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**Datasheet for the decision  
of 14 February 2014**

**Case Number:** T 1102/11 - 3.3.05  
**Application Number:** 99900207.4  
**Publication Number:** 1044044  
**IPC:** B01D1/00, F26B3/10, F26B17/10,  
F26B21/02  
**Language of the proceedings:** EN

**Title of invention:**

METHOD AND APPARATUS FOR THE REMOVAL OF LIQUID FROM  
PARTICULATE MATERIAL

**Patent Proprietor:**

ASJ Holding ApS

**Opponent:**

BMA Braunschweigische Maschinenbauanstalt AG

**Headword:**

**Relevant legal provisions:**

EPC Art. 107, 108, 111(1), 123(2), 123(3)

**Keyword:**

Amendments - added subject-matter (no) - broadening of claim  
(no)  
Appeal decision - remittal to the department of first instance  
(yes)

**Decisions cited:**

T 0039/05, T 2532/11

**Catchword:**



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Case Number: T 1102/11 - 3.3.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 14 February 2014**

**Appellant:**  
(Patent Proprietor)

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**Decision under appeal:**

**Decision of the Opposition Division of the  
European Patent Office posted on 28 March 2011  
revoking European patent No. 1044044 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman:** G. Rath  
**Members:** H. Engl  
P. Guntz

## **Summary of Facts and Submissions**

- I. European patent EP-B-1 044 044 was granted with 10 claims. Date of publication and of mention of the grant of the patent was the 26 March 2008 (Bulletin 2008/13).

Independent claims 1 and 4 read as follows:

"1. Method for the removal of liquid from particulate material by evaporation through the supply of heat transferred mainly by superheated vapours or steam of the liquids existing in the particulate material, said method taking place in a substantially closed system, characterized in that the particulate material is supplied continuously to a process chamber which is in the form of an annular or partly annular chamber (1) lying in a substantially horizontal manner, that the superheated steam is led from below up through openings (11) in a bottom (10) in the annular chamber, so that the particulate material is brought into movement by the superheated steam, and such that a transport of the particulate material occurs through the annular chamber (1)."

"4. Apparatus for the execution of the method according to claim 1, consisting of a substantially closed container which has means for the introduction of particulate material from which liquid is to be removed, means for the removal of dried particulate material, means for the circulation in the container of superheated vapours, means for the supply of thermal energy to these vapours and means for the separation of dust particles from these vapours, characterized in that the container contains a process chamber which lies

substantially horizontal and which is configured as an annular or partly annular chamber (1), said chamber having a bottom (10) through which steam can permeate, in that openings (11) are provided in the bottom (10), and in that the bottom has a relatively greater opening area close to the outer side of the annular chamber than close to the inner side of the chamber, and a relatively greater opening area in the vicinity of a supply opening (5) for the particulate material than in the vicinity of a discharge opening (6) for the particulate material and that the openings (11) in the bottom (10) are shaped in such a manner that an influx of steam takes place partly at right-angles to the bottom and partly at angles to the bottom (10) of between 0° and 90°, and preferably between 0° and 80° and particularly between 0° and 30° in different directions, so that a rotating movement and possibly a movement in the annular chamber's peripheral direction is promoted in the particulate product."

Dependent claims 2 and 3 define further embodiments of the method of claim 1.

Dependent claims 5 to 10 define further embodiments of the apparatus of claim 4.

- II. The European patent was opposed on the grounds of opposition according to Article 100(a) EPC (lack of novelty and lack of inventive step) and Article 100(b) EPC (insufficiency of disclosure).
- III. The opposition division revoked the patent because none of the pending requests (main request and auxiliary requests B, D, G and H) satisfied the requirements of

Article 123(2) and (3) EPC. In particular, claim 1 of auxiliary request H was considered to infringe Article 123(3) EPC.

IV. The patentee (henceforth: the appellant) filed a notice of appeal by letter dated 17 May 2011. The grounds of appeal, received by letter dated 13 July 2011, were accompanied by new claims constituting a main and an auxiliary request.

V. The independent claim of the main request reads as follows:

"1. Apparatus for the execution of a method for the removal of liquid from particulate material by evaporation through the supply of heat transferred mainly by superheated vapours or steam of the liquids existing in the particulate material, said method taking place in a substantially closed system wherein the particulate material is supplied continuously to a process chamber which is in the form of an annular or partly annular chamber (1) lying in a substantially horizontal manner, that the superheated steam is led from below up through openings (11) in a bottom (10) in the annular chamber, so that the particulate material is brought into movement by the superheated steam, and such that a transport of the particulate material occurs through the annular chamber (1), said apparatus consisting of a substantially closed container which has means for the introduction of particulate material from which liquid is to be removed, means for the removal of dried particulate material, means for the circulation in the container of superheated vapours, means for the supply of thermal energy to these vapours and means for the separation of dust particles from these vapours, characterized in that the container

contains a process chamber which lies substantially horizontal and which is configured as an annular or partly annular chamber (1), said chamber having a bottom (10) through which steam can permeate, in that openings (11) are provided in the bottom (10), and in that the bottom has a relatively greater opening area close to the outer side of the annular chamber than close to the inner side of the chamber, and a relatively greater opening area in the vicinity of a supply opening (5) for the particulate material than in the vicinity of a discharge opening (6) for the particulate material and that the openings (11) in the bottom (10) are shaped in such a manner that an influx of steam takes place partly at right-angles to the bottom and partly at angles to the bottom (10) of between 0° and 90°, and preferably between 0° and 80° and particularly between 0° and 30° in different directions, so that a rotating movement and possibly a movement in the annular chamber's peripheral direction is promoted in the particulate product."

Dependent claims 2 to 8 define particular embodiments of the apparatus of claim 1.

- VI. The respondent (henceforth: the opponent) filed its observations by letter dated 16 November 2011.
- VII. The board issued a communication, dated 16 January 2014, in which it gave a preliminary opinion on the admissibility of the appeal and on procedural matters.
- VIII. By letter dated 10 February 2014, the appellant withdrew its request for oral proceedings pursuant to Article 116 EPC.

IX. The arguments of the appellant, insofar as they are relevant for the instant decision, may be summarised as follows:

Claim 1 of the main request basically corresponded to claim 1 of auxiliary request H pending before the opposition division. It was based on a combination of granted claims 4 and 1 in which the wording "the method according to claim 1" in granted claim 4 was substituted by a word-for-word citation of claim 1.

Therefore, no objections under Article 123(2) or (3) EPC would arise.

X. The arguments of the respondent, insofar as they are relevant for the instant decision, are as follows:

*Regarding the admissibility of the appeal:*

In first instance proceedings, the patentee had filed nine sets of claims in the written procedure and three more sets of claims during the oral proceedings. None of them were found, after discussion, to meet the requirements of Article 123(2) and/or 123(3) EPC. The new claims filed by the appellant with the statement of grounds of appeal were not drafted in order to overcome objections of which the appellant was informed only upon receipt of the contested decision. Filing new sets of claims in the appeal procedure which could and should have been filed already in the first instance was an abuse of the procedure. The appeal should therefore be rejected as inadmissible.

*Regarding Article 123(2), (3) EPC:*

Claim 4 as originally filed and as granted referred



back only to the respective claim 1, not to claims 2 and/or 3. No combination of the features of claims 1, 2 and 4 was originally disclosed. However, claim 2 in accordance with the main request was exactly directed at such a combination of features. Therefore, the subject-matter of claim 2 inadmissibly extended beyond the original disclosure.

#### XI. Requests

The appellant requested that the contested decision be set aside and the European patent be maintained in amended form on the basis of the claims in accordance with the main request filed with the statement of grounds of appeal. As a supplementary request, the appellant requested that the board decides on Article 123(2) and 123(3) EPC and remits the case to the opposition division for further prosecution. Oral proceedings were requested in case the board took a decision contrary to the main or supplementary request.

The respondent requested that the appeal be rejected as inadmissible or, in the alternative, that the appeal be dismissed.

### **Reasons for the Decision**

#### 1. Admissibility

- 1.1 The respondent has questioned the admissibility of the appeal because it was exclusively based on new requests (new claims). The respondent argued that these requests could - and indeed should - have been filed during the first instance proceedings.

1.2 The board considers that the filing of the present sets of amended claims is a legitimate way of addressing and overcoming the deficiencies identified in the contested decision. Specific objections were raised by the opposition division against claim 1 of auxiliary request H (see points 21.0 to 21.5 of the decision). To the extent that it is adversely affected by the decision - which is obviously the case here - the appellant is entitled to have it reviewed in appeal. The board thus cannot see an abuse of the procedure.

1.3 The respondent referred to decision T 39/05 (of 22 November 2006; see reasons point 1), in which the board examined the question of the admissibility of an appeal which was exclusively based on new requests. The board considered that the appellant did not defend any of the requests rejected by the first instance decision and concluded that the appellant was not adversely affected by the contested decision and thus not entitled to appeal ("mangelnde Beschwerdeberechtigung") (Article 107 EPC).

However, the board in T 39/05 also observed (see reasons point 1.1.1, last sentence) that an appeal based entirely on new requests may nevertheless be admitted, provided that these requests constituted a serious attempt at remedying objections of which the appellant was informed only with the contested decision and which were clearly allowable. The appeal brief should make clear which were the objections to be overcome and why a request filed in appeal could not have been filed before the first instance.

1.4 This board considers that the case before it differs from the situation in T 39/05, for the following reasons. In the cited case the appellant had expressly

admitted that the requests rejected by the contested decision were in fact not allowable. Moreover, in T 39/05 the appellant had failed to argue in what possible relationship to the contested decision the new requests stood. In particular, the appellant had not pointed out which objections were supposed to be overcome by the new requests (see T 39/05, reasons point 1.1.2).

In contrast, the present appellant did react to the objections and the reasoning given in the contested decision by filing, as its main request, a new claim 1 which corresponds to auxiliary request H before the opposition division and which combines the features of claims 1 and 4 word-for-word. This claim directly addresses the objections raised by the opposition division in points 21.3 and 21.4 of the contested decision. Supporting arguments are submitted in the appeal brief (page 1). In the board's view, the appellant could not have reacted to the opposition division's specific objections before having been informed of the reasons. In this case there is a sufficient link between the decision of the first instance and the new request.

1.5 Therefore, the appeal meets the requirements of Articles 107 and 108 EPC and is admissible.

2. Amendments

2.1 *Main request*

Claim 1 is based on a combination of the features of method claim 1 and apparatus claim 4 in the versions as originally filed and published as WO-A-99/37 374. An apparatus with said combination of features is clearly

and unambiguously derivable from the original disclosure because the apparatus claimed in accordance with claim 4 is expressly characterised as being designed "for the execution of the method of claim 1".

Contrary to the respondent's arguments, claim 2 of the main request does not contravene Article 123(2) EPC either, because originally filed claim 2 depends on claim 1 and thus provides a basis for the combination of the features of claims 1 and 2. The combination of features of claim 1 + 2 with those of claim 4 is allowable for the reasons given above.

Dependent claims 2 to 8 are based on the respective claims 2 and 5 to 10, in the version as originally filed.

The requirements of Article 123(2) EPC are thus met.

- 2.2 The claims of the main request do not extend the scope of protection conferred by the claims as granted, because the apparatus as defined in claim 4 as granted was designed "for the execution of the method of claim 1".

The requirements of Article 123(3) EPC are thus met.

2.3 *Auxiliary request*

As the main request meets the requirements of Article 123(2) and (3) EPC, there is no need to consider the auxiliary request.

3. Remittal

- 3.1 The impugned decision is exclusively based on objections under Article 123(2) and (3) EPC. For the reasons given under point 2 above, these objections have been rendered moot by the amended claims in accordance with the main request. Therefore, the contested decision must be set aside.
- 3.2 Under Article 111(1) EPC the board of appeal may either decide on the appeal or remit the case to the department which was responsible for the decision appealed.
- 3.3 The board took due note of the appellant's main request to maintain the patent on the basis of the claims filed with the appeal brief and marked as "main request". As a supplementary request only the board was requested to remit the case after taking a (positive) decision on the formal allowability of the proposed amendments under Article 123(2) and (3) EPC.

In the instant case, the board considers it appropriate to follow the subsidiary request of the appellant and to remit the case to the department of first instance, to allow assessment of the unexamined issues of sufficiency of disclosure, novelty and inventive step at two levels of jurisdiction.

## **Order**

### **For these reasons it is decided that:**

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

The Registrar:

The Chairman:



C. Vodz

G. Raths

Decision electronically authenticated