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**Datasheet for the decision  
of 8 July 2020**

**Case Number:** T 0437/17 - 3.2.07

**Application Number:** 08829092.9

**Publication Number:** 2198969

**IPC:** B02C1/02, E02F3/36, E02F3/40

**Language of the proceedings:** EN

**Title of invention:**  
BUCKET TYPE JAW CRUSHER

**Patent Proprietor:**  
Ueda Industries Co., Ltd.

**Opponent:**  
Meccanica Breganzese S.p.A. In Breve Mb S.p.A.

**Headword:**

**Relevant legal provisions:**  
RPBA 2020 Art. 15(2), 15(3)  
EPC Art. 100(c), 123(2)  
EPC R. 115(2)  
Guidelines for examination H-V, 3.1

**Keyword:**

Amendments - added subject-matter (yes) - deletion of features (yes)

Grounds for opposition - extension of subject-matter (yes)

Oral proceedings - before board of appeal - postponement (no) - non-attendance of party

The mere general reference to the COVID-19 pandemic and health risks with travel in Germany to and from the Boards of Appeal does not amount to serious reasons justifying the fixing of a new date for oral proceedings.

**Decisions cited:**

G 0003/89, G 0011/91, G 0002/10, G 0001/16, T 0331/87,

T 2599/12, T 1852/13, T 1472/15, T 2227/15, T 0032/16,

T 0634/16, T 1386/18

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 0437/17 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 8 July 2020**

**Appellant:** Meccanica Breganzese S.p.A. In Breve Mb S.p.A.  
(Opponent) Via Astico, 30/A  
36030 Fara Vicentino (VI) (IT)

**Representative:** Locas, Davide  
Cantaluppi & Partners S.r.l.  
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35122 Padova (IT)

**Respondent:** Ueda Industries Co., Ltd.  
(Patent Proprietor) 4-3-3 Sawaragi-nishi  
Ibaraki  
Osaka 567-0868 (JP)

**Representative:** Hertin und Partner  
Rechts- und Patentanwälte PartG mbB  
Kurfürstendamm 54/55  
10707 Berlin (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 8 December 2016  
rejecting the opposition filed against European  
patent No. 2198969 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** I. Beckedorf  
**Members:** A. Cano Palmero  
V. Bevilacqua

## **Summary of Facts and Submissions**

- I. The opponent (appellant) lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division rejecting the opposition which had been filed against European patent No. 2 198 969.
- II. The opposition had been filed against the patent in its entirety on all grounds for opposition pursuant to Article 100(a) (novelty and inventive step), (b) (sufficiency of disclosure) and (c) EPC (added subject-matter).
- III. The appellant (opponent) requested  

that the decision under appeal be set aside and  
that the patent be revoked.
- IV. The respondent (patent proprietor) requested  

that the appeal be dismissed.
- V. In order to prepare the oral proceedings scheduled upon the parties' initial requests, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2007. The Board indicated that the subject-matter of claim 1 of the patent as granted appeared to extend beyond the content of the original disclosure. The patent was likely to be revoked.
- VI. In a letter dated 14 April 2020, the respondent submitted arguments as to why the patent as granted met the requirements of Article 123(2) EPC.

- VII. With a communication dated 22 April 2020 the Board informed the parties that due to the precautionary measures in place to prevent the spread of the COVID-19, the oral proceedings initially scheduled for 6 May 2020 were postponed to 8 July 2020.
- VIII. With a communication dated 26 May 2020, the Board requested the parties to confirm whether they would be affected by travel restrictions and would be able to come to the premises of the Boards of Appeal to attend the oral proceedings.
- IX. With letters dated 23 June 2020 the respondent requested postponement of the oral proceedings, whereas the appellant confirmed that they would be able to attend.
- X. With a communication dated 2 July 2020, sent to the parties by e-mail on 29 June 2020, the Board informed the parties that the request for postponement was not granted and that the date for the oral proceedings to take place on 8 July 2020 was maintained.
- XI. In a letter dated 2 July 2020, the respondent informed the Board that they would not attend oral proceedings. All their previous arguments and requests were maintained.
- XII. Oral proceedings before the Board took place on 8 July 2020 in the absence of the respondent. The decision was announced at the end of the oral proceedings and for further details of which reference is made to the minutes thereof. The order of the present decision was announced at the end of the oral proceedings.

XIII. The lines of arguments of the parties are dealt with in detail in the reasons for the decision.

XIV. Independent claim 1 according to the patent as granted reads as follows:

"A bucket type jaw crusher (JC, JCB) for attaching to a hydraulic shovel arm (2), which has a stationary jaw teeth (20, 20B) fixed to an inner surface of a bucket (11), a movable jaw teeth (30, 30B) opposing the stationary jaw teeth (20, 20B) forming a V shape together with the stationary jaw teeth (20, 20B) during crushing operations, a toggle plate (51, 51B) supporting a lower portion of the movable jaw teeth (30, 30B), an eccentric main shaft (40) rotatably supporting an upper portion of the movable jaw teeth (30, 30B), and a rotational driving means (60) which is configured to rotationally drive the eccentric main shaft (40), and is further configured to be capable of crushing an object to be crushed (80) with the movable jaw teeth (30, 30B) reciprocated via the eccentric main shaft (40) by the rotational driving means (60) and the stationary jaw teeth (20, 20B); wherein a hydraulic motor (60) as said rotational driving means (60) connected to one end of the eccentric main shaft (40) and a flywheel (70) connected to the other end of the eccentric main shaft (40) are provided, and a counterweight (42) for balance adjustment is provided at an intermediate portion of the eccentric main shaft (40) between said hydraulic motor (60) and said flywheel (70), a movable jaw teeth side load receiving section (52, 52B) of said toggle plate (51, 51B) is configured to be placed at an upper position than a bucket side load receiving section (53, 53B) of said toggle plate (51,

51B) during crushing operations, and the jaw crusher (JC, JCB) is configured such that, in operation, while the movable jaw teeth (30, 30B) are reciprocated by the rotation of said eccentric main shaft (40), said object to be crushed (80) is pressed against the stationary jaw teeth (20, 20B) by the moveable jaw teeth (30, 30B) via the rocking motion of said toggle plate (51, 51B)."

### **Reasons for the Decision**

1. *Transitional provisions - Revised Rules of Procedure of the Boards of Appeal (RPBA 2020)*

The appeal proceedings are governed by the revised version of the Rules of Procedure which came into effect on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) and 13(2) RPBA 2020 instead of which Articles 12(4) and 13 RPBA 2007 remain applicable (Article 25(2) and (3) RPBA 2020). The general applicability of the RPBA 2020 to the present proceedings includes Article 13(1) RPBA 2020, irrespective of the fact that the summons to oral proceedings was notified before 1 January 2020 (see T 2227/15, T 32/16, T 634/16 and T 1386/18, none of them published in the OJ EPO).

2. *Request for postponement of the Oral Proceedings*

In response to the communication of the Board of 26 May 2020 inquiring if any of the parties envisaged to be affected by any **travel restriction** in place in Europe, the respondent requested on 23 June 2020 postponement of the oral proceedings "considering the ongoing COVID-19 pandemic and continued health risk

associated with travel to and from the Boards of Appeal".

The Board closely followed the development of the Coronavirus pandemic in particular in Germany and in the other EPC Contracting States and was thus aware that, despite of singular incidences of infection, the overall situation in particular in Germany has eased in the course of June 2020 to allow a lift of previous travel restrictions within that country.

Against this background the Board did not consider the rather general and unspecific reasons given by the respondent as serious reasons justifying the fixing of a new date in the meaning of Article 15(2) RPBA 2020. With a communication of 2 July 2020, the Board, noting that the respondent was effectively represented by a professional representative established in Berlin (Germany) and in view of **no apparent travel restrictions** that would hinder the respondent to attend the oral proceedings at the premises of the Boards of Appeal, did not grant the respondent's request for postponement of the oral proceedings and maintained the oral proceedings for the scheduled date.

The respondent neither objected to this nor submitted additional arguments and/or reasons justifying the fixing of a new date for oral proceedings but, in their response to the aforementioned communication, informed the Board of their intention not to attend the oral proceedings.

On 8 July 2020 the oral proceedings took place in the presence of the appellant, who travelled from Padova (Italy), but in the absence of the respondent in accordance with Article 15(3) RPBA 2020 and Rule 115(2)



EPC. As a consequence, the respondent was treated as relying on their written case.

3. *Claim 1 of the patent as granted - Extension of subject-matter - Articles 100(c) and 123(2) EPC*

3.1 Article 123(2) EPC requires that the European patent application or European patent may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed. It is established jurisprudence of the Boards of Appeal that the question to be considered in assessing the allowability of an amendment in view of the requirements of Article 123(2) or Article 100(c) EPC is what a skilled person would have derived directly and unambiguously, using common general knowledge from the description, claims and drawings of a European patent application and seen objectively and relative to the date of filing (see Case Law of the Boards of Appeal, 9th edition 2019, II.E.1.3.1, in particular G 3/89 (OJ EPO 1993, 117); G 11/91 (OJ EPO 1993, 125); G 2/10 (OJ EPO 2012, 376; and G 1/16 OJ EPO 2018, A70), referring to this test as "**gold standard**").

3.2 In the present case, claim 1 as granted has been amended *inter alia* by deleting the term "**of a bottom**" of claim 1 as originally filed: "A bucket type jaw crusher [...], which has a stationary jaw teeth fixed to an inner surface **of a bottom** of a bucket [...].".

3.2.1 The Board notes that in the original application the bucket has been defined as presenting a bottom section 11 (paragraph [0022]), a top plate 16 (paragraph [0028]) and left and right plates 14 (paragraph [0024]).

3.2.2 As correctly argued by the appellant, **claim 1 as granted** requires that the stationary jaw is fixed to the inner surface of the bucket in general, which **covers also the possibilities** of the jaw being fixed to inner surface of the top plate or of any of the right and left plates. However, in the original disclosure, the only recognisable embodiment is that the stationary jaw is fixed to the inner surface **of the bottom of the bucket** (see original claim 1, paragraph [0022] and Figure 1, reference number 11).

3.2.3 Since the embodiments in which the stationary jaw is fixed to the inner surface of the top plate or of any of the right and left plates are not directly and unambiguously derivable for the skilled person from the original disclosure using common general knowledge, the subject-matter of claim 1 as granted extends beyond the content of the original application, resulting in an infringement of Article 123(2) EPC.

3.2.4 The respondent argued that those other theoretical possibilities proposed by the appellant and the Board, *i.e.* that stationary jaw is fixed to the inner surface of the top plate or of any of the right and left plates, were technically unfeasible and would be ruled out by the skilled reader. Hence, they could not justify the conclusion that Article 123(2) EPC was not complied with.

In particular, the implementation of the stationary jaw fixed at the inner surface of the **top plate**, would require that the movable jaw is fixed to the bottom plate which would require a repositioning of the fly wheel as well as the driving system, the eccentric shaft, the motor and the toggle mechanism. This relocation of elements would:

- 1) involve interferences which hinder the crushing work,
- 2) increase the capturing angle and require an increased force when capturing the material,
- 3) make necessary to strengthen the structure against collision and impact,
- 4) increase weight of the bucket,
- 5) make maintenance of the bucket more difficult,
- 6) make small pieces after crushing fall awkwardly in the gap between the movable jaw and the side plate and lead to clogging,
- 7) increase the effort required while lifting the mass of crushed material, and
- 8) make the transportation of an excavator comprising such a bucket on a trailer not possible.

With respect to the possibility that the stationary jaw could be fixed to the inner surface of the **right or left plate**, the respondent submitted that there appeared to be no practical way that the driving systems, the shaft, the motor and the fly wheel could function to allow operation of the bucket when the fixed jaw was attached to the left or right side of the bucket, *i.e.* on a different axis from the fly wheel that drive the jaw and transported the material to be crushed.

- 3.2.5 The Board is not persuaded by these arguments for the following reasons. As correctly put forward by the appellant during the oral proceedings, the respondent has based their reasoning that the other possibilities encompassed in claim 1 are technically unfeasible on mere allegations, but has failed to convincingly demonstrate that the other configurations cannot be reasonably implemented.

According to the respondent, the possibility according to which the stationary jaw is fixed at the inner surface of the top plate would involve either interferences caused by the fly wheel during operation or transportation of an excavator comprising such a bucket or several disadvantages compared to the stationary jaw being fixed at the bottom of the bucket.

The Board is however of the the view, that these alleged interferences obviously depend on the dimensions of the flywheel and of the bucket. Said dimensions, being a design matter, could and actually would be adapted by said skilled person depending on the circumstances.

It can thus not be accepted that this interferences would lead to a technical unfeasibility.

With respect to alleged disadvantages occasioned by the configuration of the stationary jaw being fixed at the top plate, the Board does not see how and why these disadvantages would inevitably result in this particular configuration being technically unfeasible.

With regard to the option for the stationary jaw being fixed at the right or the left plate, the Board, in line with the appellant, is of the view that the respondent has not provided convincing reasons as to why such a configuration would not be technically feasible. In particular, the Board is of the view that the axis of the driving systems, the shaft, the motor and the flywheel could be adapted to match the axis required by the movable jaw.

3.2.6 Consequently, the allegations of the respondent that the embodiments identified by the appellant as being

claimed but not originally disclosed were technically unfeasible are unfounded.

### 3.3 The essentiality or three-point test

3.3.1 In point IV of their reply to the appellant's statement setting out the grounds for appeal, the respondent follows in substance the reasoning of point 3.1 of the grounds for decision under appeal, according to which the removal of the feature "of a bottom" does not violate Article 123(2) EPC, since the skilled person would recognise that:

- (i) the feature was not explained as essential in the disclosure;
- (ii) the feature is not, as such, indispensable for the function of the invention in the light of the technical problem the invention serves to solve; and
- (iii) the replacement or removal requires no real modification of the other features to compensate for the change.

The respondent further argued that the deletion of the term "of a bottom" in claim 1 should be treated as the removal of a feature and that the considerations (i) to (iii) above are to be applied.

3.3.2 The Board notes that these conditions above correspond to the so-called essentiality or three-point test set out in the decision T 331/87 (OJ EPO 1991, 22) which is also reflected in the Guidelines for Examination H-V, 3.1 - November 2019 version.

The Board, in line with several decisions such as

T 1472/15, point 2.3 of the reasons, and T 1852/13, point 2.2.3 of the reasons (none of them published in the OJ EPO), holds that the criteria (i)-(iii) listed above are to be seen as **condiciones sine quibus non**, which means that fulfilment of these criteria is a **necessary** requirement **but not a sufficient** one for the compliance of Article 123(2) EPC.

- 3.3.3 In the present case, the Board is convinced that the consequence of the application of the essentiality test has been misinterpreted by the opposition division, by considering that the removal of the feature meeting the criteria (i) to (iii) of the test, inevitably results in the compliance of Article 123(2) EPC.
- 3.3.4 It must be further underlined, that this test cannot in any case replace of the "gold standard" and should not lead to another result than when applying the "gold standard" directly.
- 3.3.5 Consequently, the Board concludes that in cases where it can be established whether an amendment is made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the content of the application as originally filed, *i.e.* whether the amendment meets the "gold standard", the so-called three point essentiality test set out by decision T 331/87 is superfluous, unnecessary and misleading and shall not be applied (see Case Law of the Boards of Appeal, *supra*, II.E.1.4.2 and II.E.1.4.4.c), in particular T 2599/12, point 3.2 of the reasons (not published in the OJ EPO).
- 3.3.6 In the present case, as it has been discussed in point 3.2 above, the result after applying the "gold

standard" is that the subject-matter of claim 1 of the patent as granted extends beyond the original disclosure, so that the requirements of Article 123(2) EPC are not met.

4. *Conclusions*

4.1 It follows that the arguments presented by the appellant demonstrate the incorrectness of the decision under appeal as regards added subject-matter of the patent as granted. The findings of the opposition division that the patent as granted meets the requirements of Article 123(2) EPC and that the ground for opposition does not prejudice the maintenance of the patent as granted cannot be upheld by the Board.

4.2 Consequently, the decision under appeal is to be set aside. Since the patent cannot be maintained as granted and in the absence of any other set of claims on the basis of which the patent could maintained, the patent is to be revoked.

**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. Nachtigall

I. Beckedorf

Decision electronically authenticated