removing the section from the carcass (6);
characterised in that the means for anchoring (3; 19) includes a hand operated control element (20) to control the means for forcibly separating (7; 17)."

First auxiliary request

As for the main request but with the following amendments (additions and deletions highlighted by the board):

"... ~~characterised in that the means for anchoring (3; 19) includes a hand operated control element (20) to~~
a moveable handle (20) associated with the means for anchoring configured to control the means for forcibly separating ~~(7; 17).~~"

Second auxiliary request

As for the main request but with the following amendments (additions and deletions highlighted by the board):

"i. means for anchoring (3; 19) to the section of the carcass (6) via a linkage (2; 21) constrained to move substantially in one plane wherein the means for anchoring comprises a hook (19);

ii. ...;

~~characterised in that~~ wherein the means for anchoring ~~(3; 19)~~ includes a ~~hand operated control element (20)~~ moveable handle, the handle being moveable relative to the hook, configured to control the means for forcibly separating ~~(7; 17)~~."

Third auxiliary request

As for the second auxiliary request but with the following amendments (additions and deletions highlighted by the board):

"iii. characterised in that ~~wherein~~ the means for anchoring (3; 19) includes ~~a moveable handle,~~ a hand operated control element (20) comprising a handle, the handle being moveable relative to the hook to control the means for forcibly separating (7; 17)."

- VIII. The proprietor as appellant argued as follows:
The term "includes" having replaced the term "associated" in claim 1 of the main request, as well as the second and third auxiliary requests is originally disclosed in the light of the application as a whole. The amendment in claim 1 according to the first auxiliary request does not extend the protection

conferred by the patent, since the terms "include" and "associated with" are synonyms, at least in the context of the application as filed.

- IX. The opponent as respondent argued as follows:
The term "includes" in claim 1 of the main request, as well as the second and third auxiliary requests is not originally disclosed. The amendment in claim 1 according to the first auxiliary request extends the protection conferred by the patent.

Reasons for the Decision

1. The appeal is admissible.
2. *Background*

The invention concerns an apparatus for pulling a section of an animal carcass from a carcass during a boning or cutting operation. The apparatus comprises means for anchoring, e.g. a gripper or a hook, to the section of the carcass. The means for anchoring are held by means for holding. The apparatus further comprises means for forcibly separating the means for anchoring from the means for holding and thereby removing the section from the carcass. The apparatus includes a hand operated control element to control the means for forcibly separating. Thereby, the operator is enabled to make, substantially at the same time, cuts to aid in the removal of the section from the carcass (paragraphs 0035 and 0066 of the patent).

3. *Main request, second and third auxiliary requests :
added subject-matter*

3.1 Claim 1 of the main request is based on a combination of original claims 1, 2 and 4, adding detail from the description that the pulling is done during a boning or cutting operation (p1, ln 5-6), and that the control element is hand operated. Furthermore, in the sole characterizing feature of the claim, the term "means for anchoring *includes ... control element*" replaces the formulation in original claim 4 of a "control element *associated with* the means for anchoring". The impugned decision held inter alia that replacing "associated with" by "includes" resulted in added subject-matter.

It is common ground that the term "includes" has no express basis in the present context. It is further undisputed that these terms normally have different meanings in the English language. While "associated with" is the broader term, meaning "to combine for a common purpose" (OED), "includes" in this context is read as meaning "to comprise" or "to have as ... constituent element" (OED) and is thus more specific. The only point of contention is, as advanced by the appellant-proprietor, whether in the light of the application as filed the skilled person would understand the two terms as synonymous.

3.2 The board will therefore now examine whether, if not expressly disclosed, it is implicit in the application as filed that a hand operated control element *forms part of or is comprised in* the anchoring means. The board finds that this is not the case for the following reasons:

- 3.2.1 The majority of the passages in the description that relate to the hand operated element use the broader term "associate" (p4, ln 13-15; p5, ln 14-21) or nothing at all (p12, ln 21-30; p13, last paragraph), and therefore do not provide any insight as to the exact relationship between the means for anchoring and the control element. This conclusion is not altered by the references to a one handed operation of the controls (p12, ln 26-27; p13, ln 26-30), since such operation does not imply that the control element forms part of the anchoring means. Instead, one handed operation of the apparatus for pulling is also possible when the control element is separated from the means for anchoring, provided that the control element is within reach of the operator's free hand i.e. the hand not holding a knife.
- 3.2.2 With regard to the first embodiment according to figures 1 and 2, the corresponding description is silent on the presence of a manual control element therein (p9, ln 26-27: "gripper 3 may be fully automated so that operator interaction is not necessary"; p13, ln 18-19: "controls may then be used"; p13, ln 28: "a control element may be provided..."). Even for those parts of the description directed to manual control of the gripper, no details of a corresponding control element are disclosed (p12, ln 24: "operator controls (not shown)"). Turning to figures 1 and 2, it is mere speculation whether or not the non-referenced element at the top of gripper 3 in these figures, to the right of what seem to be the jaws of the gripper, would be identified by a skilled person as a hand operated control element included in the gripper, i.e. the means for anchoring.

On the one hand, figures 1 and 2 generally relate to "a first embodiment" (p8, ln 6-7), and thus, it is not clear whether the apparatus depicted therein relates to a fully automated variant of the first embodiment, or to a manually controlled variant. On the other hand, if it is assumed to represent some manual control it is not apparent from the figure what it is meant to control. For example, it may equally well be that the non-referenced element is used for manually moving flexible link arm 2 such that it places gripper 3 in the position for gripping a section of carcass 6 (p9, ln 17-19), or for causing the jaws of the gripper to close and grip the section of the carcass (p13, ln 18-24, see also p12, ln 28-29). In neither case would it then control subsequent actuation of the means for forcibly separating. This would reflect the neutral formulations in the corresponding section of the description directed to the means for forcibly separating, which do not refer to hand operation (p10, ln 6-10: "may be actuated", "upon actuation"; p14, ln 2 and 3).

Summarizing the above, the non-referenced element in figures 1 and 2 may not be regarded a direct and unambiguous disclosure of a hand operated control element that *forms part of or is comprised in* gripper 3, i.e. the means for anchoring.

3.2.3 Even the second embodiment according to figure 3 and the paragraph bridging pages 14 and 15 in the application as filed does not disclose the contested amendment. While it is common ground that hook 19 in that embodiment is a means for anchoring, and handle 20 a hand operated control element, the board is not convinced that hook 19 comprises handle 20 as one of its constituent parts. In fact, hook 19 is connected to

the inner core of cable 21, while handle 20 is connected to the outer sheath of that cable in order to allow for relative movement between handle and hook (p14, ln 30-34). The cable 21 may be considered a linkage within the meaning of claim 1, because of its technical function of coupling the hook to ram 17 (i.e. the means for forcibly separating). It may be debatable whether the linkage of the "means for anchoring the carcass via a linkage ..." in claim 1 (granted and as filed) is part of the anchoring means. However, original claim 22 directed to a linkage which is connected to the hook, which is understood to be the means for anchoring (p3, ln 21), appears to suggest that the linkage and the anchoring means are separate. Consequently, the board does not see in the fact that the handle 20 is connected to the outer sheath of cable 21 which is in turn connected to the hook 19 an unambiguous disclosure of it forming part of the means for anchoring.

3.3 As the original application does not disclose directly and unambiguously a means for anchoring which *includes* a hand operated control element, the board must conclude that - even when taking the patent application as its own dictionary - the terms "associated with" and "includes" do not acquire the same meaning in the context of the patent in suit. Thus, the replacement of the term "associated with" in original claim 4 by "includes" in claim 1 according to the main request added new subject-matter not originally disclosed in the application as filed.

3.4 The Board adds that even if the embodiment of figure 3 and the paragraph bridging pages 14 and 15 were to be seen as providing a basis for the amendment that the means for anchoring *includes* a hand operated control

element, then that amendment would constitute an unallowable intermediate generalisation vis-a-vis that specific disclosure. As is clear from the discussion above, in that case the feature would be seen to be disclosed in close structural and functional relationship with other features due to the specific connections of hook and handle with the outer sheath and inner core of cable 21 respectively. None of these features appear in the claim, so that even if disclosed, the feature would then have been added in isolation from its specific context.

3.5 The same conclusion holds for claim 1 according to the second and third auxiliary requests, which retains the term "includes". Additionally, these claims add some (handle, hook) but not all of the closely linked features (cable connected to the hook and sheath connected to the handle) from the embodiment of figure 3 mentioned above, so that these amendments also result in an unallowable intermediate generalization. The board, consequently, concludes that the subject-matter of claim 1 according to the second and third auxiliary requests extends beyond the contents of the application as filed.

4. *First auxiliary request :extension of scope of protection*

4.1 Claim 1 according to the first auxiliary request undisputedly corresponds to claim 1 of auxiliary request 3 underlying the impugned decision. The appellant-proprietor disputes the decision's finding that the amendment in claim 1 extends the protection conferred by the European patent.

4.2 With regard to the requirements of Article 123(3) EPC, claim 1 according to the first auxiliary request differs from granted claim 1 in that the feature "the means for anchoring includes a hand operated control element to control the means for forcibly separating" in its characterizing portion was replaced with "a moveable handle associated with the means for anchoring configured to control the means for forcibly separating" (emphasis added by the board).

The board already concluded that the application as filed - being its own dictionary - does not disclose that the terms "associated with" and "includes" are used in the application in a synonymous manner, see paragraph 3.2 above. In addition to that, it is common ground that the term "associated with" is broader than the term "includes" in the English language, see paragraph 3.1 above. In the case at hand, the generic term "associated with" covers both a physical association and a functional association between the means for anchoring and the hand operated control element. Replacing the narrower term "includes" with the broader term "associated with" is therefore seen by the Board as a clear extension of claim scope vis-a-vis the granted formulation that was restricted to a physical association, i.e. the inclusion of the control element in the means for anchoring, but now extends to cover also not previously protected arrangements where the hand operable control element is arranged remote and separate from the anchoring means.

From that, it follows that the amendment to "a moveable handle associated with the means for anchoring" in claim 1 of the first auxiliary request extends the protection conferred by the patent.

5. In conclusion, the board holds that claim 1 of the main request contains subject-matter which extends beyond the application as filed, contrary to Article 100(c) EPC. Further, the amendments made to claim 1 of the first auxiliary request extend the scope of protection in violation of Article 123(3) EPC. Furthermore, claim 1 of the second and third auxiliary requests contains subject-matter which extends beyond the application as filed, contrary to Article 123(2) EPC.

Since all requests fail, the patent must be revoked. The board thus confirms the decision of the opposition division, taking account of the amendments in the auxiliary requests, to revoke the patent pursuant to Article 101(3) b) 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