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**D E C I S I O N**  
**of 16 September 1997**

**Case Number:** T 0029/96 - 3.2.4

**Application Number:** 88201339.4

**Publication Number:** 0298549

**IPC:** A01C 17/00

**Language of the proceedings:** EN

**Title of invention:**

A machine for spreading material, such as fertilizer

**Patentee:**

MAASLAND N.V.

**Opponent:**

Amazonen-Werke H. Dreyer GmbH & Co.KG

**Headword:**

Spreader/MAASLAND

**Relevant legal provisions:**

EPC Art. 111(1), 104

**Keyword:**

"Remittal to the first instance"  
"Different apportionment of costs (no)"

**Decisions cited:**

T 0326/87

**Catchword:**

-



Case Number: T 0029/96 - 3.2.4

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.4  
of 16 September 1997

**Appellant:**  
(Opponent)

Amazonen-Werke  
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**Respondent:**  
(Proprietor of the patent)

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**Representative:**

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**Decision under appeal:**

Decision of the Opposition Division of the  
European Patent Office posted 31 October 1995  
rejecting the opposition filed against European  
patent No. 0 298 549 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** C. A. J. Andries  
**Members:** P. Petti  
J. P. B. Seitz

## Summary of Facts and Submissions

- I. An opposition based upon Article 100(a) EPC was filed against the European patent No. 298 549. The opposition was rejected by the decision of the opposition division dispatched on 31 October 1995.

In the decision of the opposition division the document FR-A-2 410 427 (D1) was considered as disclosing the closest prior art with respect to the subject-matter of Claim 1 of the patent as granted, which claim reads as follows:

"1. A machine for spreading material, such as fertilizer, which machine comprises a frame (1), a hopper (5) and at least one driven spreading member (12), the machine includes at least two doser apertures (22) for delivering the material from the hopper (15) to one single spreading member (12) which spreads during operation of the machine the material over a circumferential angle around the spreading member, which circumferential angle includes a number of sectors equal to the number of doser apertures each of which provides substantially material to one sector, doser slides (23) being provided movably along the apertures and the doser slides being connected with an adjusting member (26) to close the apertures to a greater or lesser extent, characterized in that each doser slide (23) is connected with a separate adjusting member (26) and the adjusting members each being separately actuateable to close the doser apertures (22) separately to a greater or lesser extent, each of the adjusting members (26) is cooperative with a measuring unit (57) provided in the machine and able to measure the distribution of the material spread during operation of the machine over the sections of the circumferential angle."

- II. On 8 January 1996 the appellant (opponent) lodged an appeal against this decision and simultaneously paid the appeal fee. The statement of grounds was received on 7 March 1996.

With the statement of grounds the appellant filed document SU-A-1 209 065 (D9) together with an English translation (D'9) of this document.

- III. Oral proceedings were held on 16 September 1997.

During the oral proceedings, the appellant argued that document D9 (D'9) was highly relevant because it, representing the most relevant secondary source of information, was prejudicial to the patentability of the claimed subject-matter with respect to inventive step. In this context the appellant argued that starting from the prior art according to document D1, which was still considered as being the most relevant primary source of information with respect to the claimed subject-matter (i.e. the document disclosing the closest prior art), and in view of the information content of document D9 (D'9) the subject-matter of Claim 1 of the patent as granted did not involve an inventive step.

The respondent, who also considered document D1 as disclosing the closest prior art, contested the arguments of the appellant with respect to the relevance of document D9 (D'9).

- IV. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- V. The respondent requested that document D9 (D'9) be disregarded, the appeal be dismissed and the patent be maintained as granted (main request).

Auxiliarily, the respondent requested the remittal of the case to the first instance, if document D9 (D'9) were to be admitted into the proceedings, and the different apportionment of costs.

Moreover, the respondent submitted three subsidiary requests relating to the maintenance of the patent in amended form (see the respondent's letter dated 15 August 1997).

### Reasons for the Decision

1. The appeal is admissible.
2. *The subject-matter of Claim 1 of the patent as granted*
  - 2.1 Claim 1 is directed to a "machine for spreading material [comprising] ... at least one driven spreading member ... which spreads ... the material over a circumferential angle around the spreading member ...". Thus, Claim 1 concerns a machine of the centrifugal type.
  - 2.2 According to Claim 1 the machine includes at least two doser apertures and the circumferential angle over which the material is spread can be considered as being divided into a number of "sectors" (column 16, line 2) or "sections" (column 16, line 18) equal to that of the apertures. It is clear from Claim 1 that for each aperture there is a doser slide, an adjusting member and a measuring unit.

2.3 The feature in the characterising portion of Claim 1 according to which "each of the adjusting members (26) is cooperative with a measuring unit (57) provided in the machine and able to measure the distribution of the material spread during operation of the machine over the sections of the circumferential angle" has to be interpreted as follows:

Firstly, it is clear from the description of the patent that a measuring unit alone is not able to measure the distribution of the material but is only able to measure the quantity of material spread over a single sector. The distribution can only be measured because each of the adjusting members and thus each of the sectors is associated with a measuring device. Therefore, the measurement of the material distribution represents the result obtainable on account of the arrangement of a plurality of measuring units, each being able to measure the quantity of material spread over a sector.

Moreover, the term "cooperative with" has to be construed as defining a one-to-one relationship between the adjusting members and the measuring units. In other words, according to Claim 1, the measuring result of each measuring unit is related to the position of the corresponding adjusting member.

Having regard to the wording of dependent Claims 2 to 4, the term "cooperative with", cannot be interpreted as implying the automatic control of the size of the doser apertures. It is clear from the description of the patent that the size of the doser apertures can also be adjusted manually (see column 13, lines 20 to 28; Figure 7).

3. *The impugned decision*

3.1 The opposition division decided that the subject-matter of Claim 1 of the patent as granted was novel and involved an inventive step over the evidence submitted by the appellant during the opposition proceedings.

3.2 Novelty was not disputed during the appeal proceedings. The board sees no reason to doubt the novelty of the subject-matter of Claim 1 of the patent as granted over the evidence submitted by the appellant during the opposition proceedings.

3.3 In the written appeal proceedings, the appellant also challenged Claim 1 on the ground of lack of inventive step starting from document D1 and combining the teaching of this document with that of either document DE-B-1 457 864 (D2) or document DE-A-2 901 767 (D6), which documents were commented upon by the board in the annex to the summons to attend oral proceedings. However the appellant's arguments relying on documents D2 and D6 were not brought forward any more during the oral proceedings. In any case, the combination of the disclosure of document D1 (considered as the primary information source) with that of either document D2 or document D6 (considered as the secondary information sources) is not prejudicial to the maintenance of the patent in suit with respect to inventive step (Article 56 EPC).

4. *Remittal to the first instance*

4.1 It is clear - even from a *prima facie* consideration of document D9 and of its translation D'9 - that this document represents a secondary information source more

relevant than any other secondary information source already considered in the impugned decision, especially because this document clearly concerns a device for controlling the distribution of the material spread by a centrifugal fertilizer spreader.

Therefore, the main request of the respondent cannot be allowed in so far as document D9 (D'9) cannot be disregarded and in so far as it is brought into the proceedings (Article 114(1) EPC).

- 4.2 Thus, it is necessary to further examine whether the content of document D9 (D'9) in combination with the closest prior art (and if necessary taking account of the content of other documents) is prejudicial to the patentability of the claimed subject-matter with respect to inventive step (Article 56 EPC).

In accordance with Article 111(1) EPC, it is at the board's discretion whether it exercises any power within the competence of the first instance and further examines the case or remits the case to the first instance.

In the present case, having regard to the high degree of relevance of the late filed document, which could put at risk the maintenance of the patent as granted, it seems fair, as requested by the respondent, that this further examination be undertaken by the first instance so that both parties would not be deprived of the right to two levels of jurisdiction.

- 4.2.1 The appellant argued that the remittal of the case to the first instance would unnecessarily delay the proceedings and - referring also to the interest of the public - asked for a rejection of the respondent's request to remit the case to the first instance.



The board cannot accept this argument of the appellant because the respondent's right to two levels of jurisdiction has to be considered more important than the interest of either the public or the appellant to a speedy completion of the proceedings, particularly since in the present case it was the appellant who filed the new document D9 (D'9) which is the cause of the remittal.

4.3 Therefore, according to Article 111(1) EPC, the case is remitted to the first instance for further prosecution.

5. *Apportionment of costs*

5.1 In the present case, the request for a different apportionment of costs in accordance with Article 104(1) EPC can only relate to the additional costs incurred by the respondent due to the late filing of document D9 (D'9) and relating to the oral proceedings. With respect to this request, the respondent referred to the decision T 326/87 (OJ EPO 1992, 522).

5.1.1 During the oral proceedings the appellant - in order to justify the late filing of document D9 (D'9) - stated that the feature in Claim 1 according to which "the measuring unit ... [is] able to measure the distribution of the material spread during operation of the machine over the sections of the circumferential angle" - because it does not clearly specify either functionally or structurally the measuring unit - had been interpreted by him during the opposition proceedings as defining a measuring unit able to check whether or not the spread pattern of the material

spread is located centrally behind the machine and argued that the reasoning in the impugned decision - being based on a different interpretation of this feature - compelled him to search for an other document.

5.1.2 The respondent argued that the appellant, as opponent, has had nine months time, i.e. the time defined in Article 99(1) EPC, to find documents to base the opposition upon.

5.2 The interpretation of Claim 1 made by the appellant (see the above section 5.1.1) is not consistent with the description of the patent (see for instance column 1, lines 31 to 33; column 13, lines 24 to 28) in so far as the description of the patent refers mainly and clearly to the aim of effecting an uniform distribution of the material through the circumferential angle of the spread pattern. However, the appellant's interpretation - although not correct - due to the high level of generalisation of the expression "measuring unit ... able to measure the distribution of the material..." is possible when the claims are read isolated from the description, especially because the reference sign "57" used in Claim 1 for the "measuring unit" is also used in dependent Claim 13 for "a device (57, 58) ... [able] to measure ... whether the spread pattern ... is located centrally ...".

The appellant's justification is reasonable.

Furthermore, in the impugned decision (see page 7, 3rd paragraph) the opposition division considered that none of the documents submitted by the opponent could "give a hint to provide a measuring unit ... able to measure the distribution of the material ...". Therefore, the introduction by the appellant of document D9 (D'9) into

the subsequent appeal proceedings has to be considered as a reaction of the appellant to a finding in the decision under appeal. It is logical that a losing party (in the opposition proceedings) tries, during the appeal proceedings, to fill a gap referred to in the impugned decision so as to improve its position with respect to the assessment of inventive step.

In the present case, the filing of document D9 (D'9) does not constitute a clear abuse of the proceedings because, firstly, it took place at the earliest possible moment (namely with the statement of grounds) and, secondly, it cannot be considered as producing virtually a new opposition in so far as it does not introduce a new closest prior art but only represents a new secondary information source, in an attempt to fill the indicated gap.

- 5.3 Moreover, it must be considered that the respondent - in its reply to the statement of grounds - analysed document D9 (D'9) and expressed the view that a combination of documents D1 and D9 (D'9) did not "lead to the invention as claimed in Claim 1" (see letter dated 22 July 1996, page 4).

Furthermore, the respondent - in its reply to the communication of the board (annex to the summons to attend oral proceedings), in which document D9 (D'9) was commented upon by the board - filed an amended Claim 1 taking account of document D9 (D'9) and stated that in this amended claim measuring units as known from document D9 (D'9) were excluded, see letter dated 2 July 1997.

Only with the facsimile dated 15 August 1997, i.e. about one month before the oral proceedings (but long after the oral proceedings were arranged) , the respondent requested for the first time the remittal of the case to the first instance and an apportionment of costs.

Thus, the respondent - having studied document D9 (D'9), whose content has to be considered as rather simple and straightforward, and having adapted the independent Claim 1 to this document - gave the impression that this document be discussed during the oral proceedings without restriction. The request concerning the referral to the first instance and the different apportionment of costs was put forward in such a late stage of the proceedings that it was not reasonable any more to cancel the oral proceedings and to debate in written proceeding the relevance of document D9 (D'9). In the present case, oral proceedings were organized because both parties requested them and no request for referral to first instance was present at the moment of fixing their date. Therefore, the board sees no reasons of equity to make a different apportionment of costs based on the filing of document D9 (D'9) and the oral proceedings which took place before the board.

- 5.4 In the case T 326/87, in which a new relevant document had been filed by the appellant for the first time during appeal proceedings, the board decided to remit the case to the first instance for further prosecution and ordered a different apportionment of costs with respect to the costs incurred by the respondent's representative during oral proceedings. The new relevant document was not considered as being a complement to the documents already considered in the opposition proceedings but as disclosing new compositions having a close relationship to the claimed

subject-matter (cf. sections 3.1 to 3.3). Moreover, the reasons given by the appellant for the belated submission of the new document only related to the search difficulties for finding this document which was a GDR (DD) patent application (cf. section 5).

Thus, the circumstances of the present case - especially in so far as the filing of document D9 (D'9) represents a reaction to a finding in the impugned decision - differ from those of the case T 326/87.

- 5.5 Having regard to the comments in sections 5.2 and 5.3 the respondent's request for a different apportionment of cost cannot be accepted.

## Order

**For these reasons it is decided that:**

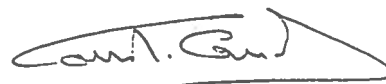
1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.
3. The request for a different apportionment of costs is refused.

The Registrar:



N. Maslin

The Chairman:



C. Andries

