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Bezeichnung der Erfindung: Method and apparatus for preventing piglets from
Title of invention: suffocating under the clam in a brooding pen.
Titre de l'invention :

Klassifikation / Classification / Classement : A01K 1/02

ENTSCHEIDUNG / DECISION

vom / of / du 24 November 1988

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet : Salminen, Ensio

Einsprechender / Opponent / Opposant : Medata Systems Limited

Stichwort / Headword / Référence :

EPO / EPC / CBE Articles 52(4), 112(1)(a), 54, 56

Schlagwort / Keyword / Mot clé :
"Therapy"
"Referral to the Enlarged Board of Appeal"
(no)
"Novelty" (yes)
"Inventive step" (yes)

Leitsatz / Headnote / Sommaire

Europäisches
Patentamt

Beschwerdekammern

European Patent
Office

Boards of Appeal

Office européen
des brevets

Chambres de recours



Case Number : T 58 /87 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 24 November 1988

Appellant :
(Opponent)

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Decision under appeal :

Interlocutory decision of Opposition Division of the
European Patent Office dated 25 November 1986
concerning maintenance of European patent No. 62 065
in amended form.

Composition of the Board :

Chairman : P. Delbecque

Members : H. Seidenschwarz

P. Ford

Summary of Facts and Submissions

- I. European patent No. 0 062 065 comprising independent Claims 1 and 3 as well as dependent Claims 2 and 4 to 7 was granted to the Respondent on 23 May 1984 in response to European patent application No. 81 902 985.1 filed on 9 October 1981 and claiming the priority of a previous application of 10 October 1980.
- II. In response to the Interlocutory Decision of the Opposition Division dated 25 November 1986, the Appellant filed an appeal against this decision on 23 January 1987, paying the appropriate fee simultaneously and stating that the entire contents of paragraphs II - 2, 3 and 4 of the decision under appeal is impugned and that the maintenance of the European patent with amended Claims 1, 3 and 7 is challenged.
- III. The Statement of Grounds was received on 3 April 1987. The Appellant raised the following objections:
 - the method according to Claims 1 and 2 is a method for treatment of the animal body by therapy which, according to Article 52(4) and is regarded as not being susceptible of industrial application within the meaning of Article 52(1);
 - the subject-matter of the European patent as far as Claim 3 is concerned extends beyond the content of the application as filed due to the undue breadth of Claim 1 and Claim 3;
 - the subject-matter of the European patent as far as claim 3 is concerned is not new as required by Article 54(1);

- the subject-matter, at least of Claim 3, does not involve an inventive step as required by Article 56; and
- the European patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b)).

Having regard to methods referring to therapy, the Appellant referred to the Guidelines CIV-4.2, the limited Kingdom Patents Act 1977 and to an extract from "Patent Law of Europe and the United Kingdom" by A.M. Walton, H.I.L. Laddie, J.P. Baldwin and D.J.T. Kitchin (Exhibit A).

Having regard to novelty and inventive step of the subject-matter of the European patent, the Appellant referred to the following documents cited during the Opposition procedure, however, not mentioned expressis verbis in his Statement of Grounds:

- Peter R. English, William J. Smith, Alastair Maclean: "The Sow-improving her efficiency"; Farming Press Limited; 1977; pages 140, 141, 147 and 148 (Exhibit B);
- J.A. Merkel and T.E. Hazen: "Zone Cooling for Lactating Sows"; Transactions of the ASAE; 1967; pages 444 to 447 (Exhibit C);
- Midwest Plan Service, September 1977: "Ventilation"; page 27 (Exhibit C₂);
- Ministry of Agriculture, Fisheries and Food: "Housing the Pig"; Bulletin 160; 1971; page 74 (Exhibit D);

- Derek H. Goodwin: "Pig management and production"; Hutchinson Educational; 1973; pages 140 to 145 (Exhibit E);
- Encyclopaedia Britannica, Volume 17, 1961; pages 918 and 919 (Exhibit F);
- Chamber's Encyclopaedia, Volume X; 1959; page 725 (Exhibit G) and page 724 (Exhibit G₂).

IV. In response to a communication from the Board of Appeal, the Appellant requested in his letter of 14 October 1988, that the question whether the method according to Claims 1 and 2 are patentable within the terms of Article 52(4) EPC be referred to the Enlarged Board of Appeal in accordance with Article 112(1)(a) EPC.

V. In the letters of 19 August 1987 and 4 November 1988 the Respondent contested the view of the Appellant and requested the rejection of the Appeal.

VI. The independent Claims 1 and 3 read as follows:

"A method for preventing piglets from suffocating under the dam in a brooding pen provided with a particular bay (1) or equivalent space reserved for the dam, in which method the standing and lying down of the dam are detected by a suitable sensor, for instance a photocell (2, 3), characterised in that after the dam has stood up, under it are created unpleasant conditions for the piglets by blowing air thereunder when the standing up of the dam is detected by said sensor."

"An apparatus for applying the method of claim 1, the said apparatus comprising a brooding pen provided with a particular bay (1) or similar space reserved for the dam,

wherein is placed a sensor, preferably a photocell (2, 3), which sensor indicates when the dam stands up or lies down, characterised in that the sensor (2, 3) is connected to a blower (5) or equivalent, which, when the standing up of the dam is detected by the sensor (2, 3), provides an air flow so that at least the major part thereof is directed to the space under the dam so as to create unpleasant conditions for the piglets."

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rules 1(1) and 64(a) EPC. The appeal also complies with Rule 64(b) which stipulates that the notice of appeal shall identify the extent to which amendment or cancellation of the impugned decision is requested. The content of the impugned decision is purely and simply the maintenance of European patent No. 62 065 in an amended form. The formulation "the Decision set out in the first sentence of paragraph II-5 (of the interlocutory decision) is challenged" is therefore to be interpreted as meaning that the setting aside of the interlocutory decision in its entirety and the revocation of the European patent is being sought. The appeal is therefore admissible.
2. According to the provision of Article 52(4) EPC methods for treatment of the animal body by therapy practised on the animal body shall not be regarded as susceptible to industrial application.
 - 2.1 The Board agrees in that the word "therapy"
 - covers any non-surgical treatment which is designed to cure, alleviate, remove or lessen the symptom of, or prevent or reduce the possibility of contracting any

malfunction of the animal body (cf. Patent Law of Europe and the United Kingdom by A.M. Walton, H.I.L. Laddie, J.P. Baldwin and D.J.T. Kitchin, 1983, page II [684]), and also

- relates to the treatment of a disease in general or to a curative treatment in the narrow sense as well as the alleviation of the symptoms of pain and suffering (cf. Chambers Twentieth Century Dictionary, 1399, "Therapy"; The Oxford English Dictionary, Vol. XI, 280, "Therapy"; and e.g., T 144/83 (point 3) - OJ, EPO 1986, 301).

2.3 The behaviour of newborn piglets to creep under the dam standing up to eat and drink either during or after farrowing cannot be fairly regarded as a malfunction of piglets whose instinct is not adequately developed. Furthermore, as far as the language of Claim 1, is concerned, it clearly covers a method for protection of piglets from the disadvantageous consequences of this behaviour, such as suffocating under the dam, by blowing air under the standing dam thus creating unpleasant conditions for the piglets. This cannot reasonably be called a treatment by therapy, which is practised on the bodies of piglets, within the meaning of Article 52(4) EPC. As the Opposition Division rightly considered, the invention is concerned with preventing accidents, analogous to a method of preventing a worker from trapping his hand in machinery.

2.4 Consequently, the Claims 1 and 2 comply with the requirements of Article 57 EPC.

3. With regard to the request of the Appellant to refer the point of law concerning Article 52(4) EPC to the Enlarged Board of Appeal, Article 112(1) EPC provides for the Enlarged Board of Appeal only to have questions referred to

it by the Board of Appeal in connection with important points of law.

The question put forward by the Appellant is concerned with the meaning of the word "therapy". This is, however, a question which is already clearly answered by decisions of Boards of Appeal in line with the general acknowledged interpretation of this word (cf. above point 2.2). This Board of Appeal has not departed from the acknowledged interpretation.

There is, therefore, no reason to accede to the Appellants' request that the point of law raised by him be submitted to the Enlarged Board of Appeal.

4. Independent Claims 1 and 3 comprise a combination of the features mentioned in the independent Claims 1 and 3 as granted and in the description as granted (column 2, lines 43 to 51).

The dependent Claims 2 and 4 to 8 correspond to those as granted.

There is no formal objection to the current version of the claims, since it is also adequately supported by the description as filed.

The claims, therefore, comply with Article 123 EPC.

5. The precharacterising portions of Claim 1 and Claim 3 are derived from the prior art as demonstrated in GB-A-932 189. This document discloses a brooding pen comprising a particular bay in which the dam can stand or lie and a separate adjoining nest unit for the piglets. This nest unit can be raised approximately level with the floor of the particular bay or can be lowered to a safe distance

below said floor when the dam is lying upright or standing. Any vertical movement away from the suckling position by the dam is detected by photo-electric cell units. These units are arranged to actuate driving means for raising or lowering the nest unit. The drawback of the known device is its complex structure, which leads to a high price. From this follows that the problem to be solved by the invention is to provide a simpler, therefore less costly, device (cf. EP-B-0 062 065, column 1, lines 32 to 48).

According to the teaching of the independent claims, the solution of this problem is based on the idea of creating conditions under the dam as soon as the standing up of the dam is detected, which conditions are uncomfortable for newborn piglets.

6. The examination as to whether the subject-matter of Claim 1 and Claim 3 is novel results in the following:

6.1 None of the documents to which the Appellant refers in paragraph 3 of his Statement of Grounds, discloses a method or an apparatus using a sensor which indicates when the dam stands up or lies down:

- Exhibit B describes the application of heat in a farrowing pen and its influence on the efficiency depending on the side of the dam and the location on the pen where the heat is provided. Heating may be carried out in conjunction with a pressurised ventilation system.

- Exhibit C describes the effects of zone ventilation with cooled and uncooled air on the performance of sows and their litters during the first weeks of the farrowing-lactation period. The ambient-air temperature of the building was maintained at 35°C (90°F) and the

temperature of the air delivered to the sows was always at 18 to 19°C (65°F). At these temperatures the sows were more comfortable and performed better than the uncooled sows.

- Exhibit C₂ deals with the specification of a blower and its operating conditions.
- Exhibit D relates to a fan control by hand, thermostats or time switches.
- Exhibit E concerns alternative ventilation systems. Since pigs do better when they are housed in comfortable air conditions, kept at the correct temperature, the insulation and ventilation must be correct to achieve optimum conditions.

6.2 None of the other documents cited in the patent specification nor during the opposition procedure discloses the method and apparatus according to Claim 1 and Claim 3. Since the Appellant did not dispute the novelty with respect to this state of the art, it is unnecessary to give the reason in detail.

6.3 The subject-matter of the independent claims is therefore novel in relation to the revealed state of the art.

7. On the question of whether or not the subject-matter of Claim 1 and Claim 3 was obvious, the following should be observed:

7.1 The documents, which were cited by the Appellant during the Opposition procedure with respect to inventive step of the subject-matter, are the Exhibits F, G and G₂:

7.1.1 Exhibit G concerns bacon and pork production in pig producing countries from 1938 until 1956 as well as the conditions influencing this production. The teaching of this citation is the same as that of the documents mentioned in above paragraph 6.1, namely to improve livestock and meat production by controlling the environment of the pigs, especially by achieving optimum air and temperature conditions. None of these exhibits, however, deals with the problem of simplifying the method and the construction of an apparatus as they are known e.g. from GB-A-932 189, nor gives any hint to solve this problem by providing a blower or equivalent which creates intentionally unpleasant conditions for the piglets under the dam by blowing air thereunder.

7.1.2 Exhibits F (page 919, left column, lines 18 and 19) and G₂ (page 724, right column, lines 45 to 49) mention the problem of preventing dams from crushing their young. According to the disclosure of these documents the pens are provided with guard rails and with infra-red lamps in the creeps. The skilled person, therefore, learns from Exhibit F and Exhibit Exhibit G₂ to restrict the movement of the dams and to create pleasant conditions for the piglets by ensuring adequate temperatures in places away from the dams. This teaching is, however, already generally known and indicated in the description of the contested patent: EP-B-0 062 065, column 1, lines 21 to 31.

7.2 The other documents cited in the patent specification as well as during the opposition procedure, to which the Appellant did not refer during the proceedings before the Board of Appeal, give likewise no hint of the subject-matter of the independent claims. Their teachings could, therefore, neither per se nor in combination with the teachings of the documents discussed in the foregoing

paragraphs lead the skilled person to the method and apparatus according to Claim 1 and Claim 3.

- 7.3 Consequently, the subject-matter of the independent claims involves an inventive step within the meaning of Article 56 EPC.
8. EP-B-0 062 065, column 2, line 16 to column 3, line 26 in combination with Figure 1 and 2, discloses the invention as claimed, in such terms, that the solution of the technical problem underlying the invention can be understood and carried out by a person skilled in the art.

The conditions of the environment preferred by dams and piglets are well known (cf. e.g Exhibits B, C and E, EP-B-0 062 065, column 1, lines 10 to 31) to the person skilled in the art. These conditions depend on the housing, the climatic zone, the season and the breed.

However, it does not matter whether there is mentioned in the description more detailed information having regard to temperature, ventilation, heating arrangement and the like, or in Claim 1 and Claim 3 a feature concerning the direction of the air-stream. The person skilled in the art does not need more detailed information because it is well within the scope of his knowledge to choose always the adequate conditions dependent on the specific situations. Further, an independent claim should state only the essential features of an invention (cf. Rule 29(3) EPC), but not prescribe down to the smallest detail to the person skilled in the art what he should do to find the most suitable solution.

The invention is disclosed in a manner sufficiently clear and complete which allows the person skilled in the art to carry out the invention.

The respective comments of the Appellant in his Statement of Grounds and in his letter of 14 October 1988, therefore, cannot support his objections.

9. Hence, the patent can be maintained with the independent Claims 1 and 3 in the wording as amended.
10. Claim 2 and Claims 4 to 8 concern particular embodiments of the method according to Claim 1 and of the apparatus according to Claim 3 and thus are not open to objection.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

P. Delbecque