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Datasheet for the decision of 13 November 2019

Case Number: T 0957/16 - 3.2.04

Application Number: 07810937.8

Publication Number: 2031957

IPC: A01G9/24

Language of the proceedings: EN

Title of invention:
GREENHOUSE AND FORCED GREENHOUSE CLIMATE CONTROL SYSTEM AND METHOD

Patent Proprietor:
Glass Investments Projects, Inc.

Opponent:
Van der Hoeven Horticultural Projects B.V.

Headword:

Relevant legal provisions:
EPC Art. 54(2), 56, 84, 114(2), 123(2), 123(3)

Keyword:

Amendments - added subject-matter (main request : yes)
Late-filed auxiliary requests - admitted (auxiliary request : yes)
Late submitted material - prior use - evidence admitted - (no)
Novelty - auxiliary request (yes)
Inventive step - auxiliary request (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Chambres de recours

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Case Number: T 0957/16 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 13 November 2019

Appellant: (Patent Proprietor)	Glass Investments Projects, Inc. 2776-64th Street Delta, BC V4L 2N7 (CA)
Representative:	Boult Wade Tennant LLP Salisbury Square House 8 Salisbury Square London EC4Y 8AP (GB)
Respondent: (Opponent)	Van der Hoeven Horticultural Projects B.V. Vrij-Harnasch 124 2635 BZ Den Hoorn (NL)
Representative:	Cramwinckel, Michiel Cramwinckel Consultancy Kallenkoterallee 82 A 8331 AJ Steenwijk (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 15 February 2016 revoking European patent No. 2031957 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	G. Martin Gonzalez
	W. Van der Eijk
	J. Wright
	C. Heath

Summary of Facts and Submissions

I. The appellant-proprietor lodged an appeal, received on 14 April 2016, against the decision of the opposition division posted on 15 February 2016 to revoke European patent No. 2031957 pursuant to Article 101(3)(b) EPC, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 27 June 2016.

II. Opposition was filed under the grounds of Article 100(a) EPC on lack of novelty and on lack of inventive step, under the ground of Article 100(b) EPC on lack of sufficiency of disclosure and under the ground of Article 100(c) EPC on added subject-matter.

The opposition division revoked the patent having regard inter-alia to the following evidence:

(D1) NL 2000152
(D2) Declaration of M. Jelle Schoonderbeek
(D4) http://www.growingedge.com. J.Benton Jones Jr. EuroFresh Tinkers With Greenhouse Design. Research shows fruit yields in the modified greenhouse have been consistently higher.
(D5) Declaration of M. Alexander van der Heiden of Priva BV.
(D6) Attachment to declaration of Alexander van der Heiden of Priva BV.
(D7) Onder Glas, n° 12, December 2006, pages 8-9.
(D11) EP 1 464 219 A1
(D15) WO 07/76296 A1
(D16) Letter Bom Holding B.V. dated 28 August 2015.
(D17) Technical drawing of Greenhouse for Gebr. v/d Lans Holding BV
(D18) Webpages of web site Gabot dated 12 October 2005

(D19) Third Party Observations cover sheet as submitted
(D20) Webpages from web site of Bom Group Innovations
(D21) Press information with reference to the Horti Fair 2005
(D22) Drawing of the stand at the Horti Fair 2005
(D24) Webpage retrieved from the Wayback Machine at https://web/20070521031122/http://www.boemgroep.nl/bomgroep/Sunergiekas_/Klimaatinstallatie.
(D24a) Translation into English of D24
(D29) Letter of Priva BV to Voshol Warmte-Electrotechniek BV relating the set-up of Priva control system for control of semi-closed greenhouses at Euro-Fresh dated 18 July 2006 as attached to declaration CEO of Priva BV.
(D31) Notary public certified declaration of M. Jelle Schoonderbeek.

III. The following further evidence was filed during the appeal proceedings by third party observations (VB Climate) received on 6 October 2016.

(D34) Video retrieved from https://www.youtube.com/watch?v=7rCePOr70K8&feature=youtu.be
(D35) NL 1032779

IV. The appellant-proprietor requests that the decision under appeal be set aside and the patent be maintained on the basis of its main request, filed with the grounds of appeal, or auxiliarily, on the basis of one of its auxiliary requests 1-5, as filed or re-filed (auxiliary requests 2 to 4) with letter of 7 October 2019.

The respondent-opponent requests that the appeal be dismissed.

V. Oral proceedings were held on 13 November 2019.

VI. The independent claims according to the relevant requests read as follows (emphasis added to indicate amendments with respect to granted claims 1 and 15 respectively):

(a) Main request

1. "A greenhouse (10; 50), comprising:
a growing section (16; 56);
a climate control system (12; 52) within said greenhouse (10; 50) and comprising a substantially enclosed end gable (14; 54) separated by a partition (22; 62) from said growing section (16; 56), said climate control system arranged to control the environment within said growing section by flowing ambient air from outside said greenhouse into said growing section, re-circulating air from said growing section back into said growing section, and a combination thereof, said ambient air, re-circulated air, or combination thereof, flowing through said climate control system (12; 52) and into said growing section (16; 56), wherein said climate control system comprises one or more vents (24; 64) adapted to draw ambient air into said climate control system, and at least one further vent (34; 74) adapted to draw re-circulated air from said growing section (16; 56) into said climate control system(12; 52), whereby a plurality of tubes (18; 58) are in communication with said one or more vents (24; 64) adapted to draw ambient air into said climate control system (12; 52), and said at least one further vent (34; 74) adapted to draw re-circulated air into said climate control system (12; 52) to regulate the environment of said growing section

(16; 56), wherein said at least one further vent (34; 74) adapted to draw re-circulated air into said climate control system (12; 52) is above said one or more vents (24; 64) adapted to draw ambient air into said climate control system (12; 52)."

14. "A method for controlling the temperature within a greenhouse growing section (16; 56), comprising:
flowing air through one or more first vents (24; 64) into a climate control system (12; 52) comprising a substantially enclosed end gable (14; 54) within a greenhouse (10; 50) and separated from said growing section (16; 56) by a partition (22; 62), said air flowing through said one or more first vents (24; 64) from outside said greenhouse (10; 50), through one or more further vents (34; 74) from inside said growing section (16; 56), or a combination thereof depending on the temperature needs of said growing section, wherein said one or more further vents (34; 74) are above said one or more first vents (24; 64);
conditioning the air by controlling its temperature and/or pressure and/or the level of certain gases contained within the air, as it flows through said climate control system;
flowing conditioned air through a plurality of tubes (18; 58) into said growing section to regulate the temperature in said growing section; and
re-circulating air within said growing section when the temperature therein is at the desired level by flowing the air back into said climate control system, then flowing the air through said plurality of tubes into said growing section."

(b) First auxiliary request

1. "A greenhouse (10; 50), comprising:

a growing section (16; 56):
a climate control system (12; 52) in a substantially enclosed end gable (14; 54) separated by a partition (22; 62) from said growing section (16; 56), said climate control system arranged to control the environment within said growing section by flowing ambient air from outside said greenhouse into said growing section, re-circulating air from said growing section back into said growing section, and a combination thereof, said ambient air, re-circulated air, or combination thereof, flowing through said climate control system(12; 52) and into said growing section (16; 56), wherein said climate control system comprises ~~one or more~~ a first vent~~s~~ (24; 64) adapted to draw ambient air into said climate control system and located on a lower portion of an outside gable wall (26) of said greenhouse (10; 50), and said partition (22; 62) comprises a second vent (34; 74) located near the top of said partition (22; 62), adapted to draw re-circulated air from said growing section (16; 56) into said climate control system (12; 52), whereby a plurality of tubes (18; 58) are in communication with said ~~one or more~~ first vent~~s~~ (24; 64) and said second vent (34; 74) to regulate the environment of said growing section (16; 56), wherein said second vent (34; 74) is above said first vent (24; 64)."

14." A method for controlling the temperature within a greenhouse growing section (16: 56), comprising:
flowing air through ~~one or more~~ a first vent~~s~~ (24; 64) into a climate control system (12; 52) in a substantially enclosed end gable (14; 54) within a greenhouse (10; 50), separated from said growing section (16; 56) by a partition (22; 62), said first vent (24; 64) being located on a lower portion of an outside gable wall (26) of said greenhouse (10; 50),

said air flowing through said first vent (24; 64) from outside said greenhouse (10; 50), through a second vent (34; 74) from inside said growing section (16; 56), or a combination thereof, depending on the temperature needs of said growing section, wherein said second vent (34; 74) is located near the top of said partition (22; 62) and above said first vent (24; 64);
conditioning the air by controlling its temperature and/or pressure and/or the level of certain gases contained within the air, as it flows through said climate control system;
flowing conditioned air through a plurality of tubes (18; 58) into said growing section to regulate the temperature in said growing section; and
re-circulating air within said growing section when the temperature therein is at the desired level by flowing the air back into said climate control system, then flowing the air through said plurality of tubes into said growing section."

VII. The appellant-proprietor argued as follows:

The independent claims of the main request do not contain added subject-matter. The alleged prior uses are either not proved or not admissible into the proceedings, as is also late filed evidence D24 and D35. The subject-matter of independent claims 1 and 14 according to the first auxiliary request is clear, does not contain subject-matter extending beyond the contents of the originally filed application, does not extend the scope of protection of the granted claims and is new and inventive in the light of the admissible cited prior art. The embodiments described in the amended description fall under the scope of the amended claims. The amended description is thus not objectionable in this respect.

VIII. The respondent-opponent argued as follows:

Claim 1 of the main request contains added subject-matter. The prior use "Eurofresh" is sufficiently proved by the evidence on file, including the late filed evidence that should be admitted for being relevant. The late filed evidence related to the prior uses "Prominent" and "SunergieKas" should also be admitted, as well as late filed documents D24 and D35. The witness offers related to the above prior uses should also be considered and the corresponding witnesses heard. The subject-matter of claims 1 and 14 according to the first auxiliary request is unclear, contains added subject-matter and is not new and not inventive in the light of D7, D11 and D15. The embodiments of the description do not fall under the scope of the amended claims, giving the impression that the scope of protection of the claims is broader than what is actually claimed.

Reasons for the Decision

1. The appeal is admissible

2. Background

The invention is concerned with a climate control system for greenhouses. The climate control system is arranged to control the temperature in the greenhouse by either flowing ambient air from outside, re-circulating air, or a combination thereof, depending on the temperature needs, see paragraph [0025]. The arrangement thus uses ambient air for cooling without employing expensive cooling systems, which provides a simple and cost effective system, see paragraphs [0022] and [0042].

3. Main request - Amendments

3.1 The respondent-opponent objects to the introduction of the feature in the independent claims of the main request that the climate control system *comprises* a substantially enclosed end gable. Accordingly, a climate control system in the form of a unit that includes the enclosed end gable as part of it falls under the scope of this new feature.

It is undisputed that there is no literal basis for the new wording. The board is also unable to identify an unambiguous basis for the new feature in the original documents. For instance, original paragraph [0029] identifies the climate control system as element 12 in figures 1-4. Several separated units 12, of a smaller size than the enclosed gabled end 14, are located

within and at the lower part of the gabled end 14, see figures 1-3. It thus cannot reasonably be said that the (or each) climate control system module 12 *comprises* the gabled end 14 of the greenhouse building, since in the original description the enclosed end gable is not part of what is identified as the climate control system 12. A similar conclusion applies to the other embodiments corresponding to figures 5-7.

3.2 The appellant-proprietor refers to different paragraphs of the originally filed application, namely [0029]-[0032], [0038], [0039], [0043]-[0046], [0049]-[0050], that would disclose that the substantially enclosed end gable is arranged to provide the climate control system functionality to flow cool, recirculated or mixed air. Reading the patent as a whole and with a mind willing to understand, this would amount to a disclosure that the substantially enclosed end gable, though not literally so described, is part of the climate control system. The board is not convinced by the argument. The enclosed end gable indeed cooperates with the climate control system to achieve the functionality. A cooperating part is however not inevitably part of that system. Thus, the undisputed original teaching that the enclosed end gable interacts with the climate control system to provide functionality cannot be regarded by the board as a disclosure that it must also form part of it.

3.3 For the above reasons, the board concludes that the amendments to claim 1 of the main request contain subject-matter extending beyond the original disclosure, Article 123(2) EPC.

4. First auxiliary request - Admissibility

The admission of the first auxiliary request, filed by the appellant-proprietor with letter dated 7 October 2019, is at the discretion of the Board, Article 13 RPBA. It is evident that the amendments to claim 1 of this new request overcome outstanding issues related to added subject-matter and extension of scope of protection, Articles 123(2) and (3) EPC, as discussed in the board's communication for the preparation to the oral proceedings, including the above added subject-matter objection. Nor does the request give rise to new issues, as also acknowledged by the appellant. Therefore, the new claims meet the clear allowability criteria for admissibility of late-filed requests.

The respondent-opponent points out that the appellant-opponent could have filed the request earlier, since the objections they try to address, amongst other objections, were raised in the reply to the statement of grounds. The board however notes that the amendments in the new auxiliary request are focused on the issues that appeared more decisive from the board's communication than the auxiliary requests previously on file. Its filing can thus be regarded as a fair reaction to the board's communication.

In view of the above, the board decided to admit the first auxiliary request into the proceedings, Article 13(3) RPBA.

5. First auxiliary request - amendments

5.1 The respondent-opponent puts forward that the features "a substantially enclosed end gable" and "a climate control system" appear to be completely unlinked in the originally filed documents. For instance, the climate

control system is claimed in original claims 1-16, while the substantially enclosed end gable is independently claimed in original claims 17-28. The combination of both features in the new claims, by the introduction of the term "a substantially enclosed end gable" into claim 1, would therefore represent subject-matter not originally disclosed.

However, in the board's opinion, the skilled person immediately derives from the original disclosure that the terms "gabled end" and the "substantially enclosed end gable" refer to the same technical feature throughout the original application and for all the embodiments. This feature, referred to as "gabled end", and the climate control system in the original disclosure are undoubtedly linked, see e.g. paragraphs [0029]-[0031]. Moreover, even if the original claims 17 to 27 do not expressly use the term "climate control system", they define its functions, the term being furthermore expressly used in claim 28. Thus the introduction of the term "a substantially enclosed end gable" in conjunction with the climate control system in amended claim 1 is fully supported by the original disclosure.

5.2 Claim 1 calls for "a climate control system (15; 52) in a substantially enclosed end gable (14; 54)". The respondent-opponent reads this feature as requiring that the complete climate control system must be inside the substantially enclosed end gable, while the original disclosure only described that the "majority of the climate control system 12 is housed within the gabled end 14", see paragraph [0029]. Housing the totality of the control system in the end gable would thus be added subject-matter, since it was not originally disclosed.

The board however notes that paragraph [0029] goes on to describe that the portions of the climate control system that are not housed in the gabled end are the devices for distributing the air in the crop growing section, i.e. the plurality of tubes. The claim, read as a whole, requires the same construction, since it also requires a plurality of tubes to regulate the environment in the growing section, i.e. outside the gabled end. The skilled person thus readily understands that the claimed tubes, for performing the claimed effect, are located in the growing section and not inside the gabled end, whereas the other components of the climate control system are inside the substantially enclosed end gable as required by the disputed new feature and as also described by original paragraph [0029]. Therefore, the board does not identify any new technical subject-matter introduced by the amendment.

5.3 The amended feature that the first vent is located on the lower portion of the outside gable wall finds literal basis in original paragraph [0031] which discusses possible vent positions structurally and functionally independently of other features. Thus its inclusion in the claim does not represent added subject-matter, regardless of the text on paragraph [0044], cited by the respondent-opponent, of a vent of a different embodiment being located near the center of the gabled wall.

5.4 The respondent-opponent reads new claim 1 as not requiring a connection between the second vent and the climate control system. The absence of this connection would constitute added subject-matter, since originally the second vent had always been disclosed for flowing re-circulated air into the climate control system and

thus connected to it. However, in the board's view, the claim read contextually clearly does require a connection between the second vent and the system. The claim specifies that the second vent is adapted to draw re-circulated air from the growing section into the climate control system. They are thus necessarily connected in the broad sense of the original disclosure.

5.5 The respondent-opponent also objects that the amended independent claims 1 and 14 do not specify that the tubes are located at a lower portion of the growing section. The absence of such limitation, that would be structurally linked to the claimed specific locations of the vents - e.g. the second vent near the top of the partition -, would constitute an intermediate generalization. In the board's opinion there is no such clearly recognisable functional or structural relationship, and therefore no unallowable intermediate generalization. Indeed, on the one hand the features of the vent locations and tube locations have not been described as having any structural or functional relationship beyond their fluid connection for air flow, which is still apparent from claim 1. On the other hand, in the original disclosure there is also no clear limitation to the location of the tubes inside the growing section due to the vent position. It is in particular not derivable from the original documents that the location of the second vents at the top of the partition is incompatible with the location of the tubes also at the upper part of the growing section or, as described in the final sentence of original paragraph [0022], above the greenhouse crop. The board is thus unable to identify the alleged unallowable intermediate generalisation.

5.6 The Board also considers that the skilled person unequivocally derives from a contextual reading of the complete original application documents including the drawings that the climate control system is originally described as being *within* the greenhouse 10. Nor is there any suggestion in the application as filed that it might be otherwise. This claimed feature is thus also originally disclosed.

5.7 Otherwise, the new independent claims are a combination of the features of original claim 1, or original method claim 29, with the features of dependent claims 4 and 7, further including a substantially enclosed end gable, as originally defined in paragraphs [0010] and [0029], and the vents locations as originally disclosed in original paragraphs [0031] and [0036]. The board is thus satisfied that the amendments comply with Article 123(2) EPC.

6. First auxiliary request - Extension of protection

The objection under Article 123(3) EPC for the main request is overcome by the amendment in claim 1 of the auxiliary request 1 that the climate control system is in the substantially enclosed end gable rather than comprising it. As the end gable is separated by a partition from the growing section, so is the climate control system within it, as required by granted claim 1. The other amendments, by adding further features, limit claim scope. The board is thus satisfied that the subject-matter of the new claims do not extend the scope of protection conferred by the granted claims and are thus compliant with Article 123(3) EPC.

7. First auxiliary request - Clarity and support by the description

7.1 The respondent-opponent objects that the feature "a substantially enclosed end gable" lacks clarity and support by the description. They in particular challenge the finding of the opposition division, see reasons 2.4.1.7., that the term "end gable" is sufficiently clear. They also object to the expression "substantially enclosed" because the term "substantially" makes the terms vague in scope as such. Furthermore, in combination with the end gable, the end gable or end wall of the described greenhouse buildings would not actually be enclosed in the embodiments so that the feature would not be supported by the description.

As regards the feature "a substantially enclosed end gable", in the board's understanding, the term "end gable" is sufficiently clear. This term normally denotes the side or face of a building between the roof pitches, either the upper triangular part between the pitches or also extending further down to encompass the whole side. What is meant by "substantially enclosed" is not immediately apparent to the board from the wording itself, but can then be understood in reference to the description and drawings. For example figures 1, 2 and paragraph [0029], state that the gabled end of the greenhouse is separated from the crop growing section by a partition, as indeed stated in the claim. The partition is shown in the figures as extending the entire height of the end gable, but whether this is implicit in the expression "enclosed end gable" is not apparent to the board. In summary, the board understands "substantially enclosed end gable separated by a partition from said growing section" as defining at least a part of the greenhouse at the end gable that

is partitioned off; the exact extent is not defined in the claim.

The board also considers that the skilled person is able to understand that the added term "substantially enclosed" defines a space separated by corresponding walls and partition while still allowing for the necessary air flows through the vents or openings.

7.2 The respondent-opponent also objected that in the method claim 14 it is only defined where the air is taken, i.e. from outside the greenhouse or from inside the growing section, through the respective vents, but that it is left undefined and thus unclear where the air is then directed, i.e. where it goes. Likewise, the last feature (last three lines) of the claim, requiring air recirculation, has no link to the previously defined vents. Thus the path followed by the air, whether through the vents or not, when circulating according to the last feature is also left undefined and thus unclear by the claim.

The board however notes that clarity is not a ground for opposition and that in accordance with established case law as confirmed by **G3/14** the board is barred from examining clarity if it does not arise from the amendments made to the granted claims, see the Case Law of the Boards of Appeal, 9th edition 2019 (CLBA), IV.C. 5.2.2. In the present case, the alleged lack of clarity would also apply to granted method claim 15, which also does not explicitly define where the air taken from the outside goes. Similar comments apply to the air flow from inside the growing section. Likewise, the alleged lack of clarity of the last feature of the granted claim 15 does not arise from the amendments defining air flow and the clarity objection could have been

raised also against the claims as granted. For this reason the Board (following **G3/14**) is barred from examining these issues.

7.3 The respondent-opponent also submits that the independent claims are not supported by the description, since the embodiment of paragraph [0045] of the patent specification describes a first vent located near the centre of the gabled wall, which would be incompatible with the claimed position on a lower portion of the gabled wall. It is not disputed that the latter position has a clear basis, see paragraph [0032] of the published application. Moreover, the board sees no contradiction between a position as in specification paragraph [0045], near the centre of the gabled wall, and the vent being in a lower portion of the gabled wall, since a vent can be both on the lower portion and near the centre of the gabled wall.

7.4 The board also holds that the skilled person would have no difficulty in understanding the wording "within the greenhouse" as inside the outer walls of the building. It might be debatable in certain theoretical cases where the outer walls are exactly, but generally and practically speaking the skilled person will have no problem identifying the outer limits of a greenhouse.

7.5 The board considers that a skilled person, reading claim 14 with synthetical propensity and with a mind desirous to understand, would readily identify that the three modes (air from outside, from inside or a combination) described in claim 14 of the first auxiliary request are alternative modes of the same method and not three different methods. The board is unable to identify the ambiguity alleged by the respondent-opponent in this respect.

7.6 The respondent-opponent objects to the use of the expressions "a lower portion" or "near the top" of the respective walls due to the inherent ambiguity of the relative terms "lower" and "near". Though relative terms may be potentially unclear, the board has no doubt that the skilled person when reading the above contested terms in the context of the whole disclosure knows what is meant and what is not, cf. CLBA, II.A.3.6 penultimate paragraph. The scope of the terms are thus clear in the context of the opposed patent.

8. Admissibility of late filed evidence

8.1 The appellant-proprietor contests admissibility of all instances of prior use and also of the late filed evidence. In its communication in preparation for the oral proceedings, see paragraph 7, the board gave its preliminary opinion regarding the alleged prior uses and the various pieces of new evidence submitted in appeal as follows:

"*7. Admissibility of late filed evidence & other submissions*

The appellant-proprietor contests admissibility of all prior uses and also of the late filed evidence. As regards evidence filed in appeal its admittance is at the discretion of the Boards under Art 12(4) RPBA (or Art 13 RPBA) in application of the relevant criteria.In respect of evidence of prior use submitted in appeal, the Boards set strict standards for the admissibility, see CLBA 8th edition 2015, IV.C.1.3.17.

7.1 Eurofresh

7.1.1 The Board is inclined to confirm the contested finding of the Opposition Division that it was not sufficiently proven what was made available to the public, on the grounds of the different descriptions of the "climate chamber" on the different pieces of evidence which would correspond to the enclosed end gable of the present main request, see sections 2.2.11-2.2.17. Indeed, in the Board's provisional opinion, not only the figures of D2, D6 and D29 show differences in respect of vents construction, but the further evidence D4 describes a room adjacent to the greenhouse of smaller dimensions and a pipe air vent or inlet discharging into a box that seem incompatible with the description shown in the other documents. All of them are declared by M Schoonderbeek to correspond to the same greenhouse, see D31. The different informations appear inconsistent and thus insufficient to prove beyond reasonable doubt what was actually built.

7.1.2 Upon appeal, the respondent-opponent offers M. J. Schoonderbeek as a witness. The admission of this late filed evidence is at the discretion of the Board, Article 12(4) RPBA.

In this regard, it appears that such new witness offer could and should have been submitted already in first instance. The Opposition Division, in the summons for oral proceedings, questioned the probative value of the evidence then on file, including the written declaration of M. Schoonderbeek. The opponent however did not offer his hearing as a witness but relied instead on a notary public certified declaration of M. Schoonderbeek (D31), see opponent's letter of 25 September 2015, page 4, section 4.1, third paragraph. From the above it is clear that the

respondent-opponent could have had Mr Schoonderbeek heard, but decided not to. In application of Art 12(4) RPBA, the Board is inclined not to admit such late filed offer to take evidence.

7.1.3 Apart from the issue of late filing, the Board finds it unlikely that the above-mentioned inconsistencies can be resolved by M. Schoonderbeek's testimony. Even if M. Schoonderbeek's testimony was taken into account as that of a truthful witness, the inconsistency of dimensions and vent constructions in the submitted documents remains.

7.2 Prominent

7.2.1 The opponent, after considering the preliminary opinion of the Opposition Division, took the position: "In view of the lack of more evidence we will, for the moment, not elaborate on this public prior use", see section 5 of letter dated 25 September 2015, and as far as it can be inferred from the minutes and written decision, maintained this position.

7.2.2 During appeal, a third party (VB Climate) submitted further evidence, which has been taken up by the respondent-opponent. It includes a video D34 introduced by VB Climate and the requests to hear M. Ton Driessen of VB Climate, M. Jelle Schoonderbeek, and M. Martin van Zeijl as witnesses, see respondent's letter of 28 August 2017.

7.2.3 The Board firstly notes that this alleged prior use appears to concern separate air treatment cases ("luchtbehandelingskasten"), i.e. without partition wall, and thus seems no more relevant than other evidence e.g. D7 or D11 already on file. Furthermore,

the respondent-opponent appears to have decided in first instance to no longer pursue this prior use, see letter of 25 September 2015, section 5, though they could have. For these reasons the Board in application of Art 12(4) RPBA is inclined not to admit this new evidence.

7.3 Bom Holding BV - SunergieKas or Sunergy Greenhouse

These two instances of prior use of the same greenhouse air treatment concept:
- SunergieKas-Van der Lans
- SunergieKas-Horti Fair 2005
were first alleged by third party observations (Bom Group), after the 9 months opposition period of Article 99(1) EPC and thus late. It included documentary evidence D16-D22, D24, D24a and the offer to hear M. Martin van Zeijl as witness.

With the reply to the statement of grounds of appeal, the respondent-opponent has incorporated these submissions and (offers of) evidence into their case. With letter of 22 June 2018 (after their reply to the statement of grounds) the respondent-opponent filed further evidence in the form of a written declaration of M. van Zeijl used in an Inter Parties Review procedure involving the US counterpart of the opposed patent.

7.3.1 This prior use also appears to concern air treatment cases ("luchtbehandelingskasten") that can be placed at the end gable of a green house. Thus prima facie it does not appear more relevant than the evidence already on file.

7.3.2 Moreover, as indicated by the Opposition Division in its communication of 28 September 2015, the evidence submitted late in first instance does not appear to include any written evidence of availability to the public of the Van der Lans instance, nor an indication of any fact in this respect that could be confirmed by the offered witness. In appeal, this evidence has now been complemented by the statutory declaration of Mr van Zeijl with supporting evidence. This supporting evidence in the form of exhibits 1023-1028 appears to correspond to that submitted with the third party observations (Bom Group) and fails to prove public availability for the same reasons. Proof of public availability appears to rely entirely on the statements of Mr van Zeijl, submitted well into the appeal and the admission of which is at the Board's discretion under Art 13(1) RPBA. Given the late stage of the proceedings, the complexity of the matter (which would most likely require the hearing of Mr van Zeijl offered as witness) and the prima facie limited relevance of this prior use, the Board is inclined not to admit this late filed evidence.

7.4 D24 (an article retrieved by the Wayback machine and filed late in first instance by the respondent-opponent in connection with SunergieKas) as well as post published D35 (NL1032779) filed in appeal by third party (VB Climate) on 6 October 2016 appear no more relevant than D7, since they relate to ATCs placed at a front gable. The Board is inclined not to admit this late filed evidence into the proceedings.
...

7.5 Finally, it is not immediately apparent to the Board what bearing the Petition for Inter Partes Review before the USPTO for a related US patent might have on

the judicial review that the Board must undertake - as its primary task - of the decision under appeal. The respondent-opponent has not made any attempt to explain its relevance as required by Art 12(2) RPBA. The Board shall therefore further disregard it in these proceedings, Art 12(4) RPBA."

8.2 As regards D24, the respondent-opponent further submitted during the oral proceedings that it unambiguously described an enclosed end gable in the sense of the disputed claim. The document would thus be prima-facie more relevant than the evidence on file and therefore admissible. The board is not convinced by these submissions. D24 describes a greenhouse with 48 ATCs (Air Treatment Cases) for climate control, see page 1/3.

Neither from the transversal section of an individual ATC, drawing on page 12 "Doorsnede Luchtbehandelingskast", nor the photograph on page 1/3 that shows details of one individual ATC, both figures referred to by the respondent-opponent, can a greenhouse partition be identified. It cannot be inferred how the other ATCs are placed. In particular, whether either of the front walls shown spans several contiguous ATCs to form a greenhouse partition/enclosed end gable or whether they merely belong to an individual ATC. In sum, the document *prima facie* discloses the use of several ATCs for climate control, which is no more than the technical teachings of document D7 already on file and therefore no more relevant. The board thus confirms its preliminary opinion not to admit late filed document D24.

8.3 At the oral proceedings before the board, with the exception of the issue of admissibility of D24, both parties merely referred to their written submissions and refrained from further comment on the board's preliminary opinion. Absent any further submissions from the parties, the board saw no reasons for deviating from its provisional opinion. It thus considered that:

- the alleged prior use "Eurofresh" has not been proven,

and decided that:

- the other instances of alleged prior use and the evidence related thereto, including D24, are not admitted into the procedure, further
- D35 is not admitted into the procedure.

8.4 First auxiliary request - Novelty

Novelty is challenged over D7, D11, and D15 as on file.

D7 describes a greenhouse where 258 ATCs (Air Treatment Cases) are placed along the front gable. Each ATC is a fully self-contained climate control device or unit within its own encasement, each unit having the air flow possibilities and conditioning features as the climate control system of claim 1. The parties only dispute whether by placing the self-contained 258 ATCs along the front gable, a partition and a substantially enclosed end gable in the sense of the contested claim is formed.

As explained above, the board understands the feature a "substantially enclosed end gable separated by a partition from said growing section" as defining at least a part of the greenhouse at the end gable, that is the end wall between the roof pitches, that is partitioned off.

In the board's view D7 does not disclose such a substantially enclosed end gable in the placement of 258 separate units along the front gable. It is true that they form individual spaces that are also separated from the growing section (by the encasement). However, no detail is given as to how these units are placed within the structure, much less that these are placed within a substantially enclosed end gable as understood above. The individual spaces themselves may form a compartment at the end wall, but that compartment does not constitute a substantially enclosed end gable.

8.5 Document D11 is directed to a climate unit ("Klimagerät") in the form of a plant growth chamber or conditioned cell or compartment of a greenhouse to be placed inside a greenhouse for test and research purposes, see paragraphs [0001]-[0002], which allows for a homogeneous air flow and temperature, with reduced space requirements, paragraph [0004]. The unit may have different configurations and may be enclosed within its own transparent housing, which may be mobile, paragraph [0028]. One such unit, featuring a transparent enclosure 13, is depicted in figure 5. The respondent-opponent submits that this unit anticipates the greenhouse and method of contested claims 1 and 14.

The board firstly doubts whether such a climate unit would be understood as itself constituting a greenhouse in the normal sense of the word. A greenhouse, much like a house, is normally understood as a relatively fixed and immobile structure with walls and roof, made chiefly of glass or other transparent or translucent material. The climate unit, cell or compartment for research purposes of D11, may be a compartment or cell of a greenhouse, or placed within one, but this does not make it a greenhouse in its own right. Even if it did, none of the embodiments in D11 have an end gable, i.e. an end wall between roof pitches, either the upper triangular part between the pitches or also extending further down to encompass the whole side. The transparent enclosure 13 of D11, figures 5 and 6, has a rectangular cross section and is thus not pitched. This indeed confirms the view that the cell or unit of D11, figures 5 and 6, is not a greenhouse proper, given that a greenhouse, which is exposed to the elements, normally has a pitched or otherwise inclined roof for the purpose of allowing rain to flow away.

8.6 Document D15 is advanced in support of the argument of lack of novelty of the method claim 14.

The respondent-opponent reads claim 14 as defining three different methods, one of them requiring only recirculation of air. The climate control system of the closed greenhouse of document D15, only using recirculated air, would anticipate that claim option.

However, as explained above under clarity, the board considers that a skilled person, reading the contested claim with synthetical propensity and with a mind desirous to understand, would readily understand that the three modes (air from outside, from inside or a

combination) described in claim 14 of the main request are alternative modes of the same method and not three different methods.

Document D15 does not use outside air for air conditioning, as is otherwise required by the contested method claim. Claim 14 is therefore new over D15.

8.7 In view of the above, the board concludes that the subject-matter of claims 1 and 14 of the first auxiliary request is new over the cited prior art.

9. First auxiliary request - Inventive step

9.1 Document D11, in particular the embodiment of figure 5, is considered by the respondent-opponent as a starting point for the assessment of inventive step. This document teaches climate control units ("Klimageräte") to be placed inside a greenhouse for test and research purposes, see paragraphs [0001]-[0002].

As explained above, this known climate control unit is not considered by the board to be a greenhouse, nor does it feature a substantially enclosed end gable.

9.2 In a first line of argument, the respondent-opponent submits that the differentiating features can be seen as modifying or adapting the unit or cell of D11 for its commercial use as a greenhouse for large scale production. The associated technical problem would thus be how to scale up the known design of D5.

In this respect, the board notes that, as explained in CLBA I.D.3.6, the person skilled in the art, although being free in choosing a starting point for their development, is then bound by that choice. In the

present case this means that if the skilled person chooses as starting point the climate control unit for test and research purposes to be placed inside a greenhouse, they will only ever work on improving (in an obvious manner) such a testing device. The result of any obvious further development of such a testing device would always be such a testing device. They would in particular not consider as a matter of obviousness redesigning such a unit for use as a production greenhouse.

9.3 In a different line of argument, the respondent-opponent argues that the skilled person, when trying to put into practice the teachings of D11, would use a pitched roof for the embodiment of figure 5, since paragraph [0028] of D11 describes that the climate control unit may also be built as a mobile unit that can be carried outside during daylight for a better use of sunlight.

It does not appear however that this teaching points the skilled person towards redesigning the shape of the covering of the known climate unit. There is no suggestion in D11 that the cell unit housing might be anything other than rectangular in cross-section. On the contrary, in the board's view, the skilled person would not be motivated as a matter of obviousness to modify the roof or cover of a device that is primarily intended for interior use into a pitched form, which serves to allow rain to flow away. They would thus not arrive at a structure having a substantially enclosed end gable in an obvious manner.

9.4 Both lines of argument thus fail. Absent any further submission on this issue, the board also has no reason to question inventive step of claims 1 and 14.

The use in a greenhouse of a substantially enclosed end gable separated by a partition as claimed, which is not per-se trivial, allows a less complex implementation of the climate control system for large commercial uses with also more uniform result across the greenhouse.

10. First auxiliary request - Description

10.1 The appellant-proprietor filed during the oral proceedings before the board an amended description bringing it into line with the amended claims.

10.2 As noted, the board sees no contradiction in the embodiment of paragraph [0045] with the vent being near the centre and the requirement that the vent is in the lower portion of the partition. Similarly, the embodiments of figures 1 to 4 read in conjunction with paragraph [0030], stating that "the majority of the climate control system 12 is housed within the gabled end 14" are not in contradiction with the requirement that the climate control system is to be inside the gabled end in the context of the claim. In figures 1 to 4, the tubes are identified as part of the climate control system, whereas they appear separately in claims 1 and 14. Any inconsistency is minor and easily resolved by a contextual reading of patent and claims with a mind willing to understand. The board concludes that in either case these embodiments thus fall within the scope of the claims.

10.3 Otherwise, the board is also satisfied that the other consequential amendments to the description bringing it into line with the amended claims are unobjectionable.

11. In summary the main request fails for added subject-matter. However, taking into consideration the amendments made according to the first auxiliary request, the patent and the invention to which it relates meet the requirements of the EPC and can therefore be maintained as amended, according to the first auxiliary request, 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 opposition division with the order to maintain European patent No. 2031957 in amended form, as follows:**

Claims:
Nr: 1-14 of the first auxiliary request, filed with letter of 7 October 2019

Description:
Pages 2-7, filed during oral proceedings before the Board

Drawings:
Figures 1-8 of the published patent specification.

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated