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**Datasheet for the decision
of 30 May 2018**

Case Number: T 1179/13 - 3.2.04

Application Number: 08154450.4

Publication Number: 1935239

IPC: A01K5/00, A01F29/00

Language of the proceedings: EN

Title of invention:

Apparatus and method for separating and mixing feed for live-
stock

Patent Proprietor:

Trioliet Mullos B.V.

Opponent:

GEA Farm Technologies GmbH

Headword:

Relevant legal provisions:

EPC Art. 56, 76(1), 83, 123(2)
RPBA Art. 12(4)

Keyword:

Inventive step - auxiliary request (yes)
Divisional application - added subject-matter (no) - after
amendment
Sufficiency of disclosure - (yes)
Late-filed evidence - admitted (no)

Decisions cited:

G 0003/14, G 0007/95

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1179/13 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 30 May 2018

Appellant: GEA Farm Technologies GmbH
(Opponent) Siemensstrasse 25-27
59199 Bönen (DE)

Representative: KNH Patentanwälte Neumann Heine Taruttis PartG
mbH
Postfach 10 33 63
40024 Düsseldorf (DE)

Respondent: Trioliet Mullos B.V.
(Patent Proprietor) Hinmanweg 19
7575 BE Oldenzaal (NL)

Representative: De Vries & Metman
Overschiestraat 180
1062 XK Amsterdam (NL)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 March 2013
rejecting the opposition filed against European
patent No. 1935239 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
W. Van der Eijk

Summary of Facts and Submissions

- I. The appellant-opponent lodged an appeal ,received on 21 May 2013, against the decision of the Opposition Division of the European Patent Office posted on 19 March 2013 rejecting the opposition filed against European patent No. 1 935 239 pursuant to Article 101(2) EPC, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 18 July 2013.
- II. Opposition was filed against the patent as a whole under Article 100(a) based on lack of inventive step, under Article 100(b) on insufficiency of disclosure and under Article 100(c) based on unallowable extension of subject-matter.

The Opposition Division held that the grounds for opposition mentioned in Article 100(a), 100(b) and 100(c) EPC did not prejudice the maintenance of the patent unamended, having regard *inter alia* to following documents:

- (D4) DE 93 03 751 U
- (D5) US 3 830 438 A
- (D10) DE 28 10 676 A1
- (D11) DE 43 19 507 A1
- (D18) EP 1 210 865 A2

- III. The appellant-opponent filed the following further documents with the statement of grounds:

- (B1) MIX FEEDER, Owner's Manual Program Version MUL17.
- (B2) Instruksjonsbok "Rundballenkutter RBK 1202"
- (B3a) Delivery note of 26 February 1999

- (B3b) German translation of B3a
- (B4a) Delivery note of 10 March 1999.
- (B4b) German translation of B4a
- (B5) Technical drawing. Plant delivered to Mr. Hevelplund with translation (B5b).
- (B6a) O. Christensen: "Robot overtager fodringer", Landsbladet Agro, 3 September 1999.
- (B6b) German translation of B6a.
- (B7) WO 91/05460 A1

- IV. The appellant-opponent requests that the decision under appeal be set aside and that the European patent No. 1 935 239 be revoked.

The respondent-proprietor requests that the appeal be dismissed and European patent No. 1 935 239 be maintained as granted (main request) or in amended form on the basis of auxiliary request 1, as filed during the oral proceedings before the Board, or auxiliary requests 2-4, filed with letter of 25 April 2018.

Both parties request oral proceedings.

- V. Oral proceedings were held on 30 May 2018.

- VI. The independent claims according to the relevant requests read as follows:

(a) Main request - claims as granted

"1. An apparatus for separating and mixing feed for live stock, comprising at least one unit (1) for processing feed, which unit comprises a conveyor alley (2) for receiving one or more bales (3) of feed, which conveyor alley comprises conveying means (5) for conveying the received bale(s) of feed from an inlet

side to a discharge side, and separating means for separating feed from a bale that has been conveyed to the discharge side, said apparatus furthermore comprising a mixing bin (26) for mixing feed components into a feed mixture and a discharge unit (18) for supplying separated feed to the mixing bin, wherein the separating element is configured as a cutting unit arranged for separating a slice of feed from the end facing towards the discharge side of the bale that is present at the discharge side **characterized in that** the cutting unit is provided with a roller (38) rotatably mounted in the cutting unit (17) for discharging separated feed from the cutting unit towards the discharge unit (18)."

"**22.** A method for separating and mixing feed for live stock, wherein one or more bales (3) of feed is (are) placed on one or more conveyor alleys (2), the bale(s) placed on the conveyor alley(s) are conveyed from an inlet side to a discharge side, and feed is separated by a cutting unit (17) from a bale that has been conveyed to the discharge side, which separated feed is mixed into a feed mixture in a mixing bin (26), wherein a slice of feed is separated from the end facing towards the discharge side of the bale that is present at the discharge side **characterized in that** the separated slice [sic] of feed is discharged from the cutting unit (17) by a rotatably mounted roller towards a discharge unit (18) for supplying separated feed to the mixing bin."

(b) Auxiliary request 1 - filed on 30 May 2018.

Claim 1 is as in the main request.

Claim 22 is amended vis-a-vis claim 22 of the main request as follows (emphasis added by the Board to indicate modified text)

"... characterized in that the cutting unit is provided with a roller (38) rotatably mounted in the cutting unit (17) and the separated ~~slide~~-slice of feed is discharged from the cutting unit (17) by a ~~rotatably mounted~~-the roller towards a discharge unit (18) for supplying separated feed to the mixing bin."

VII. The appellant-opponent argued as follows:

The patent does not sufficiently disclose the invention as claimed by dependent claims 8 and 13. The subject-matter of claims 1 and 22 of all requests contain added subject-matter. The subject-matter of claims 1 and 22 according to all requests is not inventive in the light of documents D4, D5, D10, D11 and D18. It is not new or not inventive also taking into account the new evidence B1-B7 which should be admitted as highly relevant.

VIII. The respondent-proprietor argued as follows:

The patent discloses the invention in a manner sufficiently clear and complete for it to be carried out, including the invention as claimed by claims 8 and 13. None of the claims contains added subject-matter. Consent is not given for the introduction of novelty as new opposition ground. B1-B7 should not be admitted as lacking justification for their late filing and as not being highly relevant. The subject-matter of claims 1 and 22 according to all requests is new and inventive in the light of all adduced evidence.

Reasons for the Decision

1. The appeal is admissible
2. Background

The invention is concerned with separating and mixing feed for livestock. In this context bales of feed are supplied to a conveyor alley. At the alley discharge side a cutting unit is arranged for separating a slice of feed. The separated feed is then moved by a discharge unit to a mixing bin. A correct metering of the feed is attained because separating of the slice of feed by the cutting unit can take place gradually and can be stopped at any desired moment, see specification paragraph [0008]. According to the claimed invention a discharge roller is rotatably mounted in the cutting unit to discharge separated feed from the cutting unit towards the discharge unit. By using the discharge roller for the separation of feed from the cutting unit, the cutting process is improved because most or all separated feed arrives at the mixing bin while the remaining part of the bale from which the slice has been separated remains stable and no undesirable chunks of feed will fall from the conveyor alley and be supplied to the mixing bin. Feed metering is thereby improved as a result, see paragraphs [0008] and [0038] of the B1 patent specification.

3. Main request claim 22 - Article 100(c) EPC.
 - 3.1 The Board considers that, contrary to the provisions of Article 100(c) EPC, granted claim 22 extends beyond the contents of the earlier (parent) application as filed, published as EP 1 935 239 A2.

3.2 Granted claim 22 was amended vis-a-vis independent method claim 21 of the originally filed earlier application to include the feature that the separated slice of feed is discharged from the cutting unit by a rotatably mounted roller towards a discharge unit for supplying separated feed to the mixing bin.

Paragraph [0037] of the parent application is the only textual basis for this feature. This paragraph describes that in figures 4 and 7

"a roller 38 is shown as an example of said discharge means, which roller is rotatably mounted - drivably, if desired - in the cutting unit 17".

Thus this passage discloses only rollers mounted in the cutting unit, as also shown in the corresponding figures 4 and 5. In the absence of further references to a discharge roller, the skilled person cannot derive that arrangements including rollers mounted elsewhere are also meant to be covered by the parent application. Such arrangements, for which there is thus no original disclosure, however now fall under the scope of granted claim 1. Therefore the subject-matter of granted claim 22 extends beyond the contents of the earlier application as filed.

3.3 The Board is not convinced by the respondent-proprietor's counter-argument that claim 22 is a method claim and that a structural limitation such as where the roller is mounted would be immaterial for added subject-matter as not being a method feature by nature. Structural features of the tools with which a method feature is required to be performed also represent a limitation of the scope of such a method. Thus, in the present case, performing the step of discharging feed from the cutting unit with a roller mounted elsewhere - a different tool than the one

originally described - would embody a method that is not originally disclosed in the parent application.

4. First auxiliary request - Article 100(c) EPC.

4.1 Both claims 1 and 22 call for a roller mounted in the cutting unit for discharging separated feed from the cutting unit towards the discharge unit. The Board considers the new expression to be directly and unambiguously derivable from a contextual reading of the original paragraph [0037] of the earlier parent application and the figures. From a reading of the whole parent application it is immediately clear that the feed is always discharged towards the discharge unit, in the broad sense of that expression. The finding of the Opposition Division, see impugned decision, section 3.2.3, is thus in the Board's view to be confirmed. This conclusion also holds vis-a-vis the divisional application as filed, the relevant passage and figures being identical to paragraph [0037] and figures 4 and 5 of the divisional as filed.

4.2 The appellant-opponent however objects, in writing and further precised during the oral proceedings, that claiming such a functional feature to be performed by any type of roller represents an intermediate generalization inasmuch as it now includes embodiments - e.g. a roller without fins - which are not derivable from the parent or divisional applications as filed. In particular figures 4 and 5 of parent and divisional only show roller 38 with fins.

However, the basis for the amendment is paragraph [0037] of divisional and parent as filed, which makes no mention of fins. Thus, the skilled person finds in paragraph [0037] a clear and unambiguous basis for the

contested feature. That figures 4 and 5 might show fins is irrelevant in this regard.

The further argument that such fins are essential to effectively discharge material towards the discharge unit pertains to clarity, Article 84 EPC, of a formulation that was already present in the granted claims, namely in claim 1. In application of **G3/14**, see *Catchword*, claims of a patent can be examined for compliance with the requirements of Article 84 EPC only when, and then only to the extent that the amendment introduces non-compliance with Article 84 EPC.

4.3 As otherwise there is a clear basis for the claims of auxiliary request 1 in the parent and the divisional applications, the Board concludes that claims 1 and 22 meet the requirements of Article 76(1) EPC and Article 123(2) EPC. Furthermore, the amendments clearly limit the claims vis-a-vis those granted and thus comply with Article 123(3) EPC.

5. First auxiliary request - Article 100(b) EPC.

5.1 The appellant-opponent disputes the sufficiency of disclosure finding of the Division in section 3.3.3. of the impugned decision with respect to dependent claims 8 and 13. The Board however, as explained below, sees no reason to overturn the Opposition Division's finding.

5.2 The appellant-opponent argues in respect of claim 8 that a cutting unit that forms part of the discharge unit, as defined by claim 8, cannot also transport the feed to that discharge unit of which it is a part.

However, as indicated in the Board's written communication, this apparent contradiction does not prevent the skilled person from carrying out the invention in the light of the description. This is so in particular in the light of the embodiment of figure 4, that teaches a discharge unit 18 with an integrated cutting unit 17. The Board considers that the skilled person would have no difficulty understanding the operation of this embodiment, which shows the cutting unit discharging towards the discharge conveyor belt 24 (rather than the unit).

- 5.3 The appellant-opponent also argues that the patent specification does not describe an embodiment according to claim 13, namely having a discharge unit for supplying the feed to the mixing bin combined with a mixing bin featuring a loading bucket for receiving the feed.

The Board however considers that the skilled person would have no technical difficulty, nor does it represent an undue burden for him, to realize such an embodiment by combining the relevant features of the two different embodiments each sufficiently disclosed in the description and figures. Insofar this objection takes issue with the fact that the description does not mention such a combination, it is an objection of lack of support by the description, Article 84, against a granted claim. According to G3/14, see above, the Board has no power to examine compliance with Article 84 for granted claims.

- 5.4 In conclusion the Board is satisfied that the requirements of Article 100(b) are fulfilled.

6. First auxiliary request - Article 100(a) novelty

The appellant-opponent submits a novelty objection based on new documents B1-B7. Novelty was not substantiated during opposition and in application of **G7/95** (OJ 1996, 626) the Board has no authority to examine it without the agreement of the patentee. In the present case the respondent-proprietor does not consent to it, see section 4.2 of the response to the statement of grounds.

7. Admissibility of B1-B7 - Article 12(4) RPBA.

The admission of this new evidence, insofar as it is cited in relation to inventive step, is at the discretion of the Board under Article 12(4) RPBA.

7.1 With respect to the question whether the new evidence could have been submitted already in first instance, the Board indicated in its written communication that prior use evidence B1-B6 appears to arise from Mullerup, which is an affiliate to the appellant-opponent. The Boards apply strict standards for admission of late filed evidence of prior use, see CLBA, IV.C.1.3.17, especially when it relates to the appellant-opponent's own activities. This is not mitigated by the fact, as argued by the appellant-opponent, that Mullerup was taken over by the appellant only in March 2010, as it had three years until the oral proceedings before the Opposition Division on 5 March 2013 to do so

7.2 In respect of relevance, the Board already indicated in the written communication that B1-B6 and B7 do not appear to be highly relevant for the following reasons. Looking at the elements "Knivtrommel" and "Traggtrommel" in B2 and the stripping-cutting member 7

and toothed counter-rotating plates 8 of B7, the skilled person can but conclude that these elements constitute milling members. As such they do not cut a slice of feed from the bale, as required by the claims of the contested patent. Absent any further comment from the appellant-opponent, either in writing or at the oral proceedings, the Board sees no reason to modify its preliminary opinion that the new evidence is prima facie not highly relevant for the subject-matter of claims 1 and 22 of the first auxiliary request.

7.3 In view of the above the Board decided not to admit new evidence B1-B7 into the appeal proceedings.

8. First auxiliary request - Article 100(a) inventive step

8.1 The appellant-opponent contests the conclusions of the Opposition Division (reasons 3.4 of the decision under appeal) regarding inventive step, which in principle apply also to claims 1 and 21 of the auxiliary request. The Board is however not convinced by the appellant-opponent's arguments.

8.2 The appellant-opponent firstly submits that the combination of teachings of D4 and D5 would deprive claims 1 and 22 of inventive step.

8.2.1 The Board considers that even if it would be obvious to combine the teachings of both documents, the skilled person would not arrive at the subject-matter of either claims 1 or 22, as both claims call for a cutting unit suitable for processing bales.

8.2.2 However, neither document teaches or suggests an apparatus that is suitable for processing bales, namely for separating a slice of feed from the end of a bale

as required for claims 1 and 22. Neither document indeed concerns cutting feed from bales. Both documents teach cutting heads at the tip of a vertically swinging boom to remove silage from a silo, in the case of D4, or from a stack, in the case of D5. In contrast to the relatively loose structures of D4 and D5, bales are pressed to obtain a very compact structure in order to prevent decay of the baled feed by contact with air or ambient moisture. Accurately cutting feed from such a structure is a different process than separating feed from a silo or a stack. In the Board's understanding the vertically swinging booms of D4 with knives 34 on rotating drum 28 and of D5 with reciprocating cutting elements 40 produce a different cutting action and do not possess the necessary cutting force to make them suitable for cutting a slice of feed from a bale as claimed in the contested patent. Nor is there any other reason that the skilled person might, as a matter of obviousness, consider modifying these arrangements in order to make them suitable for cutting feed off bales, as is also submitted by the respondent-proprietor in section 7 of his response to the statement of grounds.

8.2.3 That paragraphs [0001] and [0002] of the patent specification might refer to D5 as disclosing an apparatus and method according to the preamble of claim 1 cannot change the fact that it is clear from D5 itself that its arrangement is not suitable for cutting slices from a bale. Whatever might have been the motivation to introduce a reference to D5 upon grant, these paragraphs, when read together, are not an acknowledgement, much less proof, of the fact that D5 might be suitable for processing bales, as is also immediately apparent to the skilled person when reading D5, see above. On the contrary, those two first paragraphs of the description can also be read as

general introductory statements identifying the general technical field to which the invention relates and of which D5 is cited as an example. Accordingly, the skilled reader would not consider that the general reference to the preamble of claim 1 in paragraph [0001] amounts to a disclosure that the known machine referred to in paragraph [0002] is suitable for processing bales.

8.2.4 In conclusion, the combination of teachings of D4 and D5, whether obvious or not, would not lead the skilled person to the subject-matter of claims 1 or 22 that requires a machine suitable for processing bales as a matter of obviousness.

8.3 The appellant-opponent also objects to inventive step of claims 1 and 22 starting from D10 or D11 combined with commonly known mixing bins or with mixing bins as described in e.g. D5 or D18.

8.3.1 The Board however, for the reasons below, cannot identify any disclosure either in D10 or D11 of a cutting unit that is able to separate slices and that comprises a discharge roller mounted in the cutting unit as required by independent claims 1 and 22. Thus missing these further differentiating features in D10 and D11, the alleged combination, whether obvious or not, with a mixing bin would not result in the claimed apparatus or method

8.3.2 In D10 feed is milled off the bale using milling roll 2 with tines 17. The machine of D10 also uses scrapers (Abstreifer 4) to remove separated feed from between the tines of the milling roll 2. Thus, neither a cutting unit that separates a slice of feed nor a

roller to discharge feed from the "cutting unit" is described in D10.

- 8.3.3 In D11 a bale is positioned below the cutting unit 9 (figures 1,2), 22 (figure 3) or 29 (figure 4) and is then cut in slices. D11 thus teaches a cutting unit suitable to cut slices of feed. However, the separated feed is subsequently conveyed via the floor scraper 16 to the milling roll 18. Therefore D11 neither teaches nor suggests the provision of a discharge roller mounted in the cutting unit 9, 22 or 29, for discharging separated feed from the cutting unit.

The appellant-opponent argues that the cutting unit 9, 22, 29 of D11 is movable in a direction approaching the milling roller 18, see D11, column 1, lines 55-58. The claimed feature would thus be anticipated by the cutting unit in its position nearest to the roller. In that position the roller 18 would then act to discharge feed from the cutting unit, anticipating the claimed feature. This argument is firstly not convincing because D11 simply does not describe such a position or interaction of the roller 18 with the cutting unit 9, 22 or 29. In any case, roller 18 is not mounted in the cutting unit as required by claims 1 and 22.

- 8.3.4 Therefore the addition of a mixing bin to either device of D10 or D11, whether obvious or not, would not result in the claimed apparatus or method.

- 8.4 As neither line of argument succeeds, the Board confirms the finding of the Opposition Division regarding inventive step of the subject-matter of claims 1 and 22 of the then pending main request, which holds also for claims 1 and 21 of the first auxiliary request.

9. For the above reasons the Board holds that the claims as amended according to the first auxiliary request as submitted during the oral proceedings before the Board meet the requirements of the EPC. The Board is satisfied that the consequential amendments to the description bringing it into line with the amended claims are unobjectionable, and these were indeed not objected to by the appellant-opponent. The Board concludes that the patent can be maintained as amended pursuant to Article 101(3)(a) EPC.

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 with the order to maintain the patent as amended in the following version:

Claims:

1-25 of auxiliary request 1 as filed during the oral proceedings before the Board

Description:

pages 2 and 4 as filed during oral proceedings before the Board and
page 3 of the patent specification as published

Drawings:

figures 1-6 of the patent specification as published.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated