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**Datasheet for the decision
of 6 February 2025**

Case Number: T 0110/23 - 3.3.04

Application Number: 15702213.8

Publication Number: 3099165

IPC: A01N3/02, A01H5/02

Language of the proceedings: EN

Title of invention:
Bouquet of cut flowers

Patent Proprietor:
Knud Jepsen A/S

Former Opponent:
Slijkerman Breeding B.V.

Headword:
Kalanchoe cut flowers II/KNUD JEPSEN

Relevant legal provisions:
RPBA 2020 Art. 13(2)
EPC Art. 54, 56, 83, 123(2)

Keyword:
Amendment after notification of Art. 15(1) RPBA communication
- exceptional circumstances (yes)

Decisions cited:

T 1264/19



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0110/23 - 3.3.04

D E C I S I O N
of Technical Board of Appeal 3.3.04
of 6 February 2025

Appellant: Knud Jepsen A/S
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office, issued on
29 November 2022, revoking
European patent No. 3 099 165 pursuant to
Article 101(3) (b) EPC**

Composition of the Board:

Chairwoman M. Pregetter
Members: B. Rutz
L. Bühler

Summary of Facts and Submissions

- I. The appeal by the patent proprietor (appellant) lies from the second decision of the opposition division, issued on 29 November 2022, to revoke European patent No. 3 099 165.
- II. The patent had been opposed on the grounds of Article 100(a) EPC, in relation to novelty (Article 54 EPC) and inventive step (Article 56 EPC), and of Article 100(b) and (c) EPC.
- III. In a first decision, issued on 28 February 2019, the opposition division held, *inter alia*, that the subject-matter of the claims of the main request (claims as granted) extended beyond the content of the application as filed (Article 100(c) EPC). With regard to auxiliary request 9, the opposition division held that the invention to which claim 1 related was not sufficiently disclosed in the patent (Article 83 EPC).
- IV. The patent proprietor appealed the decision. This board in a different composition decided in T 1264/19 that the priority for claim 1 of the main request (patent as granted) was not validly claimed and that document D3 therefore formed part of the prior art. The subject-matter of claim 1 of the main request lacked an inventive step over the disclosure of document D3. The invention to which the claims of auxiliary request 1 (former auxiliary request 21 which is identical to auxiliary request 9 considered in the decision under appeal) related was found to be sufficiently disclosed. The case was remitted to the opposition division for further prosecution on the basis of the set of claims

of auxiliary request 1 as renumbered during the oral proceedings before the board.

- V. In a second decision, issued on 29 November 2022, the opposition division did not admit documents D37 and D38 into the proceedings because they were filed late. It further decided that the subject-matter of claim 1 of the main request (auxiliary request 1 underlying decision T 1264/19, re-submitted on 25 August 2022) was novel but lacked an inventive step over the disclosure of document D3. The same applied to auxiliary requests 1 and 2 filed on 25 August 2022 and auxiliary request 3 filed during oral proceedings before the opposition division.
- VI. With its statement of grounds of appeal, the appellant filed sets of claims for a main request and for auxiliary requests 1 to 4. The appellant further filed documents D39 to D44.
- VII. The opponent (respondent) without making any submissions in substance withdrew its opposition on 12 September 2023 and has thus ceased to be a party to the proceedings as far as the substantive issues are concerned.
- VIII. The board summoned the appellant to oral proceedings, as requested, and informed them of its preliminary opinion in a communication under Article 15(1) RPBA 2020.
- IX. In this communication, the board indicated *inter alia* that it considered the subject-matter of claims 12 to 15 of all requests to lack an inventive step over the disclosure of document D3.

X. By letter dated 20 January 2025, the appellant provided further arguments and filed sets of claims for auxiliary requests 5 to 11 and an affidavit with an annex. It further stated that "*[i]n case the Board is of the opinion that at least one of the requests is allowable without the need for the oral proceedings to take place, the patentee is willing to agree to have the patent maintained according to the said request.*"

XI. The board informed the appellant in a communication that it considered auxiliary request 6 allowable and asked whether this request should be promoted to become the main request.

XII. In a letter dated 5 February 2025, the appellant agreed to this and withdrew all other requests. The board cancelled the oral proceedings.

XIII. Claim 1 of the main request (former auxiliary request 6 filed with the letter dated 20 January 2025) reads as follows:

"1. Use of one or more cut flowers belonging to the genus *Kalanchoe* having a stem length of at least 35 cm, for prolonging the longevity of one or more cut flowers belonging to a genus different from *Kalanchoe*."

XIV. The following document is referred to in this decision:

D3 Archived page of Website Queen® that was on the Internet on 16 May 2014: <https://web.archive.org/web/20140516110437/http://www.greenex.com:80/flowering-plants/kalanchoe-queen/queen-flowers/>

- XV. The appellant's submissions as far as relevant to the decision are summarised as follows:

Admission of the main request (Article 13(2) RPBA)

The amendments in auxiliary request 6 (new main request) consisted in the deletion of the "method" claims 12 to 15 of the main request. This was in response to the board's preliminary opinion in which the inventive step of these claims was assessed for the first time (see points 21 to 25 therein, in particular point 24).

Inventive step (Article 56 EPC)

If the problem was defined as the provision of an alternative use for cut flowers of the genus Kalanchoe, document D3 did not give any hint in the direction of longevity. The skilled person would find no motivation in document D3 to put Kalanchoe to the specific alternative use of improving longevity of other cut flowers.

- XVI. The appellant requests that the decision under appeal be set aside and the patent be maintained based on the set of claims of the main request.

Reasons for the Decision

Admission of the main request (Article 13(2) RPBA)

1. The set of claims of the main request was filed as auxiliary request 6 after notification of a communication under Article 15(1) RPBA by the board.

2. The board notes that the decision under appeal did not distinguish between "method" and "use" claims (see e.g. section "2.1. Novelty" and section "2.2. Inventive step").
3. The specific legal considerations for "method and "use" claims in view of decisions G 2/88 and G 6/88 and invoked for the first time in the preliminary opinion by the board constitute exceptional circumstances justifying admittance of the request.

Added subject-matter (Article 123(2) EPC)

4. The subject-matter of claim 1 is disclosed in claim 20 combined with claim 1 as filed. The subject-matter of the remaining claims is also disclosed in the application as filed, in particular in the claims as filed.

Sufficiency of disclosure (Article 83 EPC)

5. Sufficient disclosure of the invention to which the claims relate has been acknowledged in decision T 1264/19 (see points 27 to 39 of the Reasons) which in view of the identical claims is *res judicata* for the present case.

Novelty (Article 54 EPC)

6. The board agrees with the decision under appeal that the claimed subject-matter is novel over the relevant documents of the prior art, i.e. documents D1 to D3.

Inventive step (Article 56 EPC)

7. The board agrees with the decision under appeal that document D3 constitutes a suitable starting point for assessing inventive step.
8. The differences between the claimed subject-matter and the disclosure of document D3 are (i) the use for improving longevity of one or more cut flowers belonging to a genus different from *Kalanchoe* and (ii) the stem length of at least 35 cm of the cut flowers belonging to the genus *Kalanchoe*. The first difference is a functional technical feature of the claim and thus limiting regarding the claimed use (see decisions G 2/88 and G 6/88), or, in other words, cut flowers belonging to the genus *Kalanchoe* are used to achieve a hitherto unknown effect. The second difference (stem length) has not been shown in the patent to be associated with a technical effect (see also decision under appeal, sheet 10, penultimate paragraph).
9. The board agrees with the appellant that including "*confer prolonged longevity to cut flowers belonging to a genus different from Kalanchoe and present in a bouquet*" in the formulation of the objective technical problem, as was done in the decision under appeal (see sheet 10, third paragraph), would point the skilled person to the claimed invention when starting from the disclosure of document D3. This is not permissible (see Case Law of the Boards of Appeal of the EPO, 10th edition 2022, I.D.4.2.1).
10. To avoid providing a pointer to the solution, the objective technical problem is formulated as the provision of an alternative use for cut flowers of the genus *Kalanchoe*.

11. On reading document D3, the skilled person would learn that *Kalanchoe* have "*fantastic longevity*". This, however, relates to *Kalanchoe* and not to other flowers. Document D3 further discloses that an "*antiseptic effect keeps the water clean*".
12. The decision under appeal states that "*the person skilled in the art would have included Kalanchoe flowers in the same water as other cut flowers of a genus different from Kalanchoe in order to prolonge [sic] the longevity of the flowers of a genus different from Kalanchoe due to the antiseptic effects in the water of cut flowers of Kalanchoe genus. There is no prejudice against having in water a mixed bouquet of Kalanchoe flowers and flowers of a genus different from Kalanchoe fearing any harm to the non Kalanchoe flowers.*" (sheet 12, second paragraph).
13. The board agrees that it is usual practice for the skilled person to arrange *Kalanchoe* and other flowers together in water (see also decision T 1264/19, point 23 of the Reasons). Claim 1, however, is a use claim for which the intended use represents a functional technical feature (see decision G 6/88, Headnote). The question therefore is whether the skilled person would have arrived in an obvious manner at the claimed use.
14. It is not apparent from the disclosure of document D3 that the reported "*antiseptic effect [which] keeps the water clean*" would prolong the longevity of other flowers when kept in water together with *Kalanchoe*. An antiseptic effect on water is commonly understood as a reduction of microorganisms in the water. Water which is "*clean*" is commonly understood as not being cloudy or containing few microorganisms. However, these two

features, namely an antiseptic effect and clean water, do not necessarily also provide conditions for cut flowers to stay alive for longer. It is common general knowledge that the presence of nutrients or toxic substances can equally have an influence in this regard.

15. The board therefore agrees with the appellant that it is common general knowledge that an "*antiseptic effect* [which] *keeps the water clean*" does not equate to increased longevity of other cut flowers in the water.
16. The board concludes that the skilled person consulting document D3 would not have arrived at the claimed use in an obvious manner.
17. The claimed subject-matter involves an inventive step (Article 56 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 the patent as amended in the following version:
 - Description:
Paragraphs [0001] to [0047] of the patent specification

 - Claims:
Nos. 1 to 11 according to the main request (filed on 20 January 2025 as auxiliary request 6)

Drawings:

Sheets 1 to 7 of the patent specification

The Registrar:

The Chairwoman:



I. Aperribay

M. Pregetter

Decision electronically authenticated