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Aktenzeichen / Case Number / N^o du recours : T 136/88 - 3.2.2

Anmeldenummer / Filing No / N^o de la demande : 82 200 657.3

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 66 344

Bezeichnung der Erfindung: Soil cultivating implements

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : A01B 49/02, A01B 33/06, A01B 33/16

ENTSCHEIDUNG / DECISION

vom / of / du 11 October 1989

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

C. Van der Lely N.V.

Einsprechender / Opponent / Opposant :

O1 Amazonen-Werke
H. Dreyer GmbH & Co. KG
O2 Rabewerk Heinrich Clausing

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Art. 123(2), 113(1) and (2)

Kennwort / Keyword / Mot clé :

"inadmissible deletion of an essential feature
in an independent claim";

"a party, which without giving any reasons, is
absent from an oral proceeding, although duly
summoned, did not make use of his right to
present comments and thereby exhausted such
right";

"without newly filed claims in the appeal
procedure, the Board has to decide on the
basis of the claims on file."



Case Number : T 136/88 - 3.2.2

DECISION
of the Technical Board of Appeal 3.2.2
of 11 October 1989

Appellant :
(Opponent 01) Amazonen-Werke H. Dreyer GmbH & Co. KG
Postfach 51
D-4507 Hasbergen-Gaste (DE)

Representative :
Patentanwälte Grünecker, Dr. Kinkeldey,
Dr. Stockmair, Dr. Schumann, Jakob, Dr. Bezold,
Meister, Hilgers, Dr. Meyer-Plath
Maximilianstrasse 58
D-8000 München 22 (DE)

Appellant:
(Opponent 02) Rabewerk Heinrich Clausing
D-4515 Bad Essen 1 (DE)

Representative :
Patentanwälte Dipl.-Ing. R. Schlee
Dipl.-Ing. A. Missling
Bismarckstrasse 43
D-6300 Giessen (DE)

Respondent :
(Proprietor of the patent) C. Van der Lely N.V.
Weverskade 10
P.O. Box 26
NL-3155 ZG Maasland (NL)

Representative :

Decision under appeal : Interlocutory decision of the Opposition Division of the European Patent Office dated 18 February 1988 concerning maintenance of European Patent No. 66 344 in amended form.

Composition of the Board :

Chairman : P. Delbecque

Members : C. Andries

L. Mancini

Summary of Facts and Submissions

- I. European patent No. 66 344 comprising four claims was granted to the Respondent on 31 July 1985 in response to European patent application No. 82 200 657.3 filed on 28 May 1982.

- II. The Appellants filed notices of opposition to the European patent requesting its revocation. The opposition was mainly based on the following documents:

D1: FR-A-2 320 688; and
D2: FR-A-1 228 412.

During the further proceedings document D3: "Rabewerk-Kreiseleggen RKE" was also cited.

- III. By interlocutory decision dated 18 February 1988, the Opposition Division maintained the patent as amended by the Respondent.

Claim 1 reads now as follows:

" A soil cultivating implement which comprises a plurality of soil working members (4) journaled in a frame part (1) that forms a gearbox so as to be rotatable about upwardly extending axes and which also comprises a ground roller (18) located behind the soil working members and gearbox with respect to the intended direction of operative travel of the implement, the said roller (18) being bodily and downwardly displaceable relative to said members and gearbox by means of arms (13) that are pivotable connected near the front side of the gearbox to an upright support (9,10) secured to the upper part of the gearbox and extending throughout substantially the whole of the width of the gearbox, considered in the intending direction of

operative travel of the implement, characterized in that a pair of said upright supports (9,10) is provided for every arm (13) whereby the arm (13) fits closely between the said supports (9,10) of a pair."

- IV. The Appellants lodged an appeal against that decision respectively on 27 April 1988 and 26 March 1988, with simultaneous payment of the appeal fee. The Statements of Grounds were submitted respectively on 27 June 1988 and by telecopy on 9 June 1988, confirmed on 13 June 1988. The Appellants objected that the subject-matter of Claim 1 did not involve an inventive step with respect to documents D1, D2 and D3. One of the Appellants (O1) further stated that all the elements needed to solve the objective problem as presented by the Opposition Division were not present in Claim 1.

- V. In a reply, dated 22 December 1988, the Respondent explained the invention and referred to the previous proceedings to contest the arguments of the Appellants. The Respondent implicitly seemed to request the rejection of the appeal.

- VI. In a communication of the Board pursuant to Art. 110(2) EPC, the Board drew the attention of the parties to the obviously incomplete wording of Claim 1, to the problem to be solved and to missing essential features in Claim 1 needed to directly transfer the reaction forces from the ground roller and its support on the one hand to coupling means on the other hand (among others: the ground roller carrier 15).

- VII. The Respondent did not reply to this communication.

- VIII. In an annex to the summons to the oral proceedings, again the Board drew the attention to the points raised in said

communication and defined the documents which would be the base for the oral proceedings in case no amendments were filed.

IX. During the oral proceedings held on 11 October 1989, at which the Respondent, although duly summoned, did not appear (cf. Rule 71(2) EPC) and in which the German language was used in accordance with Rule 2(4) EPC, the Board again drew the attention of the parties to the missing essential feature 15 (the ground roller carrier), which is considered by the Board to be essential and which has been described as such in the originally filed application. The Board considered the deletion of this essential feature, which was also present in the originally filed Claims 1 and 3, as inadmissible. Claim 1 therefore did not appear to satisfy the requirements of Art. 123(2) EPC which is also a ground for opposition (Art. 100(c) EPC).

The Appellants requested that the decision under appeal should be set aside and the patent in suit be revoked.

Reasons for the Decision

1. The appeal is admissible.
2. The wording of Claim 1 contains a passage ("roller being bodily and downwardly displaceable...") which seems with respect to the whole content of the patent in suit obviously incomplete and which has to be interpreted as follows: "roller being bodily upwardly and downwardly displaceable ...".

3. Claim 1 differs from Claim 1 as granted in that the wording "or part of it" has been deleted and in that the word "closely" has been added. By deleting the above wording, the subject-matter of the Claim 1 is limited to one of the alternatives (the arm or part of it) present in the granted Claim so that no extension has been made. The addition of the word "closely", which was also mentioned in the originally filed description (page 10, line 33) (Art. 123(2) EPC), specifies the kind of fitting wanted, so that with respect to the Claim 1 as granted, Claim 1 satisfies Art. 123(3) EPC.

4. However Claim 1 mainly differs from Claims 1 and 3 as originally filed i.a. in that the following feature has been deleted: "a carrier (15) having resistance to torsional deformation" (feature A).

- 4.1 Although deletion of features from a claim may in principle not always violate Art. 123(2) EPC (cf. T 331/87 of 6 July 1989, to be published), the test for compliance with Art. 123(2) EPC remains basically a novelty test, i.e. no new subject-matter may be generated by the amendment (cf. T 201/83, OJ EPO, 1984, 481).

- 4.2 The application as originally filed clearly states that feature A is part of the suggested solution (independent Claims 1 and 3; description page 1, line 26 to page 2, line 16). Indeed, the originally filed application disclosed two alternatives to solve the indicated problem. The first one (Claim 1) comprised a combination of feature A with another feature allowing the connection of feature A with the gear box, whereas the second one (Claim 3) comprised a combination of again feature A with a part (13) located at least partly between two upright supports (and allowing thereby a connection of feature A with the

gear box). Both alternatives therefore clearly considered feature A as an essential feature.

Furthermore, it is emphasised throughout the whole description that a support (39) is present comprising a carrier (15) having strong resistance to torsional deformation (page 5, lines 23, 24 and 28 to 32; page 13, lines 4 to 10).

A person skilled in the art reading the originally filed application (independent Claims 1 and 3 and the description) therefore recognises directly and unambiguously, that not only the specific carrier was needed to solve the originally indicated problem, but also that a soil cultivating implement without such a carrier was neither intended nor disclosed by that application. Even the wording used in the application to define the connection between the roller and the gear box unequivocally suggests, according to the Board, the use of a carrier. Indeed, the described connection comprises a support (39) including the arms (13), the plates (14) and the roller carrier (15), whereas such a connection, when describing (page 12, lines 20 to 30) the prior art, uses a roller-supporting arm, so that also by the used wording, "arm" versus "roller-supporting arm", it is clear which kind of connection is intended.

Further, it is unclear how such an implement without a carrier and implemented with the teaching of the patent in suit would look like, when intended as indicated in the application to avoid strengthening of the ends of the frame portion.

- 4.3 By the present wording of Claim 1, also a soil cultivating implement without a ground roller carrier, i.e. with a direct connection between the ground roller and the

gearbox frame in the form of arms solely, is included. Indeed, a ground roller carrier cannot be considered as a feature, which is implicitly present in the claimed implement, since several comparable implements do not have such a carrier, but only need roller supporting arms to connect the ground roller directly to the gearbox-frame.

However, such a device without a ground roller carrier could not be recognised for the above reasons by a person skilled in the art when reading the application at its priority date; so that due to the amendments made during the examination procedure new subject-matter is generated. The Board therefore considers that the subject-matter of Claim 1 extends beyond the content of the application as filed originally (Art. 100(c) EPC).

- 4.4 Furthermore, before the oral proceedings took place (above points VI and VIII) the Board emphasised that the essential features (carrier 15 and arms 13) should be present in Claim 1 and that this matter would be discussed.

The Respondent, however, did not react on that argument.

During the oral proceedings, the parties had the opportunity to bring forward their arguments with respect to the raised objection (Art. 100(c) EPC); the Respondent however, due to his absence for which no reason was given, did not make use of his right (Art. 113(1) EPC) to present his comments and thereby exhausted such right.

The Board considers that the Respondent has been given ample opportunity to put forward arguments to the contrary. The silence of the Respondent cannot lead, according to the Board's opinion, to an undue prolongation

of the proceedings, particularly since by his silence he made no effort to clear the raised objections.

Furthermore the Respondent did not propose new claims, so that the Board has to decide on the basis of the claims on file (Art. 113(2) EPC).

Therefore the Board, having given due consideration to Art. 113(1) EPC, was in a position to take a final decision at the end of the oral proceedings.

Order

For these reasons, it is decided that:

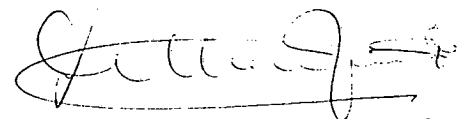
1. The decision of the opposition division is set aside.
2. The European patent No. 66 344 is revoked.

The Registrar:



S. Fabiani

The Chairman:



P. Delbecque