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D E C I S I O N
of 9 March 2005

Case Number: T 0369/03 - 3.2.4

Application Number: 95203036.9

Publication Number: 0721732

IPC: A01K 5/00

Language of the proceedings: EN

Title of invention:

A construction for displacing feed for animals

Patentee:

MAASLAND N.V.

Opponent:

DeLaval Holding AB

Headword:

-

Relevant legal provisions:

EPC Art. 100(c), 111(1), 123(2)(3)

Keyword:

"Added matter - main request (yes) - auxiliary request (no) "
"Extension of the protection conferred - auxiliary request
(no) "

Decisions cited:

T 0271/84, T 0108/91, T 0438/98

Catchword:

-



Case Number: T 0369/03 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 9 March 2005

Appellant: MAASLAND N.V.
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Representative: Harrison, Michael Charles
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 29 January 2003
revoking European patent No. 0721732 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
M-B. Tardo-Dino

Summary of Facts and Submissions

- I. By its decision dated 29 January 2003, the Opposition Division revoked the European patent 0 721 732. On 27 March 2003 the Appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 5 June 2003.
- II. The opposition was founded on Article 100(a), (b) and (c) EPC. The Opposition Division came to the conclusion that Claim 1 of the main request and claim 1 of the auxiliary request did not meet the requirements of Article 123(3) EPC and of Article 123(2) EPC respectively.
- III. Oral proceedings took place on 9 March 2005.

The Appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of a main request comprising claims 1 and 2 filed with letter of 6 May 2004 and claims 4 to 30 as granted, or on the basis of a first auxiliary request comprising claims 1 to 29 filed in oral proceeding, or of a second auxiliary request (patent as granted).

- IV. Claim 1 of the main request reads as follows:

"1. A construction for automatically displacing feed in an accommodation for animals to said animals by means of a displaceable implement, which implement includes automatically operating control means and at least one motor and a storage box (11) for the feed,

characterized in that the box (11) comprises an automatically controlled drivable loading member for loading feed from at least one silo into the storage box (11), the loading member comprising a cutting device (12), and a mixing auger."

Claim 1 of the first auxiliary request reads as follows:

"1. A construction for automatically displacing feed in an accommodation for animals to said animals by means of a displaceable implement, which implement includes automatically operating control means and at least one motor and a storage box (11) for the feed, characterized in that the storage box (11) comprises an automatically controlled drivable loading member for loading feed from at least one silo into the storage box (11), the loading member comprising a cutting device (12), and a mixing and discharging auger (13) provided inside the storage box (11)."

- V. The appellant argued as follows: Claim 1 (main request) does not contravene the requirements of Article 123(2) EPC. Claim 22 forms a basis for claiming a "mixing auger" without "discharging" function. The word "comprises" in conjunction with the "storage box" can mean nothing else than "located inside said box". The drivable loading member is compulsorily mounted "at the front side" of the storage box, otherwise it would not be able to work. The word "shovel" has been used in the description as an alternative to "storage box" and has the same meaning.

Furthermore, the insertion of the comma after "cutting device" in claim 1 (main and first auxiliary requests) does not contravene the requirements of Article 123(3) EPC. According to Article 69 EPC the extent of protection is not defined by the strict literal meaning of the wording used in the claims, the description and the drawings are employed to clarify the technical terms used therein. It is clear from the description and the drawings, that the storage box 11 comprises a loading member 12 (cutting device) and also a separate mixing auger 13.

VI. The Respondent contested the arguments of the Appellant mainly by arguing as follows: The requirements of Article 123(2) EPC are not met since the term "mixing auger" in claim 1 of the main request is a generalisation of the term "mixing and discharging auger" used throughout the application as filed; and there is only a basis in the application as filed for the wording "in the storage box" to describe the location of the mixing and discharging auger. The word "comprises" used in claim 1 of the main and first auxiliary requests allows the auger merely to be attached to the storage box; and the term "drivable loading member" has only been disclosed as being disposed in a "loading shovel" and with respect to the "front side" of the storage box, which features have been entirely removed.

Furthermore, the protection conferred has been extended: claim 1 as granted was limited to a device in which a loading member comprised two elements, namely a cutting device and a mixing device. With the amendments to claim 1 the loading member is no longer limited to having two elements but instead only limited to having

one element. Since a limitation of the granted claim 1 has been removed, the scope of protection is extended contrary to the requirements of Article 123(3) EPC.

VII. The Respondent (opponent) requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request - Article 123(2) EPC:*
 - 2.1 Claim 1 according to the main request differs from claim 1 as originally filed in that the following features have been added:
 - (a) the feed is displaced "in an accommodation" for animals,
 - (b) the displaceable implement comprises "a storage box for the feed",
 - (c) the box comprises
 - (c1) "an automatically controlled drivable loading member for loading feed from at least one silo into a storage box, the loading member comprises a cutting device,"
 - (c2) "and a mixing auger".
 - 2.2 Feature (a) is based on Figure 1 and on the description as originally filed, page 2, lines 33 to 35.
 - 2.3 Feature (b) is based on the description as originally filed, page 4, lines 4, 22 to 24.

2.4 Feature (c1) is based on the description as originally filed page 4, lines 22, 23, 29 to 31, page 5, lines 35 to 39 and Figure 2.

The Respondent argued that the description as originally filed reads "At the front side of the storage box 11, the loading shovel comprises a drivable loading member 12, here designed as a cutting member" and that the drivable loading member is only disclosed in combination with a loading shovel and as being located at the front side of the storage box. However, on page 4, line 23, it is also indicated that the loading shovel includes the storage box. Thus, stating that the storage box comprises the drivable loading member is even more restrictive than stating that the loading shovel comprises it. Therefore, there is no need to introduce the term "loading shovel" into the claim. Moreover, the expression "at the front side" is rather unclear for determining a precise location with respect to the storage box; it solely indicates that the drivable loading member is not located at the bottom side of the storage box. This however is implicit for a skilled person, since otherwise it would not be possible to obtain the desired effect. Therefore, the expression "at the front side" is not considered to establish a clear functional or structural relationship between the drivable loading member and the storage box and can therefore be omitted.

2.5 Concerning the term "mixing auger" (feature c2), it is indicated in the description as originally filed, page 4, lines 35, 36 that "inside the storage box 11, there is provided a mixing and discharging auger 13..." Thus the term "mixing auger" is clearly a

generalisation or broadening of the term "mixing and discharging auger" disclosed in the application as originally filed. Indeed the entire application refers to a "mixing and discharging auger". Further on page 4, line 39 to page 5, line 2, the discharging function of the auger is confirmed. It follows that this generalisation of "mixing and discharging auger" is not directly and unambiguously derivable from the application as originally filed.

The Appellant argued that claim 22 could form a basis for solely claiming a "mixing auger" and that the wording "box comprising" means nothing else than "located inside said box". However, the expression "mixing auger" does not appear in this form in the description and claim 22 reads as follows "... that the robot (6) is suitable for automatically mixing two or more types of feed." This passage does not refer to an auger at all and therefore does not provide an adequate support for the feature "mixing auger". Moreover, claim 1 in its amended form defines that "the storage box ... **comprises** ... the mixing auger" rather than the mixing auger being **in** the storage box. The word "comprises" allows the mixing and discharging auger merely to be attached to the storage box. This new information is also not derivable from the application as originally filed.

Consequently, the wording of claim 1 according to the main request contravenes the requirements of Article 123(2) EPC. Therefore the main request is not allowable.

3. *First auxiliary request - Article 123(2) EPC:*

3.1 Claim 1 according to the first auxiliary request differs from claim 1 according to the main request in that:

"box" has been changed to "storage box", and "mixing auger" has been changed to "mixing and discharging auger (13) provided inside the storage box (11)."

3.2 Thus, the objections raised in section 2.5 above are overcome by the amended wording of this claim and consequently the requirements of Article 123(2) EPC are met.

4. *First auxiliary request - Article 123 (3) EPC:*

4.1 In Claim 1 as granted it is stated: "the displaceable implement comprises an automatically controlled drivable loading member for loading feed from at least one silo into a storage box (11), the loading member comprising a cutting device and a mixing device". This means that the mixing device is part of the loading member.

In fact, a loading member comprising a cutting device and a mixing device has not been disclosed in the description or the figures as originally filed.

4.2 In claim 1 of the first auxiliary request, a comma has been added between "cutting device (12)" and "and a mixing and discharging auger (13)..." Thus, by adding said comma, it becomes unambiguously clear that the mixing auger is not part of the loading member, but is

part of the storage box. This strictly corresponds to what has been disclosed in the description and the figures as originally filed.

4.3 Moreover, there is an inconsistency between claims 1, 2 and 27 as granted. As a matter of fact, according to claim 27 (which also refers back to claim 2) the feed is discharged by a screw conveyor comprised in the storage box; according to claim 2 (which refers back to claim 1) the feed is discharged by the mixing device, i.e. the mixing device is the discharging member (in form of a screw conveyor); according to claim 1 the feed is loaded by a loading member which comprises a cutting device and a mixing device. Consequently, in the construction according to claim 27, the discharging member (in form of a screw conveyor) would be part of the loading member.

4.4 When turning to the description as originally filed, especially page 4, lines 29 to 36 and page 5 lines 26 to 39, it is clear that "At the front side of the storage box, the loading shovel comprises a drivable loading member 12, here designed as a cutting member...", "Inside the storage box 11, there is provided a mixing and discharging auger 13...", "... while the cutting device 12 turns at its upper end towards the storage box" and "...other feed is automatically loaded and mixed with the bulkage"

Thus, it is clear that the loading member located at the front side of the storage box does not comprise the mixing and discharging auger located inside the storage box. This is confirmed by the figures.

4.5 Thus, the wording of claim 1 as granted is not only inconsistent with the dependent claims relating to the same features but also with the totality of the disclosure.

In such a case, amending a claim to remove an inconsistency does not contravene Article 123(3) EPC, if the amended claim has the same meaning as the unamended claim in its construction in the context of the description and the drawings (see T 271/84, O.J. EPO 1987, 405 section 2; T 108/91, O.J. EPO 1994, 228, section 2.3; T 438/98, section 3.1.2).

4.6 The Respondent argued that it is clear for a skilled person that the cutting device performs some kind of mixing. This has also been one of the lines of argument followed by the Appellant. Therefore, there is no evident contradiction and no mistake at first glance which would justify an amendment. Thus, since it is not evident that the granted claim properly construed could only be interpreted as the amended claim, the conditions for the amendment to be admissible are not met.

4.7 The Board cannot agree to this view. Even if it appears possible to use the cutting device for obtaining a mixing action, this is not obvious at first glance, since it would imply (as admitted by the Respondent) to have the blades of the cutting device arranged in a specific angle, i.e. it would imply an inventive step of the part of the skilled person to achieve it. Therefore, the claim as granted does not make technical sense for a skilled person, which would therefore try to arrive at an interpretation which is technically

sensible and take into account the whole of the disclosure of the patent. As indicated in section 4.4 above, the description and the figures clearly specify that the loading member (cutting device) does not comprise the mixing and discharging auger, and thus, a skilled person would arrive to the conclusion that the granted claim properly construed could only be interpreted as the amended claim.

Consequently, the amended claim 1 of the auxiliary request fulfils the requirements of Article 123(3) EPC.

The Opposition division issued a decision under Article 123(2)(3) EPC upon added subject-matter and extension of the protection conferred and left the issue of patentability undecided. In such a case, pursuant to Article 111 EPC, the Board of Appeal may either exercise any power within the competence of the department of the first instance or remit the case to that department for further prosecution. In the current case in order to give the parties the possibility to defend their views upon the non discussed grounds the Board remits the case to the Opposition division for further prosecution on the basis of the claims according to the first auxiliary request.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte