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**Datasheet for the decision
of 28 September 2006**

Case Number: T 0832/04 - 3.2.04

Application Number: 97950507.0

Publication Number: 0954220

IPC: A01K 5/00

Language of the proceedings: EN

Title of invention:

Shredding apparatus with tiltable loading mechanism

Patentee:

PEETERS LANDBOUWMACHINES B.V.

Opponents:

Trioliet Mullos B.V.

KUHN-AUDUREAU S.A.

Maschinenfabrik Bernhard van Lengerich GmbH & Co.

Headword:

-

Relevant legal provisions:

EPC Art. 54(2), 100(a) and (c), 123(2)

Keyword:

"Entitlement of priority (no)"

"Disclosure in drawings (no)"

"Document published in the priority interval (state of the art according to Art. 54(2) EPC - yes)"

Decisions cited:

G 0002/98, T 0191/93, T 0169/83

Catchword:

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Case Number: T 0832/04 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 28 September 2006

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 18 May 2004
revoking European patent No. 0954220 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
H. Preglau

Summary of Facts and Submissions

- I. By its decision dated 18 May 2004 the Opposition Division revoked the European patent No. 0 954 220. On 29 June 2004 the Appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 17 September 2004.
- II. The patent was opposed on the grounds based on Articles 100(a) (54 and 56) EPC. In its decision the Opposition Division considered that the patent as granted was not entitled to the claimed priority and revoked the patent because it was of the opinion that:
- i) the subject-matter of claim 1 according to the main request lacked novelty with respect to D16:
DE-U-297 16 599,
 - ii) the subject-matter of claim 1 according to the auxiliary request 1 contravened the requirements of Article 100(c) EPC and
 - iii) the subject-matter of claim 1 according to auxiliary requests 2 to 4 contravened the requirements of Article 123(3) EPC.
- III. The independent claims read as follows:
- Claim 1 according to the main request:
- "1. Apparatus (1) for shredding bales (25) of material, provided with a container (2) with at least one shredding member (3) arranged therein for rotation on a standing shaft (4) and loading means (5) driven by drive means (10) and tiltable between a receiving

position and a delivery position for loading the container (2) with the bales (25), characterized in that the at least one shredding member (3) is in the form of a vertical screw and is journalled at one end only on the bottom of the container (2) and in that the loading means (5) comprise a support member (6) connected to the container (2) via at least one pivot arm (7) having its pivot shaft (8) mounted close to the underside of the container (2), said loading means (5) being arranged for placing the bales (25) into the container (2) close to its top."

Independent claims 1 and 2 according to the first auxiliary request:

"1. Apparatus (1) for shredding bales (25) of material, provided with a container (2) with at least one shredding member (3) arranged therein for rotation on a standing shaft (4) and loading means (5) driven by drive means (10) and tiltable between a receiving position and a delivery position for loading the container (2) with the bales (25), characterized in that the at least one shredding member (3) is in the form of a vertical screw and is journalled at one end only on the bottom of the container (2) and in that the loading means (5) comprise a support member (6) connected to the container (2) via at least one pivot arm (7) having its pivot shaft (8) mounted close to the underside of the container (2), said loading means (5) being arranged for placing the bales (25) into the container (2) close above its top."

"2. Apparatus (1) for shredding bales (25) of material, provided with a container (2) with at least one

shredding member (3) arranged therein for rotation on a standing shaft (4) and loading means (5) driven by drive means (10) and tiltable between a receiving position and a delivery position for loading the container (2) with the bales (25), characterized in that the at least one shredding member (3) is in the form of a vertical screw and is journalled at one end only of the bottom of the container (2) and in that the loading means (5) comprise a support member (6) connected to the container (2) via at least one pivot arm (7) having its pivot shaft (8) mounted close to the underside of the container (2), said loading means (5) being arranged for placing the bales (25) into the container (2) close below its top."

Claim 1 according to the second auxiliary request is identical with claim 1 according to the first auxiliary request.

Claim 1 according to the third auxiliary request is identical with claim 1 according to the first auxiliary request, with the exception that the expression "having its pivot shaft (8) mounted close to the underside of the container (2)" has been amended to read "having its pivot shaft (8) mounted close above the underside of the container (2)".

IV. Oral proceedings before the Board took place on 28 September 2006.

The Appellant requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or on the basis of the sets of claims according to the first auxiliary request (filed

with letter of 3 November 2004), or on the basis of the sets of claims according to the second or to the third auxiliary request, both filed with letter of 28 August 2006.

He mainly argued as follows:

The following features (a): "said loading means (5) being arranged for placing the bales (25) into the container (2) close to its top" and (b): "a support member (6) connected to the container (2) via at least one pivot arm (7) having its pivot shaft (8) mounted close to the underside of the container (2)" are not expressis verbis stated in the priority document but are within the scope of the invention disclosed therein. It is clear for a skilled person that according to the priority document the bale has to be placed into the apparatus from above almost at the same level as the top of the container, which means "close to the top of the container"; therefore feature (a) is implicitly disclosed. Feature (b) can clearly be derived from the drawings, which show that the pivot has to be close to the underside of the container, because otherwise the loading means could not cooperate with the curved guide means 9. Thus, the structure and function of features (a) and (b) are clearly and fully derivable for a skilled person from the drawings of the priority document.

Consequently, claim 1 of all requests is entitled to the date of the priority and therefore, D16 is not state of the art according to Article 54(2) EPC for these claims.

The Respondents (opponents I to III) countered the Appellant's arguments and mainly argued as follows:

Features (a) and (b) cannot be derived from the priority document. There is no implicit disclosure of these features even if taking into account the figures. Furthermore, features (a) and (b) are not related and have no defined function. Therefore, taking these features in isolation from the other features of the drawings and introducing them into the claims would not stand the test for determining whether or not an amendment satisfies the requirements of Article 123(2) EPC. Consequently, claims comprising these features are not entitled to the date of the priority document. Thus, D16 published in the priority interval is state of the art for claim 1 according to all requests and novelty destroying for the subject-matter thereof.

All Respondents requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. *Priority:*
 - 2.1 According to G 2/98 (OJ EPO 10/2001; 493) the requirement for claiming priority of "the same invention" referred to in Article 87(1) EPC means that the priority of a previous application in respect of a claim in an European patent application in accordance with Article 88 EPC is to be acknowledged only if the skilled person can derive the subject-matter of the

claim directly and unambiguously, using common general knowledge from the previous application as a whole (Headnote). Thus, the fundamental test of whether a claim is entitled to the priority date of the priority document is identical to the test of whether an amendment to an application satisfies the requirements of Article 123(2) EPC.

2.2 The priority document discloses a single embodiment according to Figures 1 to 4, in which the bales are placed into the container from above its top.

Added features:

- a) "said loading means (5) being arranged for placing the bales (25) into the container (2) close to its top"; and
- b) "a support member (6) connected to the container (2) via at least one pivot arm (7) having its pivot shaft (8) mounted close to the underside of the container (2)" can only be based on the drawings of the priority document.

Feature a) concerns the position of the loading means relative to the top of the container and feature b) the position of the pivot shaft of the support member relative to the underside of the container. These two relative positions have no interrelationship, each position solving a partial separate problem:

the loading means can be arranged for placing the bales close to the top of the container in an embodiment where the pivot shaft is not positioned close to the underside of the container and vice versa.

The Board sees no reason why these two relative positions would have been associated with each other in

the mind of the skilled reader. In other words these two specific features a) and b) have been selected among other features of the original drawings, but this selection is arbitrary in the sense that it is not directly derivable from the priority document that these two features without any interrelationship can be isolated from other features shown in the drawings. In the context of Article 123(2) EPC the original drawings cannot be considered as a reservoir of features from which the applicant can draw when amending the patent application. Reference is made in this respect to decision T 191/93 of 7 June 1994, not published in OJ EPO (point 2 of the reasons) where the arbitrary selection of certain features from the drawings and their introduction into the claims was considered as an unallowable amendment under Article 123(2) EPC.

Furthermore, the technical problem solved in the original priority document was to overcome the drawback of a prior device in which the shredding member was rotatable on a lying shaft arranged close to the bottom of the container. In order to overcome this drawback the invention disclosed therein proposes a shredding member rotatable on a standing shaft, the loading means being adapted to perform a tilting movement between a receiving position and a delivery position.

It would be quite clear to a skilled reader that the arrangement of the loading means relative to the top of the container (feature a)) and the position of the pivot shaft of the support member relative to the underside of the container (feature b)) are without importance for solving the technical problem or for carrying out the invention defined in the priority document. Thus, the specific combination of features

defined in claim 1 including the two extra features a) and b) cannot be considered to have been disclosed in the priority document.

Finally, features may be taken from the drawings if the function and structure of these features are clearly unmistakably and fully derivable for the skilled person from the drawings (see decision T 169/83, OJ EPO 1985, 193).

As to feature a) it is observed that the priority document only states that loading means are provided, which are adapted to perform a tilting movement between a receiving position and a delivery position.

Furthermore, from the drawings and in particular from figure 1, it can be derived that the bale is scooped up and drops into the container according to arrow L. It is not shown that the bales are placed into the container "close" above its top. Thus, the "structure" of feature a) is not clearly and fully derivable from the drawings and therefore cannot be considered to have been disclosed in the original priority document.

In the priority document there is no specific description of the location of the pivot shaft relative to the container (feature b)). From Figure 1 it can only be derived that the pivot shaft is positioned close above the underside of the container. Thus the amendment made that the pivot shaft is close to the underside of the container introduces new information that the pivot shaft can also be arranged close below the underside of the container. Moreover, the effect associated with, or the problem solved by, the feature b) is not clearly derivable from the priority document. The Appellant has argued that the position of the pivot shaft close to the underside of the container has a

clear function since otherwise the loading means could not cooperate with the guide means.

However, the guide means are not part of the apparatus claimed in the independent claims and the fact that the pivot shaft is not positioned close to the underside of the container does not necessarily imply that the loading means is not able to cooperate with appropriate guide means.

It can be seen from the drawings that the axis of the pivot shaft is disposed inside the container close to its underside and to its rear side. It would not be clear for a skilled reader why the position of the pivot shaft near the underside of the container is more essential for the invention than e.g. the not claimed position near the rear side of the container. Among all information derivable from the drawings and required for defining the position of the pivot shaft relative to the container, the patent proprietor has selected the feature that the pivot shaft is close to the underside of the container. As has already been explained, such a selection is arbitrary because it is not directly and unambiguously derivable from the priority document that this particular feature can be isolated from the other feature necessary to precisely define the position of the pivot shaft relative to the container. For these reasons, the added feature b) cannot be considered to have been disclosed in the priority document within the meaning of Article 123(2) EPC.

Therefore, the priority document and claim 1 of the subsequent European patent comprising feature (b) do not relate to the same invention.

2.3 Claim 1 as granted comprises features (a) and (b).
Claim 1 according to the first and second auxiliary requests comprises feature (b).
Thus, the subject-matter of claim 1 according to these requests is not entitled to the date of the priority document.

Claim 1 according to the third auxiliary request comprises feature (b) with the additional indication that the pivot shaft is mounted close **above** the underside of the container (emphasis added). However, the sole fact that the shaft is "above" the underside of the container does not alter the conclusion above, since the selection of two extra features having no interrelationship still remains arbitrary in the sense that it is not directly derivable from the priority document that they can be taken in isolation from the other features shown in the drawings.
Thus, the subject-matter of claim 1 according to the third auxiliary request is not entitled to the date of the priority document either.

2.4 Consequently, the effective date of the subject-matter of claims 1 according to all requests is the filing date of the contested patent.

3. *Novelty:*

3.1 D16 was published on 13 November 1997, thus before the filing date of the contested patent (18 December 1997). Therefore, D16 is state of the art citable under Article 54(2) EPC against the subject-matter of claim 1 of all requests.

3.2 The subject-matter of claim 1 according to all requests refers to the first embodiment of the contested patent. However, D16 is a family member of the priority document which discloses the first embodiment of the contested patent.

3.3 Consequently, D16 is novelty destroying for the subject-matter of claim 1 of all requests on file. This point has not been disputed by the Appellant. Hence, all requests must fail.

4. *Further observations:*

In the present case although D16 and thus the priority document are novelty destroying for the subject-matter of claim 1 according to all requests, the entitlement to priority cannot be acknowledged. This is due to the fact that there is no exact correspondence between the requirements of Article 123(2), an independent claim has to satisfy having regard to the priority document in order to be entitled to priority and the requirements of novelty having also regard to the priority document. In the present case, it was not directly derivable from the priority document that features a) and b) taken from the drawings could be isolated from the other features shown therein. Moreover, the structure and the function of these features were not clearly, unmistakably and fully derivable from the drawings, so that claim 1 with these two extra features does not comply with the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The registrar:

The Chairman:

G. Magouliotis

M. Ceyte