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

Case Number: T 1278/11 - 3.2.04

Application Number: 03000852.8

Publication Number: 1330952

IPC: A01K45/00

Language of the proceedings: EN

Title of invention:

A method and system for transporting live poultry

Patent Proprietor:

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Zanotti, Massimo

Opponent:

STORK PMT B.V.

Headword:

Relevant legal provisions:

EPC Art. 122(3)
RPBA Art. 13(1)

Keyword:

"Main request - claim 6 - unallowable added subject-matter (yes)"
"Auxiliary request - belated filing - not admitted into the proceedings"

Decisions cited:

Catchword:



**Beschwerdekammern
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Chambres de recours**

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Case Number: T 1278/11 - 3.2.04

**D E C I S I O N
of Technical Board of Appeal 3.2.04
of 14 January 2014**

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 April 2011 concerning maintenance of the
European Patent No. 1330952 in amended form.**

Composition of the Board:

Chairman: A. de Vries
Members: C. Scheibling
C. Heath

Summary of Facts and Submissions

I. In its interlocutory decision posted 18 April 2011, the Opposition Division found that, taking into consideration the amendments made by the patent proprietor, the European patent and the invention to which it relates met the requirements of the EPC. On 10 June 2011 the Opponent (Appellant) filed an appeal and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 18 August 2011.

The patent was opposed on the grounds of Article 100(a), (b) and (c) EPC.

II. Oral proceedings before the Board took place on 14 January 2014.

III. The Appellant (Opponent) requests that the decision under appeal be set aside and that the patent be revoked.

IV. The Respondent (Proprietor) requests that the appeal be dismissed, in the alternative that the decision under appeal be set aside and that the patent be maintained in the version of auxiliary request 1 filed during the oral proceedings.

V. Claim 6 as held allowable by the first instance reads as follows:

"A system for transporting live poultry in a transporting unit (1) including a supporting frame (2) and a series of drawer-type cages (4), which are open at the top and are carried by the supporting frame (2) in a mutually superimposed condition, and a cover (12)

to be applied on the top of the supporting frame (2), said supporting frame (2) being arranged to enable at least partial extraction of said drawer-type cages (4) in the direction of one side (1a) of the transporting unit (1) other than said front side (1b) characterized in that the front side (1b) defines, above a drawer-type cage (4) set in a lowermost position of said transporting unit (1), an unobstructed front aperture at which the live poultry are introduced into said drawer-type cages (4) set within said supporting frame (2), said unobstructed front aperture extending from the drawer-type cage (4) set in the lowermost position (2), between a pair of vertical elements (10) and delimited by a horizontal element (11) provided on the front side (1b) of the supporting frame (2) which prevents the drawer-type cage (4) set in the lowermost position from coming out, to the top of the frame (2)."

- VI. Claim 6 of the auxiliary request adds with respect to claim 6 of the main request the following final feature: "wherein the top of the frame (2) has an opening communicating with said unobstructed front aperture".
- VII. The Appellant mainly submitted that claim 6 of the main request has been amended such that it contains subject-matter which extends beyond the content of the application as filed.
- In particular, the term "unobstructed front aperture" has no basis in the description as filed, nor can it be derived from figure 5. Furthermore, the definition of this term given by claim 6 refers to the drawer-type cage in the lowermost position; however there is no drawer-type cage shown in figure 5. The fact that the front aperture is connected to the aperture provided in the top of the frame and that the front opening gives

access to an internal open structure of the frame can be identified by the skilled person as essential technical features for obtaining the desired effect of the invention with respect to the embodiment disclosed in figure 5. No corresponding features have however been included into claim 6.

There is neither a justification for the late filing of the auxiliary request, nor is the subject-matter of the amended claim 6 of this request clearly allowable.

Therefore this request should not be admitted into the proceedings.

VIII. The Respondent mainly argued that it is clear from figure 5 what the term "unobstructed front aperture" should mean. The position of the lowermost drawer-type cage is directly derivable from figures 1 to 4. How the front aperture is configured can directly and unambiguously be derived from figure 5.

That there is an opening in the top of the frame is implicit for the skilled person, because claim 6 refers to a cover 12 to be applied on the top of the supporting frame. Thus claim 6 clearly includes a top opening. Likewise it is implicit for the skilled person that the aim of providing an unobstructed front opening is to give access to an unobstructed internal structure.

The auxiliary request has been filed during the oral proceedings for tactical reasons. Claim 6 of this request has been amended only in order to overcome the objection raised by the Appellant under Article 123(2) EPC. Thus the Appellant should not have been taken by surprise.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request - objection based on Article 123(2) EPC*
 - 2.1 Claim 6 of the main request has been amended with respect to claim 6 as filed by the addition of all the features of the characterising part, except for the feature that the poultry are introduced into said drawer-like cages at the front side, which was already present in claim 6 as originally filed.
 - 2.2 These new features introduce an "unobstructed front aperture". This expression is not used in the application as filed. As admitted by the Respondent, the sole possible basis for this amendment is Figure 5.
 - 2.3 According to the case law, it is not prohibited to amend a claim to include features from the drawings, provided the structure and function of such features are clearly, unmistakably and fully derivable from the drawings by the skilled person and not at odds with the other parts of the disclosure; nor can any element be dropped (Case Law of the Boards of Appeal, 7th edition, II.E.1.5).
 - 2.4 Claim 6 of the main request defines the term "unobstructed aperture" inter alia with respect to "the drawer-like cage (4) set in the lowermost position". However, figure 5 solely shows the supporting frame but no drawer-like cages. Thus, if figure 5 might provide a basis for an unobstructed aperture, it does not do so in relation to the lowermost drawer-like cage. Although figures 1 to 4 show the supporting frame and the

drawer-like cages, these figures show side views of the transport system and fail to show the front aperture in relation to the drawer-like cages, so that they, too, are unable to define the relation between the lowermost drawer-like cage and the front aperture. Consequently, figure 5 alone cannot form an adequate basis for the feature of an obstructed aperture. As this is the only cited basis and there is no further basis evident in the text or other parts of the originally filed documents there is thus no original basis for defining clearly and unmistakably the dimensions of the "unobstructed front aperture" with respect to the lowermost drawer-like cage.

2.5 Moreover, according to the application as filed the aim of the invention is to provide a simplified and more convenient loading operation (see the paragraph bridging pages 2 and 3 of the filed application corresponding to paragraph [0007] of the patent). When trying to derive the structure and function of the supporting frame from the embodiment shown in figure 5, the skilled person would consider that, in order to achieve the desired result, it is not only necessary to have an aperture in the front side but also an aperture on the top of the supporting frame which is contiguous with the front opening as shown in figure 5, that is with the top and front opening in fact forming a single continuous opening extending over the area of the top front edge of the frame. This is especially important when loading the uppermost drawer-like cage, which must take place through the top opening, as may be inferred from page 6, line 5 to page 7, line 2 of the application as filed. Additionally, as also shown in figure 5, the inner space behind the unobstructed front aperture must also be unobstructed in order to achieve the expected result. For example, runners for the

drawers are shown on the side of the frame, and thus do not occupy any inner space where they would obstruct access.

Since these features, which can also be inferred from figure 5, are in structural and functional relationship with the "unobstructed front aperture" this latter feature cannot be incorporated into claim 6 in isolation from them.

2.6 In this respect the Respondent contended that claim 6 may also encompass an embodiment comprising a horizontal element or bar at the top edge of the front opening for delimiting the front aperture with respect to the top of the frame. Such an embodiment would be supported by the paragraph bridging pages 5 and 6 of the originally filed description, which refers generally to horizontal elements, in the plural, for preventing the drawer type cages from coming out. However this is inconsistent with claim 6 which comprises only a single such element for the lowermost cage.

Such an embodiment, with a bar extending along the top front edge of the frame between top and front openings, is however not disclosed in either figures or text of the application as filed. It cannot therefore be relied upon to argue the presence of an unobstructed front aperture in its own right separated from that on the top.

Finally, the Board is unconvinced that the fact that claim 6 provides for a cover to be applied on the top of the supporting frame, implies (as asserted by the Respondent) that there must be an unobstructed aperture in the top side of the supporting frame, nor is it convinced that the skilled person would consider it as

implicit that an "unobstructed front aperture" necessarily gives access to an "unobstructed inner space" of the supporting frame.

2.7 Accordingly, claim 6 of the main request has been modified in such a way that it contravenes the requirements of Article 123(2) EPC. Consequently, the main request must fail.

3. *Auxiliary request - admissibility into the proceedings*

3.1 At the end of the oral proceedings, after the Board announced that it considered that the amendments to claim 6 did not meet the requirements of Article 123(2) EPC, the Respondent presented an auxiliary request.

3.2 It is well established case-law that a late-filed request may be admitted and considered at the Board's discretion; see Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA). Under that article the Board is afforded discretion in admitting and considering such amendments.

An approach frequently adopted by the Boards when exercising their discretion in admitting amendments filed during oral proceedings can be summarized as follows: the late filing of a new request is justifiable if its filing is occasioned by an argument or a point raised for the first time in the course of the oral proceedings.

Furthermore, in order to be admissible, an amended claim belatedly filed in oral proceedings must be clearly allowable by virtue of a clearly admissible amendment. It must be immediately apparent to the Board, with little or no investigative effort on its

part, that amendments successfully address the issues raised without giving rise to new ones (see Case Law of the Boards of Appeal; IV.E.4.2.3 a).

- 3.3 In the present case, the question of added-subject matter was already an issue in the first instance's proceedings and raised again by the Appellant in its grounds of appeal. The Board mentioned it in its communication as one of the issues to be discussed during the oral proceedings.

The fact that the Respondent filed this auxiliary request for the first time at the end of the oral proceedings is thus not justified by the course of the appeal proceedings. That he may, by his own admission, have done so for "tactical reasons" does not constitute in any way a justification in the sense of established case law, where equitability is the underlying concern. On the contrary, a party that files requests at a late stage purely for tactical reasons does so to gain an advantage over another party. Such behaviour is far from fair or equitable.

- 3.4 As indicated with respect to claim 6 of the main request the fact that "the top of the frame (2) has an opening communicating with said unobstructed front aperture" is not the sole missing feature with respect to the set of features disclosed in combination by figure 5 and which are structurally or functionally interrelated.

As stated above, figure 5 also discloses that the top opening is unobstructed and contiguous with the front opening while both give access to an unobstructed internal open structure. Moreover, neither the problem of linking the definition of the front opening to the

lowermost drawer-like cage, nor that of the possible presence of a horizontal bar at the top of the front opening have been addressed. Consequently, it is not immediately apparent that the subject-matter of claim 1 of the auxiliary request as amended successfully addresses all the issues raised with respect to the main request.

3.5 Accordingly, since there is no justification for the belated filing of amendments and since these amendments do not clearly address all the issues raised, the Board decided not to admit the auxiliary request into the proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated