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D E C I S I O N
of 4 March 1997

Case Number: T 0937/93 - 3.2.4

Application Number: 84200986.2

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Language of the proceedings: EN

Title of invention:
A mowing machine

Patentee:
C. VAN DER LELY N.V.

Opponent:
Greenland Geldrop B.V.

Headword:
Mowing machine/van der Lely

Relevant legal provisions:
EPC Art. 56

Keyword:
"Novelty (no: main and first subsidiary requests) - Prior use"
"Inventive step (yes: second subsidiary request)"

Decisions cited:
T 0270/90, T 0482/89

Catchword:
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Boards of Appeal

Chambres de recours

Case Number: T 0937/93 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 4 March 1997

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 2 June 1993
revoking European patent No. 0 126 518 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
J. P. B. Seitz
M. G. Hatherly
M. Lewenton

Summary of Facts and Submissions

- I. The European patent No. 126 518 was revoked by a decision of the Opposition Division dispatched on 2 June 1993.

The independent Claim 1 of the patent as granted reads as follows:

"1. A mowing machine comprising a plurality of rotary cutting units (8) mounted to a main frame so as to be drivable about upwardly extending axes (9), wherein a) the main frame (6) extends, during operation of the machine, transverse to the operative travel (A) of the machine and comprises at least one driving unit (36), b) said driving unit supports at least one cutting unit (8) and drive means therefore, and c) the driving unit comprises a releasable shoe (72) mounted, with respect to the normal direction of operative travel of the machine, to the rear side of the driving unit extending from the rear side of the driving unit along the lower side thereof to the front side of the driving unit, protection means (74) being situated in front of the driving unit, below the cutting unit, characterized in that the protecting means (74) and the front side of the shoe rigidly secured together are fitted around and over the forwardly protruding leading edge of the driving unit."

- II. In the decision under appeal the subject-matter of the independent Claim 1 of the patent as granted was considered as lacking novelty in view of the prior use of a mowing machine of the type FALAZET 185 which was manufactured by the opponent's firm.

With respect to this prior use, *inter alia* the following documents were filed:

- Annex 1: leaflet concerning the mowing machine FALAZET 185,
- Annex 2: drawing DM-0153 dated 10 December 1979,
- Annex 6: spare part lists for the cyclomower FALAZET, pages 1 to 17.

On 7 July 1992 the Opposition Division, in order to obtain evidence with respect to the machine FALAZET 185, inspected a machine of this type in the courtyard of the EPO and heard the witness Mr van Zon.

- III. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division on 29 July 1993 and paid the appeal fee on 30 July 1993. The statement setting out the grounds of appeal was filed on 29 September 1993.
- IV. Oral proceedings were held on 4 March 1997. During the oral proceedings the appellant filed an amended Claim 1a and amended Claims 1b and 2 to 7 upon which two subsidiary requests are based.

The independent Claim 1a according to the first subsidiary request reads as follows:

"1a. A mowing machine comprising a plurality of rotary cutting units (8) mounted to a main frame so as to be drivable about upwardly extending axes (9), wherein (a) the main frame (6) extends, during operation of the machine, transverse to the operative travel (A) of the machine and comprises at least one driving unit (36) having a housing, b) said driving unit supports at least one cutting unit (8) and drive means therefore, and c) the driving unit comprises a releasable shoe (72), extending along the bottom to the front side of

the driving unit, protecting means (74) being situated in front of the driving unit, below the cutting unit, the protecting means (74) and the front side of the shoe (72) being rigidly secured together, characterized in that the releasable shoe (72) is mounted, with respect to the normal direction of operative travel of the machine, to the rear side of the driving unit and is extending from the rear side of the driving unit to its front side, and in that the protecting means (74) and the front side of the shoe (72) are fitted around and over the forwardly protruding leading edge of the housing of the driving unit (36)."

The independent Claim 1b according to the second subsidiary request reads as follows:

"1b. A mowing machine comprising a plurality of rotary cutting units (8) mounted to a main frame so as to be drivable about upwardly extending axes (9), wherein (a) the main frame (6) extends, during operation of the machine, transverse to the operative travel (A) of the machine and comprises at least one driving unit (36) having a housing, b) said driving unit supports at least one cutting unit (8) and drive means therefore, and c) the driving unit comprises a releasable shoe (72), extending forwardly, with respect to the normal direction of operative travel of the machine, along the bottom of the driving unit to its front side, protecting means (74) being situated in front of the driving unit, below the cutting unit, the protecting means (74) and the front side of the shoe (72) being rigidly secured together, wherein the releasable shoe (72) is mounted, with respect to the normal direction of operative travel of the machine, to the rear side of the driving unit and is extending from the rear side of the driving unit to its

frontside, and in that the protecting means (74) and the front side of the shoe (72) are fitted around and over the forwardly protruding leading edge of the housing of the driving unit (36) and the shoe is curved upwardly behind the rear wall of the driving unit and is fastened only at the said rear wall by two bolts, such that the shape of the shoe (72) generally follows the form of the front, underneath and rear surfaces of the housing of the driving unit (36), and that only the shoe is merely hooked around the leading edge."

- V. The appellant asserted that the evidence concerning the prior use is not sufficient to establish the prior use of the machine FALAZET 185. In this respect the appellant argued that the testimony of the witness has to be disregarded because the witness not only did not give evidence from his own knowledge but only by hearsay, but also had a personal interest in the revocation of the patent in so far as he was the head of the patent department of the opponent's firm.

The appellant also argued that the subject-matter of Claim 1 of each of its requests is new and inventive with respect to the machine according to the alleged prior use.

- VI. The respondent (opponent) contested the arguments of the appellant.

The respondent argued that the subject-matter of claim 1 of the main and claim 1a of the first subsidiary request is not new with respect to the machine according to the alleged prior use, and that the subject-matter of claim 1b of the second subsidiary request does not involve an inventive step having regard to the machine according to the alleged prior use and to the content of document GB-A-2 059 236 (D2).

VII. The appellant requested that the impugned decision be set aside and that the patent be maintained, either as granted (main request) or on the basis of one of the independent claims 1a or 1b as filed during the oral proceedings (first and second subsidiary requests).

VIII. The respondent requested that the appeal be dismissed.

Subsidiarily, the respondent requested that Mr Werberne, employed in the development department of the respondent's firm, be heard as a witness with respect to the prior use, if the Board were not to consider the prior use of the machine FALAZET 185 as being established on the basis of the witness of Mr van Zon.

Reasons for the Decision

1. The appeal is admissible.
2. *The prior use*
 - 2.1 Evidence concerning the prior use
 - 2.1.1 The most relevant documents concerning the FALAZET machine are the Annexes 1, 2 and 6.

Annex 1 is a leaflet from a firm whose name was "P. J. Zweegers en Zonen Landbouwmachinefabrieken b.v.", whose rights were transferred to the opponent's firm. The leaflet concerns a mowing machine ("Rotormäher") of the type FALAZET 185 and contains schematic as well as some photographic representations of the machine. The leaflet also refers to shoes arranged on the lower frame ("Gleitkufen am Unterbalken") but does not show the shoes in detail.

According to the respondent, leaflets as Annex 1 were distributed before the priority date of the patent in suit. The appellant agreed that leaflets "showing the PZ FALAZET 185 were distributed" but the appellant was of the opinion that they "did not show...the form of the shoe" (see letter dated 22 July 1996 page 3, first paragraph).

Annex 6 is a booklet from "P. J. Zweegers en Zonen Landbouwmachinefabriek b.v." containing spare part lists of the PZ Cyclomower FALAZET as from machine No. DM 000001. Page 10 of Annex 6 shows *inter alia* the parts (6 and 7) of the gear box of the cyclomower as well as a wear plate (19), i.e. a shoe. The part number of the shoe is disclosed on page 11, namely DM-0153. During the oral proceedings the respondent declared that each buyer of a FALAZET machine received a booklet like Annex 6. The appellant accepted that "a shoe was known as shown on page 10 in the spare part list PZ cyclomower" (i.e. Annex 6) (see letter dated 22 July 1996, page 3, second paragraph).

Annex 2 is the drawing No. DM-0153 of "P. J. Zweegers en Zonen Landbouwmachinefabrieken b.v." dated 10 December 1979. The drawing shows a mechanical element whose shape nearly corresponds to that of the wear plate 19 according to page 10 of Annex 6, and which is also defined as "Slÿtzool", i.e. wear plate as indicated on page 11 (19; part No. DM-0153) of Annex 6 .

- 2.1.2 It is clear from the minutes of the oral proceedings held before the Opposition Division on 7 June 1992 (page 2) as well as from the decision under appeal (page 4) that the Falazet 185 machine inspected by the Opposition Division in the courtyard of the European Patent Office was provided with an identification plate with the number "000 310".

According to the testimony of the witness the machine No. 000310 was delivered to the firm Boeke-Heesters on 7 March 1980. The witness derived this information from a delivery book in which the machines of the FALAZET type sold by the opponent in 1980 were registered. This delivery book was also presented to the Board during the oral proceedings.

The witness also declared that all mowing machines of the type FALAZET 185 were delivered without any agreement on secrecy (see minutes of the taking of evidence, page 10).

The appellant also agreed that, before the date of priority of the patent in suit, "at least one Falazet 185 was sold" (see letter dated 27 September 1993, page 1).

Moreover, according to the minutes of the taking of evidence from the witness (see page 2, last paragraph to page 3, first paragraph; page 2, fourth paragraph; page 3, fourth paragraph; page 4, second paragraph; page 5, first paragraph) the witness stated that the machine inspected by the Opposition Division corresponded to the machine shown in the Annex 1 and that the shape of the two external shoes of the machine was that of the original shoes, i.e. that the shape of these shoes corresponded to that of the shoe according to Annex 2 (DM-0153) as well as to the wear plate 19 (DM-0153) shown on page 10 and defined on page 11 of Annex 6.

It is clear from the minutes of the taking of evidence from the witness (see for instance page 3) that the witness derived this information not from his own memory but from conversations which occurred probably after the priority date of the patent in suit between him and draughtsmen of the opponent's firm.

2.2 Having regard to the evidence mentioned above, a machine FALAZET 185 comprises four rotary cutting units mounted to a main frame (see Annex 6: part 10 on page 6, parts 13 on page 8 and parts 6 and 7 on page 10) so as to be drivable about upwardly extending axes, wherein the main frame extends, during operation of the machine, transverse to the operative travel of the machine and comprises one driving unit having a housing (see Annex 6: parts 6 and 7 on page 10), said driving unit supports said four cutting units and the drive means therefor, the driving unit (6, 7) comprises also a releasable wear plate (shoe) (see Annex 6: part 19 on pages 10 and 11). It can be understood from page 10 of Annex 6 that the wear plate 19, which according to Annex 2 consists of a lower plate (parts DM-153 and DM-154) and an upper plate (DM-0138), is mounted to the rear side of the driving unit, namely to the rear flanges of the housing 6/7, by means of a bolt 29, a bush 20 and a lock nut 37 and that it extends forwardly from the rear side of the driving unit along the lower side (i.e. along the bottom) of the driving unit to its front side (parts DM-153 and DM-154). According to Annexes 2 and 6, the wear plate has a front arcuate side, where the arcuate lower plate and the arcuate upper plate are welded to each other (see Annex 2), and forms a pocket, said arcuate upper plate being situated in front of the driving unit, below the cutting unit. The arcuate upper and lower plates of the wear plate form at the ends of their welded portion (symmetrically with respect to the longitudinal axis of the shoe) cuttings which permit the arcuate upper and lower plates of the shoe to surround the front flanges of the housing of the driving unit, which flanges protrude forwardly in front of the remaining portion of the housing. In the region in which the arcuate upper and lower plates of the shoe surround the front flanges of the housing, two pairs of aligned bosses are provided inside the pocket. The bosses have holes which

permit the fastening of the wear plate by means of two bolts 32 (see Annex 6, page 10) to the front flanges of the housing 6/7. It can be derived from Annexes 2 and 6 that the front flanges of the housing fit into the space between the bosses when the wear plate is fastened to the housing.

According to Annex 6 the shoe is connected to the housing 6/7 of the driving unit by means of two lock bolts 32 and one carriage bolt 28, all three bolts extending vertically. It is also clear from Annex 2 that the holes for receiving the bolts are provided on the underside of the shoe, such that the heads of the bolts or the corresponding nuts can be damaged and/or can wear during operation of the machine.

- 2.3 The decision of whether or not the evidence allows the confirmation of the availability to the public of a FALAZET 185 machine before the priority date of the patent in suit has to be taken on the basis of the standard of the "balance of probabilities" (cf. for instance the decision T 270/90, OJ EPO 1993, 725).

In the present case, the Board has no reason to doubt that the machine FALAZET 185 having the identification No. 000 310 (corresponding to the "Rotormäher FALAZET 185" according to Annex 1) was sold and delivered without any agreement of secrecy before the priority date of the patent in suit. Moreover it is credible that a booklet consisting of the spare part lists corresponding to Annex 6 was associated with the machine No. 000 310.

It must also be considered that Annex 2 is a drawing showing a wear plate "Slýtzoöl", and having the number DM-0153 and that the same number DM-0153 is also used on page 11 of the Annex 6 in order to identify the wear plate (Dutch: Slytzoöl) which on page 10 is provided

with the reference number 19. The Board therefore accepts, that Annex 2 - as such -, although being not available to the public, gives the information of how the corresponding shoes sold were fabricated, so that, due to the selling of the FALAZET machine, the thus fabricated shoes were available to the public before the priority date of the patent in suit. The fact that a development of these shoes has taken place does not interfere with the fact that a shoe as shown in Annexes 2 and 6 has been made available to the public.

The Board also accepts that the two external shoes of the mowing machine inspected by the Opposition Division, which shoes corresponded to the shoe shown in Annexes 2 and 6, had the same shape as the original shoes, i.e. as the shoes mounted on the machine when it was delivered to the firm Boeke-Heesters.

The above considerations are furthermore confirmed by the testimony of the witness according to which the machine inspected by the Opposition Division was provided with two original shoes whose shape corresponds not only to that of the shoe according to Annex 2, but also to that of the part 19 shown on page 10 of Annex 6 (see page 2, last paragraph to page 3, first paragraph; page 2, fourth paragraph; page 3, fourth paragraph; page 4, second paragraph). This testimony - although based on information gathered by the witness rather than on his own knowledge - does not contradict the available information but connects that information together into a clear picture.

Having regard to the comments above, it is more probable than not for the Board that a mowing machine as referred to above section 2.2 was made available to the public by its use.

2.4 The appellant put forward the following arguments with respect to the prior use:

- (i) According to the appellant the evidence concerning the machine FALAZET 185 does not permit a person skilled in the art to determine with certainty that the machine as described in Annex 1 and provided with a wear plate as shown in Annex 2 or in Annex 6 is comprised in the prior art according to Article 54(2) EPC. In this context, the appellant stated that the declarations of the witness concerning the shoes of the machine FALAZET 185 do not rely on the witness's own knowledge and that the witness, as head of the patent department of the opponent, had a personal interest in the revocation of the patent. The appellant also drew the attention of the Board to the "well-known legal rule that one witness is no witness".

- (ii) Moreover, the appellant asserted that there is no identity between the frame of the machine as represented in Annex 1 and the frame as represented on page 4 (sheet B) of Annex 6 and that the dimensions of the shoe shown on page 10 of Annex 6 do not correspond to the dimensions of the shoe according to Annex 2. Therefore, the appellant argued that the relationship between the machine FALAZET 185 and the Annexes 1, 2 and 6 as established by the testimony of the witness was not credible.

The Board cannot accept these arguments for the following reasons:

It must be stated that the probative value of any means of proof has to be determined by applying the principle of free evaluation of evidence, which principle also

applies to the hearing of witnesses (cf. the decision T 482/89, OJ EPO 1992, 646). Because of the application of this principle, any person may be heard as a witness, such as the head of the patent department of one of the parties, even if the testimony of the witness is the sole means of proof. The probative value of the declarations of a witness depends on the circumstances of the particular case.

In the present case, the witness is only an employee of the respondent with the function of head of the patent department. According to the Board, this does not imply that the witness was partial or had a personal interest in the outcome of the opposition proceedings.

It is also clear that the declarations of the witness concerning the shoes of the machine FALAZET 185 are based upon conversations that occurred between him and draughtsmen of the opponent's firm. However, although the task of a witness should normally consist in giving evidence from his own knowledge, i.e. to give information from his own ability to remember events he has personally experienced, it must be considered that the declarations of the witness concerning the shoes of the machine FALAZET 185 are not the sole means of proof concerning the shoe but are supported by other means of proof, such as the Annexes 2 and 6 which show the shape of the shoe and to which a date anteceding the priority date of the patent in suit can be credibly assigned. Therefore, it is possible to state that the witness declarations are additionally linking the other means of proof.

The argument according to item (ii) is based upon the comparison between different modes of graphic representation of parts of a machine. Annex 1 shows the frame of the machine in a schematic way and in an assembled state, Annex 2 is a technical drawing of a

shoe, while Annex 6 (pages 4 and 10) contains *inter alia* photographic representations of parts of the frame (page 4) and of the shoe (page 10). According to the Board, a perfect identity of analogous parts of the machine cannot be established on the basis of different graphic representations. In any case these different graphic representations allow the clear establishment of a correspondence not only between technical aspects of the machine which concern the shape and the function of many of its parts but also between their part numbers (i.e. DM-0153). Therefore, according to the Board, it is more probable than not that the Annexes 1, 2 and 6 relate to a mowing machine as referred to in the testimony of the witness and as inspected by the Opposition Division.

2.5 A mowing machine as referred to in above section 2.2 is therefore considered as being comprised in the state of the art according to Article 54(2) EPC.

2.6 Therefore, there is no need to consider the request of the respondent to hear Mr Werberne as a further witness.

3. *The main request of the appellant*

3.1 The driving unit of mowing machine as referred to in above section 2.2 is provided with a releasable shoe (wear plate 19). The arcuate upper plate welded to the arcuate lower plate of the shoe and situated in front of the driving unit below the cutting unit can be considered as a protecting means (with respect to the cutting unit). It is clear that this protecting means (upper plate) and the lower plate of the shoe are rigidly secured together so as to form a pocket which closely surrounds the front flanges of the housing such that it extends along these flanges in a direction transverse to operative travel of the machine and, in a

sectional view, from the upper side of the flanges around the leading edge of the flanges to the lower side of the flanges. Since the leading edge of the flanges protrudes in front of the remaining portion of the housing, this leading edge can be considered as being "forwardly protruding". Therefore, having also regard to the general meaning of the term "fitted" used in claim 1 as granted, the pocket formed by the protecting means and lower plate of the shoe can be considered as "fitted around and over the forwardly protruding leading edge of the driving unit".

- 3.2 Having regard to the above comments, the machine referred to in above section 2.2 falls within the general terms of claim 1 as granted.
- 3.3 With respect to the machine FALAZET 185, the appellant argued that
- (a) the shoe is not mounted to the rear side of the driving unit and does not extend from the rear side of the driving unit to its front side but only along the bottom of the driving unit to its front side, essentially because the shoe is not curved upwardly at its rear side,
 - (b) the protection means and the front side of the shoe are not fitted around and over the leading edge of the driving unit, essentially because the fixation of the shoe is ensured by two bolts,
 - (c) the leading edge of the driving unit cannot be considered as forwardly protruding essentially because it extends in a straight line in a direction transverse to operative travel of the machine and therefore does not protrude in front of the leading edges of other pieces.

The Board cannot accept these arguments of the appellant for the following reasons:

- (a') It is clear from Annex 6 that the shoe 19 is fastened to the flanges of the housing 6/7 at its rear side by means of the bolt 29. Therefore, the shoe can be considered as mounted to the rear side of the driving unit and as extending from the rear side.

- (b') The term "fitted" as well as the expression "fitted over and around the leading edge" are very general. This expression can be used to define the relationship of a shoe to the edge of a further mechanical element when the shoe is provided with a pocket-like concavity which is put on the edge of this mechanical element, extends along this edge (in a plan view) and around the edge (in a side view) either when other fastening means are provided at the front side of the shoe to connect its pocket-like portion to the edge of the mechanical element (like in the machine Falazet 185) or when there is no fastening means at the front side of the shoe ensuring the connection of the pocket-like portion of the shoe to the edge of the mechanical element (like in the machine according to Figure 5 of the patent in suit).

- (c') Since the expression "forwardly protruding leading edge" does not specify in front of what the edge protrudes, it can also be attributed to the edge of the front flanges of the housing 6/7 of the machine FALAZET 185. The appellant interpreted this expression as implicitly defining the feature that the leading edge protrudes in front of the leading adjacent edges. This cannot be accepted because this feature is explicitly specified in dependent Claim 2 of the patent as granted.

3.4 Therefore, the subject-matter of Claim 1 as granted lacks novelty (Article 54(1) EPC) and the main request of the appellant has to be rejected.

4. *The first subsidiary request of the appellant*

Claim 1a according to this request does not differ substantially from the Claim 1 as granted. The amendments concern the two-part form of the claim and the introduction of the term "housing" as a part of the driving unit. These amendments do not further limit the claimed subject-matter. Therefore, the first subsidiary request has to be rejected for the same reason as for the main request, i.e. that the subject-matter of claim 1a lacks novelty (Article 54(1) EPC).

5. *Admissibility of the amendments according to the second subsidiary request of the appellant*

5.1 The independent Claim 1b differs from Claim 1 of the patent as granted by the addition of the features that

(a) the driving unit has a housing and

(b) the shoe is curved upwardly behind the rear wall of the driving unit and is fastened only at said rear wall by two bolts, such that the shape of the shoe generally follows the form of the front, underneath and rear surfaces of the housing of the driving unit and only the shoe is merely hooked around the leading edge.

The amendment according to item (a) can clearly be derived from Figure 4 of the patent as granted which is identical with Figure 4 of the divisional application No. 84 200 986.2 and of the earlier application

No. 82 200 642.5 as originally filed. The word "housing" is also used in the description of patent (see for instance column 9, line 60) as well as of both the divisional and earlier applications as filed (see for instance page 13, lines 34 and 35).

The amendment according to item (b) can clearly be derived from Figure 5 of the patent when read in combination with a passage of the description (column 9, lines 51 to 61), Figure 5 and this passage of the description of the patent being identical respectively with Figure 5 and a passage of the description (see page 13, lines 28 to 37) of both the divisional and earlier applications.

5.2 Claim 3 of this subsidiary request of the appellant differs from Claim 3 of the patent as granted only in that the feature that the shoe is "curved upwardly ..." has been deleted in order to adapt this dependent claim to the amended Claim 1b.

5.3 There is no objection with respect to Article 123 EPC.

6. *The subject-matter of Claim 1b (second subsidiary request)*

6.1 According to Claim 1b the shoe "is fastened only at the rear wall [of the driving unit] thereto [i.e. to the said rear wall] by two bolts such that...only the shoe is merely hooked around the leading edge [of the housing of the driving unit]". Moreover, according to Claim 1 "the shape of the shoe generally follows the form of the front, underneath and rear surfaces of the housing of the driving unit". These features have to be considered in the context of the feature that "the protecting means and the front side of the shoe are fitted around and over the protruding leading edge of

the housing of driving unit". Thus, it is clear from Claim 1b that only the front side of the shoe is fitted around and over the leading edge of the housing in such a manner that the shoe is merely hooked around the leading edge. In other words, according to Claim 1b, the protecting means which is rigidly secured to the front side of the shoe does not contribute to ensure the hooking of the shoe around the leading edge. Moreover, it is clear from Claim 1b that no fastening means, such as bolts, are provided at the front side of the shoe, the fastening means, i.e. the two bolts, being provided only at the rear side of the shoe.

6.2 Furthermore, the feature that the shoe "is curved upwardly behind the rear wall of the driving unit" read in combination with the feature that "the shape of the shoe generally follows the form of the...rear surfaces of the housing of the driving unit" defines implicitly a driving unit provided with a rear wall having an upwardly extending portion, to which the shoe is fastened by means of two bolts.

7. *Novelty (second subsidiary request)*

Having regard to the comments in above section 6, the subject-matter of Claim 1b is novel with respect to the mowing machine referred to in the above section 2.2, in which machine the shoe is fastened both to the rear flanges (by means of one bolt 28) and to the front flanges (by means of two bolts 32) of the housing 6/7.

8. *Problem and solution (second subsidiary request)*

8.1 The subject-matter of Claim 1 differs from the prior art referred to in section 2.2 substantially in that the shoe is curved upwardly behind the rear wall of the driving unit and is fastened only at the rear wall of the housing thereto by two bolts, such that the shape

of the shoe generally follows the form of the front, underneath and rear surfaces of the housing of the driving unit and in that only the shoe is merely hooked around the leading edge.

8.1.1 Having regard to the comments in the above section 6.2 the Board cannot accept the respondent's argument according to which the features that the shoe is curved upwardly behind the rear wall of the housing is fastened to the housing at the rear wall of the housing are also present in the mowing machine according to the prior use.

8.2 The distinguishing features specified in section 8.1 above result in simplifying the connection of the side to the housing of the driving unit, particularly because the shoe can easily be hooked around the leading edge of the driving unit and then fastened only at the rear wall to the housing by means of two bolts. Thus, mounting and dismounting of the shoe - for instance when a worn shoe has to be replaced - is easier.

Moreover, since the shoe is curved upwardly behind the rear wall of the housing (see comments in above section 6.2) it is possible to avoid arranging the two bolts at the underneath surface of the shoe such that the risk of damage and wear of these bolts is reduced.

Furthermore, the feature that only the front side of the shoe is fitted around and over the leading edge of the housing in such a manner that the shoe is merely hooked around the leading edge (see above section 6.1) implies the functional separation between the front side of the shoe (ensuring the fitting around the leading edge) and the protecting means (ensuring the protection of the cutting means). Thus, it is possible to secure the protecting means to the front side of the

shoe in such a manner that the protecting means also protects the connection between the front side of the shoe and the leading edge of the housing (cf. column 2, lines 1 to 5).

9. *Inventive step (second subsidiary request)*

9.1 Since the problem to be solved relates to disadvantages of the mowing machine according to the closest prior art which disadvantages can easily be observed during the use of the machine, the perception of this problem does not contribute to the inventive merit of the solution.

However, it must be considered that there is no suggestion in the available prior art pointing towards a shoe connected to the housing such that it is merely hooked around the leading edge and fastened to the housing only at the rear wall of the housing by two bolts.

Moreover, there is no suggestion in the available prior art pointing towards a protecting means protecting both the cutting unit and the connection of the shoe with the front portion of the driving unit.

Therefore, the skilled person cannot be guided from the available prior art to a mowing machine as defined in Claim 1b.

9.2 Document D2 discloses a mowing machine whose main frame comprises a plurality of sections 20, each section being provided with two cutting units 7, the sections 20 being connected to one another by means of front and rear tie members 29/30 to provide a housing for the drive gear of the machine, the front and rear tie members 29/30 extending lengthwise of the housing through openings of the sections (see for instance

Figures 6 to 8). Since the sections are shaped such that they have arcuate portions (see Figures 2 and 4), the portions of the front tie rod 29 between two adjacent arcuate portions 24 are situated outside of the housing. The housing is also provided with releasable skids 92 (i.e. a shoe) providing protection against wear for the housing. According to Figure 10 of document D2, the shoe, at the front side of the housing, is fitted around a portion of the tie rod 29 extending between two adjacent arcuate portions 24 of the housing and, at the rear side of the housing, is curved upwardly behind the rear wall of the housing and fastened to the housing at its rear wall by a bolt, the shape of the shoe generally following the form of the underneath and rear surfaces of the housing.

It is clear from Figure 10 of document D2 that the shape of the front side of the shoe does not permit the shoe to be merely hooked around the tie rod 29. Thus, although the shoe is fastened to the housing only at its rear wall by a bolt, the mounting and/or dismounting of the shoe may require time.

It may be that the cutting units are partly protected by the arcuate, protruding portions 24, 26 of the sections 20. These portions however cannot protect the connection between the front side of the shoe and the front tie rod 29 because this connection is situated between two adjacent arcuate, protruding portions 24, 26 (see page 1, lines 57, 58 and 49, 50; page 3, lines 46 to 49 and Figures 10 and 1).

Document D2 neither points towards the advantage of a shoe which can easily be mounted or dismounted in the meaning of the patent in suit, nor indicates to the skilled person the idea of designing the shoe such that

it can easily be hooked over the leading edge of the housing, nor suggests a protecting means which can protect both the cutting unit and the connection of the front side of the shoes to the front portion of the driving unit.

Since the skilled person, when confronted with document D2, would not realize that the features concerning the connection of the shoe to the housing as described therein permit the elimination of the disadvantages observed in the machine according to the closest prior art, it is highly unlikely that the skilled person would consider document D2 as relevant for the solution of the technical problem. In any case, even if the skilled person were to combine the information from document D2 with the information concerning the machine Falazet 185, he still would not arrive at the subject-matter of Claim 1b.

- 9.3 Having regard the cited prior art, the subject-matter of Claim 1b would not be obvious for a skilled person, so that it meets the requirements of Article 56 EPC.
10. Dependent Claims 2 to 7 of the second subsidiary request concern particular embodiments of the invention defined in Claim 1b.
11. Although the claims according to the second subsidiary request of the appellant meet the criteria of patentability, the patent cannot yet be maintained because the description still needs to be amended in order to bring it into conformity with these claims. Moreover, the prior art referred to in the above section 2.2 has to be indicated in the description (Rule 27(1)(b) EPC).

For these purposes, the case is remitted to the first instance.

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 with the order to maintain the patent with the following claims and drawings and with a description to be adapted:

Claims: 1 to 7 as filed during the oral proceedings
(second subsidiary request),

Drawings: Figures 1 to 9 as granted

The Registrar:



N. Maslin

The Chairman:



C. Andries

45 *Maslin*

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Handwritten marks

