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D E C I S I O N
of 12 October 1995

Case Number: T 0223/93 - 3.2.4

Application Number: 90202293.8

Publication Number: 0411724

IPC: A01F 25/20

Language of the proceedings: EN

Title of invention:

Device for removing silage from a silage supply

Applicant:

LITECH B.V.

Opponent:

-

Headword:

Silage cutter/LITECH

Relevant legal provisions:

EPC Art. 76(1)

Keyword:

"Removal of features"

"Remittal to the Examining Division"

Decisions cited:

T 0222/87, T 0924/91

Catchword:

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Case Number: T 0223/93 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 12 October 1995

Appellant: LITECH B.V.
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NL-7521 PD Enschede (NL)

Representative: de Vries, Johannes Hendrik Fokke
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Decision under appeal: Decision of the Examining Division of the European
Patent Office dispatched on 31 August 1992
refusing European patent application
No. 90 202 293.8 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
M. Lewenton

Summary of Facts and Submissions

I. The European patent application No. 90 202 293.8, filed as a divisional application to the earlier European application No. 88 202 817.8 (parent application), which was filed on 8 December 1988 in Dutch and for which an English translation was filed on 29 December 1988, was refused by a decision of the Examining Division dispatched on 31 August 1992.

The reason the Examining Division gave for the refusal was that the subject-matter of the independent Claim 1 filed with the letter of 25 March 1992 did not comply with Article 76 EPC since this independent Claim 1 did not contain some features specified in Claim 1 of the parent application as originally filed, and these omitted features were considered to be essential features.

II. The appellant (applicant) lodged an appeal against this decision on 30 October 1992 and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was filed on 17 December 1992.

III. In a communication dated 24 May 1995 the Board, expressing its provisional opinion, informed the appellant that one of the omitted features was considered to be an essential feature. The Board also informed the appellant that if it filed a new independent Claim 1 complying with the requirements of Article 76 EPC, then the Board would remit the case to the first instance for the further substantive examination.

With the letter dated 19 June 1995 the appellant filed new Claims 1 to 5.

IV. As a main request, the appellant requested that the impugned decision be set aside and that a patent should be granted on the basis of Claims 1 to 5 as filed with its letter dated 19 June 1995. As a subsidiary request, the appellant requested that a patent should be granted on the basis of Claim 1 (auxiliary request) as defined in the Statement of Grounds (page 4, first paragraph). The appellant also filed a conditional request for oral proceedings.

The independent Claim 1 according to the main request reads as follows:

"1. Device for cutting silage from a silage supply comprising a support frame (102) with a plurality of sides, said support frame being movable up and down, wherein each side of said support frame (102) is provided with a pair of downwardly directed cutter plates (108, 109) that are positioned close to one another, provided with rows of cutting teeth (151), co-acting and movable reciprocally relative to one another, wherein all teeth of each pair of cutter plates have the same form and have sharp points with an apex angle of no more than 120°, **characterized in that** of each pair of cutter plates, one (108) is fixed in position on the support frame and the other (109) is movable, and in that the driving of movable cutter plates (109) takes place in such a way that at the ends of each stroke the teeth of co-acting cutter plates (108, 109) substantially coincide, such that co-acting cutting edges perform successive scissor-like movements."

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of Claim 1 according to the main request with respect to Article 76 (1) EPC*
 - 2.1 The present Claim 1 has been derived essentially from the combination of the features specified in Claims 1 and 2 of the parent application, by the addition of features concerning the form of the teeth and the driving of the movable cutter plates, and by the omission of features concerning the guiding frame as well as the shape of the support frame.
 - 2.2 The added features have a basis in the parent application (English translation), namely in the description (page 3, lines 21 to 23; page 13, lines 1 to 17) as well as in Claims 5 and 8.
 - 2.3 The following features were omitted:
 - (a) the cutting device has a **substantially vertical extending guiding frame;**
 - (b) the up and down movable support frame is movable **along the guiding frame;**
 - (c) the support frame is **at least virtually horizontal U-shaped;**
 - (d) the support frame has **three** sides (this feature has been generalised, in as far as, according to the present Claim 1, the support frame has a plurality of sides).

2.3.1 According to the description of the parent application as filed (English translation), "the invention has for its object to improve the cutting action of the known device and achieves this by providing a device displaying the feature that at least one of the cutter plates has sharp points with an angle of no more than 120° ..." (see page 1, lines 27 to 32).

A skilled person reading the parent application will immediately realize that the essential matter relates to the cutting action, and particularly to the specific cutter plates. According to the Board, it cannot be derived from the parent application that either the guiding frame (features (a) and (b) above) or the specific U-shaped support frame (features (c) and (d) above) are essential for obtaining the improved cutting action. In this respect, it should be emphasized that a feature cannot be considered as being essential only because "nowhere in the earlier parent application was there any disclosure that the ... feature was not considered to be essential..." (see the impugned decision, point 2 of the Reasons). On the contrary, the essential character of a feature must be clearly derivable from the original disclosure, either explicitly (e.g. because of a statement in the application) or implicitly (e.g. due to fact the feature contributes to the solution of the stated technical problem).

Thus, it appears from the description of the parent application that the omitted features, which only relate to the guiding and support frames, are not necessary for the solution of the technical problem. The only feature defined as being indispensable concerns the angle of the points of the cutter plate.

It is also clear from the whole content of the parent application that the omitted features and the remaining features of Claim 1 are not interrelated in such a way that the removal of the former features requires a further modification of the claimed device.

2.3.2 Moreover, in Claim 1 of the parent application as filed which was directed in rather general terms to a "Device for removing silage from a pit comprising a movable cutting member ...", specific examples of apparatuses falling within the term "device for removing silage from a pit" are also mentioned, the mentioning of these examples having only a facultative character. In particular, Claim 1 of the parent application as filed refers not only to a device for cutting silage but also to a feed dosing container and a feed mixing-dosing wagon.

The appellant submitted documents (EP-A-14 154, DE-A-3 126 447, FR-A-2 531 602 and EP-A-166 653) relating to feed mixing-dosing wagons which are neither provided with a guiding frame nor with the specific support frame as defined in Claim 1 of the parent application as filed.

The above mentioned documents - although not forming a part of the description of the parent application - represent the general technical knowledge of the skilled person reading the application.

Thus, taking into account the foregoing, the examples mentioned in Claim 1 of the parent application implicitly disclose that cutter plates whose teeth have sharp points with an angle of no more than 120° can also be used in all devices provided with a movable cutting member for removing silage from a pit.

Therefore, there is in the parent application a disclosure of the use of specific cutter plates in a device without a guiding frame and/or without a specific support frame.

- 2.3.3 Moreover, Claim 9 of the parent application as originally filed as well as its corresponding part in the description were directed to "components, particularly cutter plates, evidently intended for use with a device as claimed in any of the foregoing claims". The subject-matter of this claim, which has to be considered not only as an independent claim but also as the broadest independent claim of the parent application, also represents a basis from the removal of the omitted features.

Indeed, this claim does not define the combination of cutter plates with a device as claimed in any of the foregoing Claims 1 to 8 but discloses cutter plates per se, which are suitable for mounting in a device as claimed in any of Claims 1 to 8 of the parent application.

In other words, the subject-matter of the present Claim 1 is also derivable from Claim 9 of the parent application by addition of features.

- 2.4 Having regard to the considerations in the sections above, the subject-matter of Claim 1 does not extend beyond the content of the parent application as filed. Thus, the requirements of Article 76 (1) EPC are met.

3. Since the only ground for refusal indicated in the impugned decision cannot be upheld for the present Claim 1 of the main request, the decision under appeal has to be set aside.

Although the Examining Division, in a communication annexed to the summons to attend oral proceedings, expressed the opinion that the subject-matter of Claim 1 did not involve an inventive step with respect to documents EP-A-102 437 and US-A-3 193 925, the impugned decision does not deal with inventive step. Furthermore, it is clear from the minutes of the oral proceedings held on 13 August 1992 that the question of whether the subject-matter of Claim 1 involves an inventive step was not discussed during the oral proceedings.

For these reasons, according to the Board, it is appropriate that the further examination of present Claims 1 to 5 according to main request of the appellant (as well as the examination of the subsidiary request, if necessary) be carried out by the Examining Division. In this way the right of the applicant to have two levels of jurisdiction will be safeguarded.

Therefore, the case is remitted to the Examining Division (Article 111(1) EPC) for further prosecution on the basis of Claims 1 to 5 as filed with its letter dated 19 June 1995 (main request).

4. The appellant requested oral proceedings. Since the case is remitted to the first instance, there is no need to appoint oral proceedings (see decisions T 222/87, Section 5, not published and T 924/91, Section 10, not published).

Order

For these reasons it is decided that:

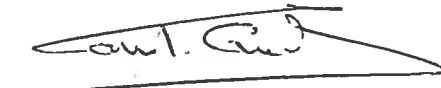
1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of Claims 1 to 5 as filed with letter dated 19 June 1995 (main request).

The Registrar:



N. Maslin

The Chairman:



C. Andries