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**Datasheet for the decision
of 22 April 2008**

Case Number: T 1126/07 - 3.2.06

Application Number: 99660074.8

Publication Number: 0972743

IPC: B66F 11/04

Language of the proceedings: EN

Title of invention:

Product series of trailer mounted aerial work platforms

Patentee:

Dinolift Oy

Opponent:

Teupen Maschinenbau GmbH

Headword:

-

Relevant legal provisions:

EPC Art. 123(2), (3)

Relevant legal provisions (EPC 1973):

-

Keyword:

"Admissibility of amendments (Main and auxiliary request) -
no"

Decisions cited:

-

Catchword:

-



Case Number: T 1126/07 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 22 April 2008

Appellant: Dinolift Oy
(Patent Proprietor) Raikkolantie 145
FI-32210 Loimaa (FI)

Representative: Pelin, Torolf Johannes
Berggren Oy Ab
P.O. Box 16
FI-00101 Helsinki (FI)

Respondent: Teupen Maschinenbau GmbH
(Opponent) Marie Curie Str. 13
D-48599 Gronau (DE)

Representative: Tarvenkorn, Oliver
Spieker & Jaeger
Hafenweg 14
D-48155 Münster (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 23 May 2007
revoking European patent No. 0972743 pursuant
to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: P. Alting Van Geusau
Members: G. Kadner
G. Weiss

Summary of Facts and Submissions

I. The mention of grant of European patent No. 0 972 743 in respect of European patent application No. 99660074.8 filed on 6 May 1999 and claiming a Finnish priority from 13 July 1998 was published on 23 July 2003 with one claim which reads as follows:

"A method of manufacturing any one model selected from among a plurality of models forming a range of work platform products, wherein each model embodies a trailer-mounted aerial work platform including a hoist unit, said hoist unit comprising an extendable boom unit selected from among a plurality of extendable boom units and mounted on a base unit by means of an appropriately selected slew device unit, the method including the steps of:

- providing an extendable boom unit selected from said plurality thereof in accordance with prescribed operational requirements, whereby said plurality comprises at least one extendable boom unit of telescopic construction and at least one extendable boom unit of combined articulating and telescopic construction;
- providing a corresponding slew device unit selected from a plurality thereof, whereby each slew device unit comprised within said plurality is compatible with a corresponding one of said plurality of extendable boom units and the slew device unit actually selected is compatible with the extendable boom unit selected in the preceding step;

- providing a base unit; and
- thereupon assembling the hoist unit by:
 - mounting the selected slew device unit on the base unit; and
 - assembling the proximal end of the selected extendable boom unit to said slew device unit."

II. Notice of opposition was filed against the granted patent and revocation of the patent on the grounds of Article 100(a), (b) and (c) EPC was requested.

By decision posted on 23 May 2007, the Opposition Division revoked the patent. Claim 1 according to the main request (patent as granted) and auxiliary request at least violated Article 123(2) EPC and also did not meet the requirement of inventive step. The Opponent's request for apportionment of costs was rejected.

III. Notice of appeal was filed against this decision by the Patentee (Appellant) on 7 July 2007 and the appeal fee was paid on the same day. With its grounds of appeal filed on 21 September 2007, the Appellant pursued its request for maintenance of the patent.

IV. In a communication accompanying the summons to oral proceedings the Board expressed its preliminary view that the Opposition Division's decision appeared correct and that it did not see any reason to change the decision of the department of first instance.

- V. With letter received on 19 March 2009 the Appellant informed the Board that it would not appear at the oral proceedings.
- VI. Oral proceedings were held on 22 April 2009 in which the Appellant was not present as it had announced.
- VII. The Appellant had requested in writing that the decision under appeal be set aside and the patent be maintained as granted (main request) or alternatively that the patent be maintained in amended form on the basis of claim 1 filed with letter dated 28 February 2007.

The Opponent (Respondent) who was present at the oral proceedings requested that the appeal be dismissed. Furthermore he requested an apportionment of costs.

Claim 1 according to the auxiliary request reads as follows:

"A method of manufacturing any one model selected from among a plurality of models forming a range of work platforms, wherein each model embodies a haulable passenger hoist, the hoist comprising an extendable boom construction selected from among a plurality of extendable boom constructions and mounted on a base module by means of an appropriately selected turning device construction, the method including the steps of:

- providing an extendable boom construction selected from said plurality thereof in accordance with prescribed operational requirements, whereby said plurality comprises a telescopic construction and a combined articulating and telescopic construction,

wherein said telescopic construction comprises a boom module (3) and a base module (1) combined with a first turning device (2), and said combined articulating and telescopic construction comprises a boom module (3) and a base module (1) combined with a second turning device (11) and articulated arms (10);

- providing a corresponding turning device construction selected from a plurality thereof, whereby each turning device construction comprised within said plurality is compatible with a corresponding one of said plurality of extendable boom constructions and the turning device construction actually selected is compatible with the extendable boom construction in the preceding step, wherein the turning device constructions are selected between the first turning device and the second turning device combined with the articulated arms;
- providing the base module; and
- thereupon assembling the hoist by:
 - mounting the selected turning device construction on the base module; and
 - assembling the proximal end of the selected boom module to said turning device construction."

VIII. In support of its requests the Appellant, in its written submissions, contested any inadmissible amendment to the claim. The term "articulated boom construction" in this

technical field did not extend the meaning of "knuckle boom construction". The further added features were the direct result of the change of claim category from the originally filed product claim to a method claim. These features were apparent from the figures and the description. The selection of "a boom construction of a certain size class" would clearly follow from the description of a modular construction consisting of a boom unit, a base unit and a turning device. The skilled person would not adhere to the strict literal interpretation, but would find no technically ambiguous difference between the changed expressions.

IX. The arguments of the Respondent can be summarized as follows:

The claims according to the main request and the auxiliary request had been extended in an inadmissible manner when compared with the content of the application as originally filed or the claim as granted. At least the change of the terms "knuckle boom construction" to "articulating boom construction" and "slew device" to "turning device" violated Article 123(2) EPC since the new expressions were not disclosed in the application as filed and had a broader meaning than the originally used words. Moreover, the deletion of "extendable" in the auxiliary request extended the scope of protection and was therefore inadmissible under Article 123(3) EPC. Lack of disclosure existed also in respect of the method claim and of the step of a selection of a model from a plurality of models.

An apportionment of costs was justified because the Appellant already in the opposition proceedings and

again in appeal had requested oral proceedings but did not take part when it was held. The Respondent was obliged to appear at the oral proceedings in order to be able to react in case the Appellant filed new requests because it could not be sure that the Appellant would actually be absent as it had announced.

Reasons for the Decision

1. The appeal is admissible.
2. *Amendments (Article 123(2), (3) EPC)*
 - 2.1 *Main request*

The Board agrees with the Respondent's opinion in view of the inadmissible extensions of claim 1. With its statement of grounds of appeal the Appellant filed an internet document "Product Selection Guide PDF" by JLC Australia (<http://www.jgl.com.au/products.html>) (E10) as evidence that "knuckle boom construction" would have the same meaning as "articulating boom construction". However the publication date of that document is ambiguous and anyway it does not bear a date before the priority date of the patent in suit.

In particular cases "knuckle" may have the same meaning as "articulating". However, the generally understood literal meaning of "knuckle" is a motion within one plane whereas "articulated" can also include a motion in a further plane. There is no disclosure in the application which would unambiguously define that both terms concern identical technical features.

2.2 *Auxiliary request*

A similar deficiency is implied in the change of "slew device unit" to "turning device construction" because "turning" has a broader meaning than "slew" which rather means a motion in one plane, and "unit" is a narrower expression than "construction" which does not define any physical shape and also can be composed of several "units".

Furthermore the deletion of the term "extendable", which was included in granted claim 1, broadens the scope of protection and therefore violates Article 123(3) EPC.

- 2.3. For these reasons, neither the main request nor the auxiliary request are allowable. In the absence of an allowable request there is no basis for maintenance of the patent.

3. *Apportionment of costs*

- 3.1 According to Article 104(1) EPC each party to the proceedings shall bear the costs it has incurred. The Board does not see a reason to deviate from that principle since it is not identifiable that an apportionment of costs would be caused by reasons of equity.

The Respondent argued that the Appellant had requested oral proceedings, firstly in opposition and secondly in appeal, but both times did not appear at the oral proceedings. Although having announced that the Appellant would not be present and despite this

announcement the Respondent could not rely on it and had to attend as a precaution in case a new request would be filed during or shortly before the oral proceedings.

The Board concludes that the Appellant had, in each proceedings, submitted a declaration of its absence in the proceedings early enough. Its actions were compliant with the regulations of the EPC, and therefore no abuse of the procedure was committed which could justify an apportionment of costs. The Respondent was informed in due time, and, since the announcement was sent by a European Patent Attorney acting in his professional capacity, reliance could be placed on that announcement, such that the Respondent was not obliged to appear at the oral proceedings as a precautionary measure. Therefore it has to bear its own costs incurred.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau