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Datasheet for the decision of 19 February 2020

Case Number: T 1621/17 - 3.2.04

Application Number: 04100532.3

Publication Number: 1452087

IPC: A01F25/20

Language of the proceedings: EN

Title of invention:
Method and apparatus for removing a quantity of fodder from a stock thereof

Patent Proprietor:
Trioliet Mullos B.V.

Opponent:
Octrooibureau Van der Lely N.V.

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)
RPBA 2020 Art. 11

Keyword:
Grounds for opposition - subject-matter extends beyond content of earlier application (no)
Remittal to the department of first instance

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 1621/17 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 19 February 2020

Appellant: (Patent Proprietor)	Trioliet Mullos B.V. Hinmanweg 19 7575 BE Oldenzaal (NL)
Representative:	Grünecker Patent- und Rechtsanwälte PartG mbB Leopoldstraße 4 80802 München (DE)
Respondent: (Opponent)	Octrooibureau Van der Lely N.V. Weverskade 110 3147 PA MAASSLUIS (NL)
Representative:	Octrooibureau Van der Lely N.V. Cornelis van der Lelylaan 1 3147 PB Maassluis (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 18 May 2017 revoking European patent No. 1452087 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	S. Oechsner de Coninck
Members:	C. Kujat
	W. Van der Eijk

Summary of Facts and Submissions

I. The appellant (proprietor) lodged an appeal received on 17 July 2017 against the decision of the opposition division of the European Patent Office posted on 18 May 2017 revoking European patent No. 1452087, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 28 September 2017.

II. The opposition was based on Articles 100(a), 100(b) and 100(c) EPC; the opposition division came to the conclusion that taking account of the amendments made by the patent proprietor, the European Patent had to be revoked on the ground of Article 100(c) EPC because it contained subject-matter which extends beyond the content of the application as filed, contrary to the requirements of Article 123(2) EPC.

III. The Board issued a communication in preparation for oral proceedings setting out its provisional view on the relevant issues.

IV. Oral proceedings were held on 19 February 2020.

V. The appellant requests to set aside the decision under appeal and to maintain the patent as granted (as main request), alternatively, to maintain in amended form according to auxiliary request 1 filed on 12 February 2020, or according to auxiliary requests 2 or 4 filed as auxiliary requests 1 and 3 on 28 September 2017, or according to auxiliary request 3 filed as auxiliary request 1 during opposition.

VI. The respondent (opponent) requests that the appeal be dismissed.

VII. The wording of the independent claims 1 and 9 of the main request reads as follows:

"1. A method for removing a quantity of fodder from a stock (1) thereof, wherein fodder is separated from the stock and placed into a container by removing means (2) having a removing range, which stock of fodder has a front wall (10) to which the removing means has access, wherein a specific weight of fodder is to be separated in one or more operations of the removing means (2), characterized in that the volume of the quantity of fodder that is to be separated or that has been separated is measured, with the weight being determined on the basis of the volume that is to be separated or that has been separated."

"9. Apparatus for removing fodder from a stock (1) thereof, comprising removing means (2) having a removing range and a container (11) for receiving removed fodder, which apparatus can be moved according to a direction of movement with respect to the stock of fodder for the purpose of placing the removing means (2) in an operating position, characterized by means (6, 12-15, 16, 20) for measuring the volume of the fodder that is to be separated or that has been separated."

VIII. The appellant argues as follows:
In all embodiments disclosed in the application as filed, at least a measurement of one dimension takes place. The first embodiment that uses a scale instead of sensors supports the generalisation of measuring the volume without sensors.

IX. The respondent argues as follows:
The measurement of the volume of the quantity of fodder is only disclosed in relation to the embodiment of figure 2 where the measurement functionally relates to the use of sensors. Claims 1 and 9 do not define these sensors, and thus there is an intermediate generalisation that is unallowable under Article 123(2) EPC.

Reasons for the Decision

1. The appeal is admissible.

2. Background
The invention relates to a method and apparatus for removing a quantity of fodder from a stock. It is sought to provide a method and apparatus that allows to determine the weight before the fodder is collected. This weight is converted into a certain volume of the quantity of fodder to be separated, that permits removing means to separate the needed quantity of fodder. The published application discloses the same removing apparatus in all the embodiments shown in figures 1-9. The removal apparatus consists of a removing jaw 2 pivotally connected to a loading flap 3 for receiving the removed quantity of fodder (col 2, lines 8-12 and lines 18-20). In all these embodiments the patent considers various ways for ascertaining the volume of fodder to be separated from the stock of fodder.

3. Added subject-matter - Article 100(c) EPC

3.1 The present European patent was published as EP 1 452 087 A2, which content corresponds to the content of the application as filed for the purpose of checking compliance with Articles 100(c) and 123(2) EPC.

3.2 During examination of the patent application the way the volume of the quantity of fodder to be separated or that has been separated is assessed, has been amended by replacing the verb "determined" by the verb "measured" in claim 1. A corresponding amendment defining means for measuring the same volume has been made in the apparatus claim 9. Measuring a volume is a specific, and more limited way of determining the volume, and the replacement results in a limitation of the scope of claims 1 and 9. This has not been disputed.

3.3 The second embodiment in figure 2 of the published application is explained in detail in paragraph 19. Lines 28 to 31 expressly state that "the volume of the quantity of fodder to be separated is measured by means of sensors 12-15". Measurement of the depth of the block to be cut out is made with sensor 12, sensor 13 measures the height of the block to be cut out, whilst the sensors 14, 15 measure the width of the block to be cut out. The three dimensions measured are fed to a computer that calculates the volume of the block (lines 32-39 of paragraph 19). Therefore this embodiment gives an explicit valid basis for the replacement of "determined" by "measured" in the context of this embodiment. This has not been challenged.

3.4 The respondent however submits that this measurement of the volume with several sensors is only disclosed in relation to this embodiment of figure 2, and the measurement of the volume of fodder functionally related to these sensors. Claims 1 and 9 do not define these sensors and there is thus an intermediate generalisation that is unallowable under Article 123(2) EPC.

3.5 The Board disagrees. The application as filed already explains within the context of the second embodiment that the sensors measure each of the three dimensions: depth with sensor 12, height with sensor 13 and width with sensors 14, 15. Therefore the sensors directly measure a length and their signals are sent to a computer, which is capable of computing the volume of the block to be cut out. Thus measurement of the volume of the quantity of fodder relies in the specific context of the second embodiment on one of the standard ways of obtaining a volume: by measuring three dimensions and calculating their product. The number and type of sensors indicated as an example, laser telemeters are used to measure a single linear dimension. These sensors cannot without further processing directly measure a future volume to be cut out from the stock of fodder. What is meant by "volume of the quantity of fodder to be separated is measured by means of sensors 12-15" is therefore an indirect measurement of the volume, where each sensor actually measures a length.

3.6 The third embodiment briefly explained in paragraph 21 in relation to figures 3 and 4 elaborates further on the above embodiment of figure 2 and also explicitly uses the concept of measuring the volume. However this

embodiment relies on measurements with only two sensors 16. These sensors are not further specified, especially not as to whether they explicitly measure width, depth or height. It is merely indicated that the volume to be cut out depends solely on the height calculated by a computer, this height is the variable dimension for allowing a measurement of the volume effectively cut out. Thus in this embodiment, the sensors in fact do not directly measure the total required volume. Instead it can be inferred that they continuously measure width and depth while the computer stops the removing jaw at a certain height. There again the third embodiment discloses an indirect measurement of the volume with sensors that directly measure dimensions.

3.7 Both second and third embodiments, which expressly disclose a measurement of the volume of the quantity of fodder to be separated or that has been separated, rely on an indirect measurement of that volume, where the sensors in different numbers (2 to 4) and of various types (laser telemeter as an example) in fact directly measure one of the three dimensions. In this context the disclosed kind of measurement of the volume is not the narrow one of directly ascertaining a volume expressed in liters or cubic meters intrinsically related to the use of the disclosed sensors, but a broader concept of indirect measurement, which is necessary because the volume considered is either a projected required volume to be separated that cannot be measured directly before its removal from the stock of fodder (second embodiment), or an already separated volume that is assessed continuously during removal (third embodiment).

3.8 The respondent submits that in the first embodiment no measurement of the volume takes place but a determination in the sense of setting a volume to be separated using the scale disclosed in that embodiment.

3.9 The Board does not share this view. Using the same understanding of indirect measurement of the volume, the skilled person directly and unambiguously derives that such measurement also takes place in the first embodiment.

Paragraph 16 explains in relation to the first embodiment of figure 1 that the loading flap 3 is moved under the stock of fodder with its bottom plate 8 until one of the side walls 9, or both side walls, abut(s) against the front wall 10 of the stock of silage 1, thereby determining the maximum cutting depth. The height is a constant value either obtained by an optional measurement explained in paragraph 26, or otherwise a known constant value acquired once when the stock has been constituted. Lines 31 to 36 explain that the scale division is readable and serves as means to easily determine the volume of the quantity of fodder to be separated. The scale division is shown in figure 1 to be graduated, and according to the last sentence of paragraph 16 this scale division serves to ascertain a width of the stock to be cut out. The scale division placed on the cutting edge of the removing jaw 2 undoubtedly is "an instrument (such as a yardstick) or utensil (such as a graduated cup) for measuring" (Definition of "measure" 2a in Merriam Webster) whereby the width belongs to the "dimensions, capacity, or amount of something ascertained by measuring" (Definition of "measure" 1b in Merriam Webster).

Therefore as in the second and third embodiments, the scale division directly measures the required width, i.e. a single dimension. The volume of the quantity of fodder that needs to be removed from the stock is further calculated by the optional weighing computer explained in paragraph 17. Therefore within the context of the first embodiment a way of indirectly measuring the volume has been disclosed that does not rely on the use of sensors.

3.10 From the whole context of the first to third embodiments, measuring the volume of the quantity of fodder is not disclosed as intrinsically related to the use of any sensor. Thus the amendment that limits the scope of claim 1 to measure the volume is not based on an unallowable intermediate generalisation.
The same conclusion applies to the corresponding means for measuring the volume replacing the means for determining the volume in claim 9.

3.11 The further argument of the respondent that the embodiment according to figure 5 does not measure a volume but instead scans the profile of the front wall of the stock of fodder is moot. Indeed once acknowledged within the framework of the first embodiment, that the measurement of the volume is not functionally closely related to the use of sensors for each one of the three dimensions as disclosed in the second embodiment of figure 2, the term "measure" can replace the term "determine" without further specification of the use of any sensor. Indirect measurement of the volume of the quantity of fodder adequately covers all the originally disclosed embodiments using either a scale or sensors in various numbers (1 to 4) or of various types (laser, distance

sensors, pivotable or not). No new information arises from replacing the original term "determine" by the term "measure".

3.12 It follows from the above, that granted claims 1 and 9 do not contain subject-matter extending beyond the content of the application as filed and the ground for opposition mentioned in Article 100(c) EPC does not prejudice the maintenance of the patent as granted.

4. Remittal

4.1 The Board has considered the opposition ground based on Art 100(c) together with 123(2) EPC, as decided by the opposition division in its decision and challenged in the appeal. However, the opposition division did not examine and decide on the grounds of Art 100(b) and (a) in relation to novelty and inventive step also raised in opposition. These issues were neither the subject of the appeal, nor have they been addressed in a complete manner by the parties in their submissions to date.

4.2 In accordance with Article 111(1) EPC, second sentence, a Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. Since the main purpose of the appeal proceedings is to give the losing party a possibility to challenge the decision of the opposition division on its merits (see G0010/91, point 18), remittal in accordance with Article 111(1) EPC has normally been considered by the Boards in cases where the opposition division issues a decision solely upon a particular issue (e.g. added subject-matter) and leaves other substantive issues regarding sufficiency, novelty and inventive step undecided. This present practice is

in conformity with the primary object of appeal proceedings to review the decision under appeal in a judicial manner as expressed in Art 12(2) RPBA 2020.

4.3 In the present case, the respondent has requested remittal and the appellant also agrees with this course of procedure.

4.4 In the Board's view all these elements constitute special reasons that justify a remittal of the case to the opposition division in accordance with Article 11 RPBA 2020.

4.5 In the light of the above, the Board therefore decides to remit the case to the opposition division for further prosecution.

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 for further prosecution.**

The Registrar: The Chairman:

G. Magouliotis S.Oechsner de Coninck

Decision electronically authenticated