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D E C I S I O N
of 18 May 1998

Case Number: T 0738/95 - 3.2.4

Application Number: 89202716.0

Publication Number: 0369508

IPC: A01G 9/14

Language of the proceedings: EN

Title of invention:

Greenhouse, ridge profile and bar coupling thereof

Patentee:

Bordeso B.V.

Opponents:

Alcoa Nederland B.V.

Kassen- en Verwarmingsindustrie Gakon B.V.

Venkon Tuinbouwkassen B.V.

Entex Kassen B.V.

Alcomij B.V., Wanders Agro B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 123, 84

Keyword:

"Main request - claim 2 - clarity and basis in original disclosure - no"

"First subsidiary request - novel and inventive"

Decisions cited:

T 0371/88

Catchword:

-



Case Number: T 0738/95 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 18 May 1998

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Decision under appeal:

**Interlocutory decision of the Opposition Division
of the European Patent Office posted 27 June 1995
concerning maintenance of European patent
No. 0 369 508 in amended form.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
J. C. M. De Preter

Summary of Facts and Submissions

I. The interlocutory decision of the opposition division to maintain the European patent No. 0 369 508 in amended form was dispatched on 27 June 1995.

On 30 August 1995 the appellant (opponent I) filed an appeal against this decision and paid the appeal fee. The statement of grounds of appeal was received on 6 November 1995.

II. The following documents were relied upon during the appeal proceedings:

D1: prior use of a greenhouse called "Drunenkas" manufactured by Alcoa Nederland B.V.

D2: prior use of a greenhouse called "Prinskas" manufactured by Prins N.V. Dokkum.

D4: NL-C-168 110

Also cited in the appeal proceedings were documents clarifying the "Venlo-kas" type of glasshouse and a number of pages of dictionaries dealing with such words as "hoofdzaak" and "substantially".

III. Oral proceedings were held on 18 May 1998 in the presence of the appellant and the respondent (proprietor).

Although duly summoned, the parties as of right

(opponents II to V) did not attend. In accordance with Rule 71(2) EPC the oral proceedings were held without them.

- IV. In the appeal proceedings the appellant argued that the amendment allowed by the opposition division of the roof being **substantially** supported by the gutters should be disallowed, that the claims were not clear and that the claimed subject-matter was not new or not inventive over the cited public prior uses.

The parties as of right did not comment during the appeal proceedings.

In the appeal proceedings the respondent countered the appellant's arguments. Following the annex to the summons to oral proceedings in which the board raised provisional objections to the independent claim according to the interlocutory decision, the respondent filed new claims and an amended description. These were extensively discussed in the oral proceedings having regard to clarity and basis in the original disclosure whereafter the respondent filed new requests.

- V. The appellant requests that the decision under appeal be set aside and the patent revoked.

The respondent requests that the decision under appeal be set aside and the patent be maintained on the basis of one of its three requests:

- The **main request** includes independent claims 1 and 2 filed during the oral proceedings of 18 May

1998. Independent claim 1 is directed to the embodiments of Figures 1 to 5, 7 and 8 and independent claim 2 is directed to the embodiment of Figure 6.

- The **first subsidiary request** includes only one independent claim 1 filed during the oral proceedings of 18 May 1998.

- The **second subsidiary request** includes only one independent claim 1 filed during the oral proceedings of 18 May 1998.

For each request the accompanying patent documents are as follows:

- dependent claims 2 to 6 as granted

- description pages 1, 2 and 3 as filed during the oral proceedings

- description column 1, line 58 to column 4, line 12 as granted

- Figures 1 to 8 as granted.

Independent claim 2 of the main request reads:

"2. Glasshouse comprising gutters and a roof extending between said gutters, said roof being substantially supported by said gutters and comprising at least one ridge profile 94, and bars (5) connected thereto by means of at least one bar coupling, wherein said ridge

profile (94) has a pivot head (7) on which roof windows can grip pivotally, a vertical body and upper and lower flanges (9, 10, between which light transparent panels are arranged, furthermore said ridge profile, 94, is provided with at least one profiled anchoring piece comprising at least one transversely extending part (95) bounding at least one anchor space for receiving a connecting part 97 to bar connecting means (96, 100, 101) of said bar coupling, said bars being positioned on either side of the ridge profile (94,) at its portion found between its ends, said bars (5) having a tubular profile, said flanges (9, 10,) constituting the most sidewardly protruding parts of said ridge profile 94,;

light transparent roof panels being arranged in said bars (5) at both sides thereof;

said bar coupling comprising at least one coupling element forming said connecting part (7) and extending under said ridge profile,94,;

wherein said bar coupling by means of said at least one coupling element (97) mutually connects said ridge profile (94) and two bars (5) positioned on either side of said ridge profile 94,;

characterised in that each profiled anchoring piece and also the underside of said ridge profile (94) are situated at a higher level than the lower edges of the bar profiles of the bars (5) facing towards said ridge profile , 94,, and that each profiled anchoring piece is arranged between the cross cut ends of two bars (5) situated on either side of said ridge profile 94,."

Independent claim 1 of the first subsidiary request reads:

"1. Glasshouse (1) comprising gutters (2) and a roof (3) extending between said gutters (2), said roof (3) being substantially supported by said gutters (2) and comprising at least one ridge profile (4, 44, 94, 204) and bars (5) connected thereto by means of at least one bar coupling (16, 56, 96, 216), wherein said ridge profile (4, 44, 94, 204) has a pivot head (7) on which roof windows can grip pivotally, a vertical body (8) and upper and lower flanges (9, 10, 209, 210) between which light transparent panels (6) are arranged, said ridge profile is furthermore provided with at least one profiled anchoring piece (11, 52, 95, 211) comprising at least one transversely extending part (12, 95, 211) bounding at least one anchor space (13, 213) for receiving bar connecting means (15, 55, 75; 97, 215) of said bar coupling (16, 56, 96, 216), said bars being positioned on either side of the ridge profile (4, 44, 94, 204) at its portion found between its ends, said bars (5) having a tubular profile, said flanges (9, 10, 209, 210) constituting the most sidewardly protruding parts of said ridge profile (4, 44, 94, 204); light transparent roof panels (6) being arranged in said bars (5) at both sides thereof; said bar coupling (16, 56, 96, 216) comprising at least one coupling element (17, 77, 100, 101, 102, 220) extending under said ridge profile (4, 44, 94, 204); wherein said bar coupling (16, 56, 96, 216) by means of said at least one coupling element (17, 77; 100, 101, 102, 220, 250) and the bar connecting means connected thereto mutually connects said ridge profile and said two bars (5) positioned on either side of said ridge profile (4, 44, 94, 204);

characterised in that each profiled anchoring piece (11, 52, 95, 211) and also the underside (26) of said ridge profile are situated at a higher level (27) than the lower edges (28) of the bar profiles of the bars (5) facing towards said ridge profile (4, 44, 94, 204), and that each profiled anchoring piece (11, 52, 95, 211) is arranged between the cross cut ends of two bars (5) situated on either side of said ridge profile (4, 44, 94, 204)."

Reasons for the Decision

1. The appeal is admissible.
2. *"in hoofdzaak" - "substantially" - "mainly"*
 - 2.1 Each of the independent claims of the main request, the first subsidiary request and the second subsidiary request includes the feature of the roof being substantially supported by the gutters.
 - 2.2 The original Dutch text of the application states in lines 28 and 29 of page 1 that "het dak in hoofdzaak door de goten wordt gedragen" which was translated to "the roof is mainly supported by the gutters" in lines 28 and 29 of page 1 of the application in English. The opposition division allowed "mainly" to be amended to "substantially" and stated in section 9.b. on page 7 of the interlocutory decision that "substantially" means "substantially completely" and is used to prevent an elusion of the protection of the

patent by having supplementary trivial support(s)". The appellant argued however that the translation of "in hoofdzaak" to "substantially" was incorrect.

- 2.3 The board stated in the annex to the summons to oral proceedings that it provisionally considered, regardless of the precise translation into English of the words "in hoofdzaak" taken in isolation, that it had always been clear that the roof was substantially supported by the gutters and thus that the amendment was allowable. In addition to the whole context of the application, it was specifically stated on page 2 in lines 27 to 37 of the originally filed application in English that "... pillars and trusses support in a robust manner gutters 2 which because of their shape generally have a strong bearing capacity" and "The roof 3 between two gutters 2 consists substantially of a ridge profile 4 ... bars 5 ... and roof panels 6". Corresponding passages were to be found in the originally filed application in Dutch and in the granted patent specification. Thus there was no mention of support of the ridge profile by pillars or trusses and thus no suggestion of support of the ridge profile other than by the gutters and bars. The board added that, according to the sheet entitled "BOM glasshouse according to the invention" filed by the respondent with the letter of 11 October 1996, the ridge was supported at the end wall by an upright. However, in view of the size of glasshouses which with the present invention was plainly concerned, such edge effects did not detract from the general finding that the roof was substantially supported by the gutters. Moreover it was clear that, because of the statements of "said bars (5)

being positioned on either side of the ridge profile (4) **at its portion found between its ends**" and the "light transparent roof panels (6) being arranged in said bars (5) **at both sides** thereof", the independent claim 1 as maintained by the opposition division specified the bars and bar coupling not at the end walls but intermediate thereof.

2.4 During the oral proceedings before the board the appellant made essentially no further arguments on the allowability of the amendment per se (while maintaining however that the roofs according to the public prior uses D1 and D2 were also substantially supported by the gutters). The board sees no reason to change its provisional opinion and so finds that the amendment to the roof being substantially supported by the gutters is allowable.

3. *Independent claim 2 of the main request*

3.1 The reason why the respondent filed this claim in the appeal proceedings was the board's objection that the independent claim 1 according to the interlocutory decision did not read onto the embodiment shown in Figure 6 and described in column 3, lines 35 to 50 of the granted patent.

This embodiment includes a clamp 96 with two clamp jaws 97 which engage two anchor cavities located above the flange 95 of the ridge profile 94 on either side of the vertical body (labelled 8 on Figure 2).

3.2 Claim 2 of the main request makes essentially four

statements concerning the bar coupling:

- (a) bars are connected to the at least one ridge profile by means of at least one bar coupling (see lines 4 to 6 of the claim as filed at the oral proceedings),
- (b) the ridge profile has at least one profiled anchoring piece comprising at least one transversely extending part bounding at least one anchor space for receiving a connecting part to bar connecting means of the bar coupling (lines 6 to 11),
- (c) the bar coupling comprises at least one coupling element forming the connecting part and extending under the ridge profile (lines 25 to 27), and
- (d) the bar coupling by means of the at least one coupling element mutually connects the ridge profile and two bars (lines 29 to 31).

3.3 The differences and relationships between the four terms bar coupling, connecting part, bar connecting means, and coupling element used in claim 2 of the main request are unclear. Although it is said in the claim that the bar coupling connects the bars to the ridge profile, the form of the bar coupling is left very much open. It is moreover impossible even to reliably relate all the parts listed in the claim to the parts shown on Figure 6.

In statement (a) the bar coupling is plainly the unit

of the clamp 96 with two clamp jaws 97.

Since the jaws 97 enter the anchor spaces these must be the connecting parts of statement (b). However the term bar connecting means is ambiguous as to whether it means the connection of the bars to each other or the connection of the bars to the ridge profile. It might be the lower part of the jaws 97 which is meant but the reference numerals 96, 100, 101 given in the claim suggest that it is the part of the unit below the jaws.

Statement (c) appears to say that the coupling element is the connecting part (and indeed both are given the reference numeral 97, in lines 10 and 29 respectively) and so it is confusing to give the same component two names. In any case, if there is a difference between the coupling element and the connecting part, this difference is not clear from the claim. Statement (c) is ambiguous as to whether it is the bar coupling or the coupling element which extends under the ridge profile.

Statement (d) repeats statement (a) adding essentially only that the connection is by means of the coupling element. This is extremely vague and is really no addition at all since it has already been said the coupling element is part of the bar coupling.

Claim 2 of the main request is thus unclear (Article 84 EPC). While lack of clarity is itself not an opposition ground, the lack of clarity of the present claim 2 results from amendments made after grant and so the claim is unallowable.

3.4 Moreover claim 2 of the main request is not fairly based on the original disclosure (Article 123 EPC).

As is clear from section 3.1 above, the claim must be directed to the embodiment of Figure 6. While the drafter of a claim would not need to restrict his claim in every way to the details of a preferred embodiment, it is clear that the central idea of this preferred embodiment is a clamp whose two jaws engage two anchor cavities.

Claim 2 of the main request however refers to there being "at least one" of various things, e.g. the anchor space. Taking the choice in the claim of the singular, e.g. just one anchor space, it would not be implicit or obvious to the skilled person that the embodiment of Figure 6, towards which the claim is directed, could be modified to have a single jaw engaging a single anchor cavity, because then it would no longer be a clamp. Further, the modifications necessary to make such an arrangement work would also not be implicit or obvious to the skilled person. In other respects as well, the claim leaves the form of the bar coupling very much open.

3.5 In formulating claim 2 of the main request the respondent was in principle limited to not going beyond the scope of the independent claim 1 as granted and also, since the respondent chose not to appeal the decision of the opposition division, to not going beyond the scope of the independent claim 1 according to the interlocutory decision.

However in the oral proceedings before the board the respondent maintained that it was permissible to generalise claim 1 according to the interlocutory decision in view of the decision T 371/88 (OJ EPO 1992, 157) which concerned amending a granted claim, despite Article 123(3) EPC, to replace a restrictive term, which in its strict literal meaning did not clearly embrace a further embodiment of the description, by a less restrictive term clearly embracing also this embodiment.

The cited decision concerned an embodiment in which shafts were arranged side-by-side and an embodiment in which shafts were arranged in line, while the claim referred to them as being parallel. The board on that decision found that "parallel" in its strict literal meaning did not include "in line" and allowed an amendment to the claim to cover this possibility. However that board also recognised in section 2.5 of the decision that it was not in every case permissible under Articles 123(3) and 69(1) EPC to amend a claim in the sense that a term which in principle only embraced one embodiment of the description, was replaced by a broader term, which also covered an additional embodiment set out in the description.

The board considers that the respondent cannot use the very restricted clarification in the case of decision T 371/88 to justify the more extensive changes made in claim 2 of the main request.

Moreover the cited decision concerned an amendment to

the **granted** independent claim which did not read onto all the embodiments, whereas in the present case the respondent is attempting to rely on a problem with the independent claim according to the interlocutory decision. Still further, as seen from section 3.3 above, the amendments made do not even result in a claim which is clear.

3.6 Thus claim 2 of the main request is unallowable (Articles 84 and 123 EPC).

4. Since its claim 2 is unallowable, the main request must fail as a whole.

5. *The first subsidiary request - amendments and clarity*

5.1 Claim 1 of the first subsidiary request is a rearranged and clarified version of claim 1 according to the interlocutory decision, making clear the differences and relationships between the various terms. The board wishes to emphasise that the claimed glasshouse is of the "Venlo-kas" type, i.e. a glasshouse of which the roof is in fact only supported by the gutters, ignoring the end faces of the glasshouse.

5.2 It is clear from lines 11, 25 and 26 of claim 1 of the first subsidiary request that the bar coupling comprises bar connecting means and at least one coupling element. The bar connecting means of the bar coupling is received in at least one anchor space of the ridge profile (see lines 7 to 11). According to line 29, the bar connecting means is connected to at least one coupling element which, according to lines 25

to 27, extends under the ridge profile. According to lines 28 to 31, two bars on either side of the ridge profile are connected by the bar coupling. Thus it is clear that the bar coupling not only couples two bars together but also couples the bars to the ridge profile.

Moreover since the anchoring piece is additional to the other parts of the ridge profile, it is clear that the coupling is not merely by means of an interlocking of the ends of the bars with the ridge profile.

Concerning the embodiment of Figures 1 to 3 and referring in particular to Figure 2, the bar connecting means can be seen as the bolt 15 whose head 10 engages the anchor space or cavity 13 in the ridge profile 4. The bar connecting means is connected to the coupling element 17. The preferred embodiments of Figures 4, 5, 7 and 8 are functionally similar to that of Figures 1 to 3.

Concerning the embodiment of Figure 6 the bar connecting means can be seen as the upper parts of the jaws 97 whose bent ends engage the anchor spaces between the horizontal flange 95 and the flanges 10 of the ridge profile 94. The upper parts of the jaws are connected to the lower parts of the jaws, the shaft 100 and the screw bolt 101 and threaded hole 102, thus constituting the coupling element.

- 5.3 The appellant has argued that the words "at least one anchor space" in the claim are unclear and unjustified in view of the original disclosure because Figure 2

shows only one anchor space, that there are similar objections elsewhere in the claim, and that the term "space" is less clear than "cavity". However all these words are to be found in claim 1 as granted so that lack of clarity in this respect cannot be discussed as it is not a ground for opposition. Moreover while it may be true that "space" is not synonymous with "cavity", the term used in the claim is in fact the more restrictive "anchor space", i.e. not just any space but in fact a space suitable for anchoring something. The board therefore sees no reason for there to be a difference between an anchor cavity and an anchor space, both having the function of anchoring something.

With respect to the feature "anchor space" and in view of the discussion during the oral proceedings, the board emphasises that, according to the claim itself and according to the complete application as originally filed including all the Figures 1 to 8, the space between the flanges 9 and 10 is only used to position the light transparent panels. There is not the slightest indication in the disclosure of either the originally filed application or the granted patent (or even of document D4 which was discussed as prior art in the originally filed application) that this space between the flanges 9 and 10 is also used as an anchor space in the meaning of the present patent.

- 5.4 Apart from reference numerals the characterising portion of the claim is the same of that according to the interlocutory decision.

5.5 The dependent claims for this request are those as granted. The description has been amended in line with the independent claim and to acknowledge the prior art.

5.6 Thus the board sees no objection under Articles 84 and 123 EPC to the documents for the first subsidiary request.

6. *Claim 1 of the first subsidiary request - closest prior art and novelty thereover, problem and solution*

6.1 The board considers the closest prior art glasshouse to be that disclosed by document D4 from which the pre-characterising portion of claim 1 is known.

The characterising portion of claim 1 of the first subsidiary request explains that each profiled anchoring piece and also the underside of the ridge profile are situated at a higher level than the lower edges of the bar profiles of the bars facing towards the ridge profile, and that each profiled anchoring piece is arranged between the cross cut ends of two bars situated on either side of the ridge profile.

These are the differences over the arrangement disclosed by the document D4 where the ridge profile 2 extends downwardly below the ends of the bars 3, 3' and the anchoring piece into which the bolt head 5b fits is located below the bar ends and not therebetween.

6.2 The subject-matter of claim 1 is thus novel over the closest prior art (Article 54 EPC).

6.3 The problem to be solved by the present invention is to improve the glasshouse disclosed by document D4 such that plants therein can be grown more efficiently. The present invention solves this problem because its ridge profile is shorter in the vertical direction than that of document D4 and so shades the plants less.

7. *Claim 1 of the first subsidiary request - novelty over the public prior uses D1 and D2*

7.1 Annex 1 filed with the appellant's notice of opposition relates to the (undisputed) prior public use D1, namely a greenhouse called "Drunenkas" manufactured by Alcoa Nederland B.V..

The coupling member on page IV of the Annex I is plainly supported by a column (which is not a column at the end face of the glasshouse), as is shown in the lower photograph on page I of the annex. This column appears to be essential for supporting the roof and so the roof is not substantially supported by the gutters, compare the present claim 1 and the above section 5.1. While said photograph shows other bars which are not above columns, these bars and their couplings are different both from the bars and coupling member of page IV and from those claimed.

The subject-matter of the present claim 1 is thus novel over the public prior use D1.

7.2 The most relevant documents for the (undisputed) prior public use D2, namely a greenhouse called "Prinskas"

manufactured by Prins N.V. Dokkum, are a Prins N.V. Dokkum drawing A-6951 and a set of pages I to XII filed by the appellant with the notice of opposition.

Detail 2 at the bottom right hand corner of the drawing A-6951 shows the end face of the glasshouse (see numbers 0-6155 and 0-6156 in detail 2 and on the plan at the top left hand corner of the drawing). These end bars do not satisfy the definitions in the present claim 1 of "said bars (5) being positioned on either side of the ridge profile (4) **at its portion found between its ends**", "said bars 5 having a **tubular** profile" and "light transparent roof panels (6) being arranged in said bars (5) **at both sides** thereof".

The situation at the middle of the glasshouse is shown on page I of said set of pages I to XII. The ridge profile is similar to the one numbered D-8221 or D-8240 in the middle of and in detail 1 of the drawing A-6951 which is connected by a bar numbered R-759 to a gutter (see section A-A). Directly below this section view A-A is a sectional view of said bar R-759 in section B-B.

It is immediately apparent that not only in the middle but even at the end face of the glasshouse, unlike the requirement of the present claim 1, the cited upper and lower flanges between which the light transparent panels are arranged do not constitute the most sidewardly protruding parts of the ridge profile. Moreover the bar does not have a tubular profile. Furthermore it is stressed that at the middle of the glasshouse, where the bars R-759 join the ridge profile, no bar-to-bar coupling is present.

Thus the subject-matter of the present claim 1 is novel also over the prior public use D2.

8. *Claim 1 of the first subsidiary request - inventive step*

8.1 The closest prior art, document D4, contains no hint to lead the skilled person wishing to grow plants more efficiently to reduce plant shading by reducing the height of the ridge profile. Thus it would not be obvious, using this document alone, to proceed to the subject-matter of claim 1 of the first subsidiary request.

8.2 Starting with the public prior use D1, since the columns appear to be essential for supporting those coupling members under which they are located, the board cannot see that the skilled person would take the risk of the roof collapsing if he were to remove the columns.

8.3 Starting with the public prior use D2, to summarise, the appellant argues that it would be obvious for the skilled person to use the end bars 0-6155 and 0-6156 (shown in detail 2 at the bottom right hand corner of the drawing A-6951) also in the middle of the glasshouse and so arrive at the claimed subject-matter.

These end bars 0-6155 and 0-6156 are higher than the central bars R-759 and, as can even be seen in the plan view at the top left hand corner of the drawing A-6951, wider. Thus if the end bars were used also elsewhere in

the glasshouse, the shading of plants therein would increase. Presumably the larger profile would also result in an increase of cost. Thus the board cannot see that the skilled person would use these end bars elsewhere in the glasshouse.

Moreover even if the end bars were used elsewhere in the glasshouse, the result would not be a glasshouse as presently claimed. For example, unlike what is said in the claim, the glass-bearing flanges of the ridge profile D-8221 are not its most sidewardly protruding parts (which is important with respect to the problem of reducing shade). Further, the end bars are not tubular.

8.4 Thus the board considers that the public prior uses D1 and D2, and the document D4 when taken alone do not render the claimed subject-matter obvious. Moreover the board cannot see a logical combination of these prior art items and/or other documents on file which would lead to the claimed glasshouse. Thus claim 1 of the first subsidiary request meets the requirement of Article 56 EPC.

9. The subject-matter of claim 1 of the first subsidiary request is thus patentable as required by Article 52 EPC. The patent may therefore be maintained amended based on this allowable independent claim and on claims 2 to 6 which are dependent on claim 1.

10. The respondent's second subsidiary request therefore does not need to be considered.

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 in the following version:

claims: 1 of the first subsidiary request as
filed during the oral proceedings
2 to 6 as granted

description: pages 1, 2 and 3 as filed during the oral
proceedings
column 1, line 58 to column 4, line 12 as
granted

Figures: 1 to 8 as granted.

The Registrar:

The Chairman:

N. Maslin

C. Andries