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D E C I S I O N
of 30 May 2000

Case Number: T 1117/98 - 3.2.4

Application Number: 93922668.4

Publication Number: 0659159

IPC: B65F 1/12

Language of the proceedings: EN

Title of invention:
Device for collecting refuse

Patentee:
Metro Waste Systems B.V.

Opponent:
(I) Paul Villiger Umwelttechnik AG
(II) Bammens B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 100(b),(c), 56

Keyword:
"Extension of subject-matter - yes (main and second auxiliary requests)"
"Disclosure of the invention - yes"
"Inventive step - yes (third auxiliary request)"

Decisions cited:
-

Catchword:



Case Number: T 1117/98 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 30 May 2000

Appellant: Metro Waste Systems B.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 18 September 1998
revoking European patent No. 0 659 159 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries

Members: M. G. Hatherly
R. E. Teschemacher

Summary of Facts and Submissions

- I. European patent No. 0 659 159 was revoked by the opposition division's decision dispatched on 18 September 1998.

On Monday 30 November 1998 the proprietor filed an appeal and paid the appeal fee, filing the statement of grounds on 27 January 1999.

- II. Claim 1 as granted forms the basis of the **main request** and reads:

"Device for collecting refuse, such as glass, paper, coarse refuse and the like, comprising an outer casing (1) to be built into the ground, and a rigid refuse container (2) adapted to be placed in the outer casing (1) and having a hoist engagement means to be lifted therefrom in order to be emptied, the refuse container (2) having an insert opening (14) in or near the upper wall and a discharge opening in its bottom part closable by a closure means (5), the refuse container (2) having an overground part and an underground part and the cross section of the overground part being smaller than that of the underground part, characterized in that there are provided safety means including a fence or inner casing rising automatically through raising means if the refuse container is hoisted from the outer casing to prevent people passing by to fall into the outer casing (1)."

Claim 1 of the **first auxiliary request** adds the words "such that the casing will extend only underground" to claim 1 as granted after the word "ground" in column 3, line 5 of the patent specification as granted.

Claim 1 of the **second auxiliary request** adds the words "wherein the raising means includes a spring device or counter weights" at the end of claim 1 as granted.

Claim 1 of the **third auxiliary request** reads as follows, the changes to claim 1 as granted being in bold type:

"Device for collecting refuse, such as glass, paper, coarse refuse and the like, comprising an outer casing (1) to be built into the ground **such that the casing will extend only underground**, and a rigid refuse container (2) adapted to be placed in the outer casing (1) and having a hoist engagement means to be lifted therefrom in order to be emptied, the refuse container (2) having an insert opening (14) in or near the upper wall and a discharge opening in its bottom part closable by a closure means (5), the refuse container (2) having an overground part and an underground part and the cross section of the overground part being smaller than that of the underground part, characterized in that there are provided safety means including a fence or inner casing rising automatically through raising means **when** the refuse container is hoisted from the outer casing to prevent people passing by to fall into the outer casing (1), **wherein the raising means includes a spring device or counter weights.**"

III. The following documents played a role in the appeal proceedings:

D1: DE-B-1 097 355

D2: EP-A-0 240 748

- D3: DE-C-69 232
- D4: District Court of the Hague, Judgement in interim injunction proceedings with cause-list number KG 96/1275, Rutte Recycling B.V. versus Bammens B.V.
- D5: Article entitled "Würdigung der Preisträger aus dem Bereich Industrial Design" written by Rido Busse
- D6: Declaration by R. J. de Boer dated 8 November 1996
- D7: Dutch Standard NEN 3585, Safety requirements for immobile material hoists, first printed March 1990, Dutch Standards Institute, sections 5.1.5 to 8.1.2
- D8: DE-U-9 004 988
- D10: Letter from Mr T. Cohen Jehoram dated 12 November 1996 to Mr De Schwartz of Lödige Holland B.V., including Lödige Holland product data sheet 1270/06 dated 1996.
- D11: Report by Mr Ir. H. Mulder dated 7 October 1996 (seven pages including Annex 1)
- D11: Appendix 2 - Statement by Mr Ir. H. Mulder about the Autolift in the Vroom & Dreesmann building on the Grote Marktstraat in The Hague, with 9 photographs
- D12: Fax from W. Hoomans of Vroom & Dreesmann Department Stores to De Brauw Blackstone Westbroek dated 8 November 1996

- D14: Letter from C. Keus of the Dutch Standards Institute dated 13 April 2000 to Mr Levie
- D15: Fax from Mr Levie dated 11 April 2000 and fax from Mr T. Cohen Jehoram dated 14 April 2000, both to Professor Steinauer, and a faxed reply dated 13 April 2000
- D16: Statement by Pel Ariesen dated 20 April 2000
- D17: Merriam-Webster's Collegiate® Dictionary, Tenth Edition, Merriam-Webster, Incorporated, Springfield, Massachusetts, U.S.A., page 552 - definition of the word "hoist"
- D18: Collins Dictionary of the English Language, Collins, London and Glasgow, page 534 - definition of the word "fence"
- D19: New Webster's Dictionary and Thesaurus of the English Language, 1991 Edition, Lexicon Publications, Inc., New York, page 346 - definition of the word "fence".

IV. In its decision revoking the patent, the opposition division found the subject-matter of claim 1 of each of the requests then on file to lack inventive step, essentially over D5, D8 and D3.

In the appeal proceedings the appellant (proprietor) argued against the opposition division's reasoning and against the objections of respondent II (opponent II) under paragraphs (a), (b) and (c) of Article 100 EPC. Respondent II was concerned with whether a device

having an automatically rising floor would fall within the scope of the claims whereas the appellant objected to the opposition division making a statement on this point.

Respondent I (opponent I) made no comment during the appeal proceedings.

V. Oral proceedings took place on 30 May 2000, attended by the appellant and respondent II. Although duly summoned, no one appeared for respondent I who had announced in the letter of 24 May 2000 that he would not attend, so in accordance with Rule 71(2) EPC the proceedings were continued without him.

VI. The appellant requested that the decision under appeal be set aside and the patent be maintained as granted.

Alternatively he requested that the patent be maintained on the basis of one of the following three auxiliary requests:

- Claims 1 to 5 as submitted during the oral proceedings - first auxiliary request,
- Claims 1 to 4 as annexed to the decision under appeal - second auxiliary request,
- Claims 1 to 4 as submitted during the oral proceedings - third auxiliary request.

Furthermore he requested that section 7 of the Statements of Reasons of the decision under appeal be stated to be null and void and may not be considered by any national court.

Respondent I made no requests in the appeal proceedings but before the first instance had requested that the patent be revoked.

Respondent II requested that the appeal be dismissed.

Respondent II offered additional evidence for the publication date of D5 in case the board did not accept that it had been published before the priority date.

In case the board doubted the correctness of Mr De Schwartz's declaration in D10, respondent II offered him as a witness.

Reasons for the decision

1. The appeal is admissible, as was accepted by respondent II during the oral proceedings.
2. *Interpretation and scope of claim 1 of each request*
 - 2.1 At the outset the board must point out that its function is not to decide whether non-prior art devices (such as the Bammens device described in D4 and Professor Steinauer's devices set out in D15) fall within the scope of the claims.
 - 2.2 Moreover - referring to the proprietor's request that section 7 of the Statements of Reasons of the decision under appeal be stated to be null and void and may not be considered by any national court, the board has no power or wish to tell national courts what they can and cannot do. This request is therefore refused.

2.3 However the board must interpret the claims in order to be able to decide whether they are patentable in view of the **prior** art. The board will therefore comment on the terms "hoist", "fence" and "inner casing" but it is convenient to defer this to section 7.3.4 below.

3. *Extension of subject-matter - Articles 100(c) and 123 EPC*

3.1 Claim 1 as granted (the main request)

3.1.1 Claim 1 as granted includes the feature of "the refuse container (2) having an overground part and an underground part and the cross section of the overground part being smaller than that of the underground part".

3.1.2 However Figures 1 and 2 in the granted patent (the only Figures) show refuse containers 2 of **constant** cross section. While lines 36 to 39 of the originally filed page 15 specify the claimed feature, lines 1 and 2 of page 16 go on to say that "In this case the casing will extend only underground." This qualification is repeated in column 2, lines 46 and 47 of the patent as granted.

3.1.3 Moreover claim 1 as granted states that "there are provided safety means including a fence or inner casing rising automatically through raising means if the refuse container is hoisted from the outer casing to prevent people passing by to fall into the outer casing (1)."

While a similar statement can be found in lines 6 to 10 of the originally filed page 16, it is preceded by the

statement in lines 5 and 6 that "In case the outer casing extends only underground ...". This qualification is also in column 2, lines 50 to 52 of the patent as granted.

3.1.4 Claim 1 as granted states that there is "an outer casing (1) to be built into the ground" but does not specify whether this outer casing extends above the ground or not. Thus the claim implicitly includes the alternative of the casing (of a refuse container with the specified relative cross sections and the specified safety means) extending also overground.

3.1.5 The appellant argued that it was clear that the advantage of an outer casing extending only underground would not be lost if the outer casing extended a little overground. The board cannot agree with the appellant's view that this forms a basis for claiming an outer casing which extends overground. The board relies instead on the disclosure of the original patent application and finds (for the reasons set out in sections 3.1.2 and 3.1.3 above) that the implicitly claimed alternative (referred to in section 3.1.4 above) is not derivable from the originally filed patent application.

3.1.6 Thus claim 1 as granted contravenes Article 100(c) EPC and is unallowable.

3.2 Claim 1 of the first auxiliary request

3.2.1 This claim adds to claim 1 as granted the words "such that the casing will extend only underground" and so is not subject to the objection against claim 1 as granted set out in section 3.1 above.

3.2.2 Respondent II argued that claim 1 as granted and therefore claim 1 of the first auxiliary request included features which had not originally been claimed and which yielded a combination that was not specifically disclosed by the originally filed application and which was not in line with its teaching. In particular he argued that the disclosure in the paragraph bridging pages 15 and 16 of the originally filed application of rising "a fence or inner casing automatically, for example by means of a spring device or by counterweights" was not linked to a particular embodiment and was not linked to other features of the claim such as the hoist engagement means, the discharge opening, the safety means, and the raising means in its general form.

The board considers however that the originally filed claim 1 and its dependent claim 16 (see also page 1, line 32 to page 2, line 13 of the originally filed description) do not rely on a specific embodiment and form a basis for a device which is further defined by features taken from the paragraph bridging pages 15 and 16 of the originally filed application but which remains within the framework of the very general originally filed claim 1. It is clearly permissible in principle to introduce into the independent claim features which were not present in any of the originally filed claims. While it is clear that the safety features dealt with in this cited paragraph of the originally filed application could not be applied to many of the devices originally disclosed, the board finds that these safety features could be generally applied when the refuse container is removable from an outer casing that extends only underground since the safety features are clearly functionally independent of

for instance the features by which the container is emptied.

3.2.3 Respondent II argued further that the claimed "raising means" were not disclosed at all in the originally filed application. The board considers however that "raising means" is an allowable generic term covering the specific examples in lines 7 to 9 of page 16 of the originally filed description (lines 54 and 55 of column 2 of the patent as granted), particularly since this passage first indicates in general terms that a fence or inner casing is raised automatically and then continues by giving the specific examples of a spring device and counterweights.

3.2.4 Accordingly the board considers that claim 1 of the first auxiliary request does not contravene Article 123(2) EPC and, since it is more restricted than claim 1 as granted, it does not contravene Article 123(3) EPC either.

3.3 Claim 1 of the second auxiliary request

This claim does not specify whether the outer casing extends above the ground or not. The arguments set out in section 3.1 above apply equally to claim 1 of the second auxiliary request which claim 1 therefore contravenes Article 100(c) EPC and is unallowable.

3.4 Claim 1 of the third auxiliary request

3.4.1 This claim is based on claim 1 of the first auxiliary request which was found in the above section 2.2 not to contravene Article 123 EPC.

3.4.2 In claim 1 of the third auxiliary request the word "if" in the wording "if the refuse container is hoisted from the outer casing" is changed to "when" (a clarification to bring it into line with page 16, line 6 of the originally filed description and column 2, line 52 of the description as granted).

The addition of the spring device or counterweights comes from page 16, line 9 of the originally filed description (line 55 of column 2 of the description as granted and claim 2 as granted).

3.4.3 Thus these amendments do not contravene Article 123(2) EPC and, since they are additive and restrictive, they do not contravene Article 123(3) EPC either.

3.5 The dependent claims of the first and third auxiliary requests correspond to or are selected from the granted dependent claims which are derivable from the originally filed application. The description and the drawings of the first and third auxiliary requests are as granted and are derivable from the originally filed application.

4. *Claim 1 as granted (the main request)*

For the reasons given in section 3.1 above, claim 1 as granted is unallowable and the main request is therefore refused.

5. *Claim 1 of the first auxiliary request*

5.1 Novelty

No single document on file discloses all the features

of claim 1 of the first auxiliary request. The parties do not dispute this.

The subject-matter of claim 1 of the first auxiliary request is thus considered novel within the meaning of Article 54 EPC.

5.2 Closest prior art

5.2.1 The paragraph bridging pages 2 and 3 of D8 refers to a "Diplomarbeit" of Joachim Döring concerning a rubbish container in a shaft. The container has a one piece lid which also covers the shaft. The lid can be stood upon and has a filling tube by which the container is lifted. It is clear that when the container is lifted from the shaft for emptying that the shaft will be open at the top.

This Döring system (comprising a container and a shaft) is in accordance with the preamble of claim 1 of the first auxiliary request.

5.2.2 Also D5, cited by respondent II with the notice of opposition, refers to this Döring system. D5 was not only extensively discussed before the opposition division and also at the appeal stage prior to the oral proceedings but also formed the basis for the revocation of the patent by the opposition division. However during these oral proceedings the appellant objected for the first time that D5 bore no date and that there was no proof that it had been pre-published.

While respondent II had the duty to prove that D5 on which he wished to rely was pre-published, the appellant made his first objection more than three

years after the filing of D5 and he gave no concrete reason for doubting publication of the article.

D5 comments on the second page that "The industry and the councils must decide whether there must be a device to make safe the shaft during the emptying process". Thus, if pre-published, D5 would appear to be a slightly better starting point for assessing inventive step than D8.

- 5.2.3 However the board considers it self evident that the public must be protected against falling into a hole in a public area, even if this hole is only temporary, to prevent e.g. the water board or the local council being sued after an accident. Workmen can prevent the public from falling in a hole dug in the road in various ways but the most common is probably by manually erecting a fence around the hole.

Thus when the skilled person considering the Döring system reads in D5 about deciding "whether there must be a device to make safe the shaft during the emptying process", he learns nothing that he did not already know from D8 and his practical experience i.e. that the hole created by removing the container from its shaft must be guarded.

- 5.2.4 Thus it makes little difference whether the closest prior art for assessing inventive step is held to be D8 or - if pre-published - D5. Accordingly the board will not investigate the public availability of D5 and will refer simply to "the Döring system".

5.3 Problem

The board sees the problem facing the skilled person starting from the Döring system as being how to improve its safety during emptying of the container.

5.4 Solution

The board considers that the provision of safety means including a fence or inner casing rising automatically through raising means if the refuse container is hoisted from the outer casing to prevent people passing by to fall into the outer casing, as set out in the characterising portion of claim 1 of the first auxiliary request, solves the problem set out in section 5.3 above.

5.5 Inventive step

5.5.1 As explained in section 5.2.3 above, the skilled person knows that a fence will stop people falling in a temporary hole in the ground and that removal of the Döring container for emptying will create just such a temporary hole. He will realise that the fence could not remain in place all the time while the container is being used by the public because this would defeat the object of the container being unobtrusive and because people could then not get close enough to use the insert opening. Therefore the fence can only be temporary.

5.5.2 However he also knows that when a safety operation like the provision of a fence is supposed to be regularly carried out, sooner or later it is forgotten and an accident may occur. Therefore he will realise that it would be better for the provision of the fence to be made either unavoidable or automatic.

5.5.3 From his everyday experience while waiting at a passenger lift he knows that when the doors open then the lift compartment will already be there. There will be no danger of him stepping into an open lift shaft because the opening of the doors is linked to the presence of the compartment. The doors block entry to the lift shaft when it is not blocked at that particular floor of the building by the compartment.

5.5.4 While most lift doors move sideways, there are also lifts whose doors move vertically e.g. the Autolift referred to in D11 Appendix 2 and in D12. It is not disputed that this lift was publicly known prior to the earlier priority date claimed for the present patent.

In short, the lower door of the Autolift is up (see photograph 1 of D11 Appendix 2) when the lift compartment is absent, and down when the compartment is present (see photograph 4). Photograph 3 shows a mid-position of the lower door and one realises that there is in effect a temporary, vertically movable fence which blocks the lift shaft when the lift compartment is absent.

- 5.5.5 The board therefore considers that it would be obvious for the skilled person wishing to improve safety when the Döring container is emptied to provide a vertically movable fence along the lines of the Autolift and to arrange for this to be operated in a basically similar manner.

Thus, before the refuse container is hoisted, the fence would be moved upwards to block access to the shaft opening which will subsequently be exposed. Various ways of initiating the upward fence movement would occur to the skilled person but all would be dependent on the driver of the refuse lorry deciding to hoist the container or some action following his decision. After initiation, the fence would be moved upward by a motor to the predetermined upper position.

- 5.5.6 The characterising portion of claim 1 of the first auxiliary request says no more than this. That the raising occurs "if the refuse container is hoisted" is rather general and it is not explained what is meant by "automatically". Moreover the exact timing of this raising (before, during or after hoisting) is uncertain.

In the postulated Döring/Autolift system the fence

would rise automatically (initiation being followed by motorised movement to a predetermined end stop) through raising means (the motor) if the refuse container is hoisted thus preventing people passing by from falling into the outer casing i.e. shaft.

5.5.7 Thus the board considers that the subject-matter of claim 1 of the first auxiliary request is not inventive (Articles 52(1) and 56 EPC) and therefore refuses this request.

6. *The second auxiliary request*

For the reasons given in section 3.3 above, the second auxiliary request must be refused.

7. *Claim 1 of the third auxiliary request*

7.1 Novelty

This claim adds features to claim 1 of the first auxiliary request whose subject-matter was found in section 5.2 above to be novel.

Thus also the subject-matter of claim 1 of the third auxiliary request is considered novel within the meaning of Article 54 EPC.

7.2 Problem, solution and disclosure of the invention

7.2.1 Referring to the characterising portion of claim 1 of the third auxiliary request, because the raising means includes a spring device or counterweights it becomes clear when the safety means rise, namely as the refuse container is hoisted from the outer casing. Moreover it

becomes clear how the safety means rise and that the rising is dependent on the hoisting of the refuse container.

7.2.2 The features of the characterising portion of claim 1 of the third auxiliary request thus solve the problem set out in the above section 5.3.

7.2.3 In view of section 7.2.1 the board considers that the skilled person using the information in the originally filed patent application would be able to arrive at a device as defined by claim 1 of the third auxiliary request.

For the third auxiliary request, therefore, the board finds that respondent II's objection under Article 100(b) EPC fails and that Article 83 EPC is satisfied.

7.3 Inventive step

7.3.1 Conventional lifts for passengers (and presumably the Autolift of D11 Appendix 2 and D12 - see the above sections 5.5.4 to 5.5.6) use separately powered means (such as electric motors) to move the safety means and employ complicated interlocks to ensure that the door cannot open unless the cage is there and to ensure that the cage cannot move until the door is closed.

Such separately powered means for moving the safety means and such complicated interlocks are however not essential in the present device whose raising means includes a spring device or counterweights thus allowing the device to be simpler and cheaper.

While counterweights are commonly used in lifts, their function is to balance the weight of the cage whereas in the present invention they counterbalance the safety means.

7.3.2 It will next be examined whether the subject-matter of claim 1 of the third auxiliary request (and especially the specified safety means and raising means) are known or obvious from the other prior art on file.

7.3.3 Fig. 1 of D1 shows a carrier plate 3 supporting a rubbish container 11. The plate 3 is raised by the water operated telescopic arrangement 4 and thus pushes the container 11 out from the pit 1.

The teaching of D1 would not solve the safety problem of the Döring system because if the container 11 of D1 were hoisted out of the pit (leaving the plate 3 at the bottom of the pit) then the pit would be uncovered and someone could fall thereinto. Moreover safety does not seem even to have been considered when drafting D1 because Fig. 1 shows that even when the container 11 is in the pit 1 a person could still fall into the pit above the container.

In D1 the raising of the container is dependent on the raising of its support whereas in the present invention it is the other way round (the raising of the safety means is depended on the hoisting of the container).

7.3.4 At this point it is convenient to use D1 to make some remarks on some of the words in the claim (see section 2.3 above).

Respondent II argues with the aid of dictionary D17

that the word "hoist" means simply to "raise" and that therefore the container in D1 is hoisted by the carrying plate 3. However the board notes that, as well as including the words "the refuse container is hoisted from the outer casing", the claim refers to "hoist engagement means to be lifted". It is clear from the patent that these hoist engagement means are embodied by the lug 7 shown in Figs. 1 and 2 "to enable a loading crane to pull the refuse container 2 out of the outer casing 1", see the originally filed description page 6, lines 3 to 5. Thus - in the whole context of the claim and the patent - the word "hoisting" implies from pulling the container from above not pushing it from below which is what is done in D1. This interpretation of the word "hoist" was confirmed by the appellant during the oral proceedings.

In line with the definitions in dictionaries D18 and D19, the board considers that a "fence" must be or at least must include a vertical structure. The carrying plate 3 of D1 is certainly not a fence nor is it acting as a fence in Fig. 2 of D1.

The term "inner casing" is used in the claim as an alternative to the fence and in the context of the patent the board considers it to be an **inner** casing within the **outer** casing 1 shown in Figs. 1 and 2. The board could perhaps see the carrying plate of D1 as being part of the outer casing but cannot see it as an "inner casing".

- 7.3.5 As in D1, in the embodiment of Figs. 1 to 3 of D2 the raising of the container 4 is dependent on the raising (by rotation) of the support 10, 11.

Figs. 1 and 2 show that a cover 5 over the pit 7 moves upwards when the support 10, 11 is raised. Even if the container 4 were provided with means in order to allow it to be hoisted from above, the presence of this cover 5 would prevent such hoisting taking place.

In the embodiment of Figs. 4 to 6 the container 4 is rotated to raise it whereupon it can be removed from the pit 7. However lid 27 is attached to the container 4 and so the pit is left uncovered when the container is removed. Thus the safety problem solved by the invention is not solved or hinted at by this embodiment.

- 7.3.6 D3 concerns preventing a person from entering the bottom of a shaft and being hit by a hoist in the shaft falling onto him whereas the present invention concerns preventing a person falling into a shaft at the top when no container is present therein.

The board cannot agree that the skilled person searching for a solution to the safety problem presented by the Döring system would consult this document D3 and, even if he did, the board cannot see that it would lead him to the inventive solution. To argue otherwise is to use an ex post facto approach.

- 7.3.7 Respondent II argued that there is no Standard specifically for underground hoisted containers but that the skilled person would consult Standards for similar applications, in particular the Standard D7.

The board agrees with some of the passages of D7 relied upon by respondent II, such as section 7.1.1 that states that "material hoists with a hoisting height of

more than 1.8m must be provided with shaft closures, and section 7.2.1 that states that a shaft closure must be arranged in situations where there exists the hazard of falling into a hole. However these passages do no more than state the obvious, see section 5.5.1 above.

Other passages relied on by respondent II are insufficiently detailed to draw conclusions as to what they mean in concrete terms e.g. section 7.4.1 b that states that shaft door locking is not required for shaft closures moved by the hoisting surface and coupled mechanically thereto, section 7.1.11 that states that for floor hatch material hoists the shaft closure at the topmost access may consist of upward pivoting or horizontally or vertically moving hatches moved or operated by the hoisting surface, and section 7.2.2 that instead of a closure at the top stop position, a fence may be arranged on the hoisting surface.

Respondent II provided only parts of this Standard and did not adequately explain the context in which the short statements cited should be seen. The board cannot see a clear disclosure in these passages of anything more than what is known to the skilled person from conventional systems such as the Autolift system of D11 Appendix 2. Thus section 7.4.3 states that the shaft doors must be closed and locked before the hoisting surface can depart which differs from the present invention where the safety means rises as the container rises. It is insufficient to say - in hindsight - that isolated passages of D7 seem to be describing the solution arrived at by the present invention. On the contrary, it would be necessary to show that this Standard D7 would have led the skilled person to the

claimed solution.

The standardization consultant of the Dutch Standards Institute comments in D14 (submitted by respondent II) on the Standard D7 that it is formulated for other lifting and hoisting machines and advises "a thorough analysis of whether the risks covered by such standards correspond sufficiently with the risks of your machine." Thus D14 (submitted by respondent II) casts doubt on the relevance of D7 to the field of hoisting underground refuse containers. The other Standards mentioned in D14 have not been submitted by respondent II (and at least two of them are not prior art).

7.3.8 Respondent II argued that Fig. 11 of D8 showed a hexagonal cover plate 192 which when raised would form a fence around the pit.

However Figs. 10 and 11 of D8 (see page 17, lines 11 to 14) each show a hexagonal throw-in shaft with a hexagonal corresponding split cover. In Fig. 10 the shaft 186 and the cover 184 are divided in two and it appears that the shaft halves 186 are pivoted away from each other and downwardly, each taking with it the half of the cover 184 attached to it. Page 17, lines 17 and 18 state that the cover 192 of Fig. 11 slopes. Fig. 12 shows a circular cover which, according to page 17, lines 24 and 25, is divided like the previous embodiments. Therefore there is nothing in D8 to imply that the Fig. 11 cover 192 is divided into six segments, it is more likely that it is divided merely into two halves like Figs. 10 and 12. Even if the Fig. 11 cover 192 were divided into six segments these would not form an effective fence since there would be

triangular gaps.

- 7.3.9 Even if it is accepted that hoists in the product data sheet dated 1996 accompanying the letter D10 have been produced technically unchanged since 1975, then these hoists would not lead the skilled person from the problem underlying the Döring system to the subject-matter of claim 1 of the third auxiliary request.

Presumably the door in the lower photograph prevents entry of the car into the cage until this is in place at the upper level but this is no more relevant than the Autolift of D11 Appendix 2 and D12 referred to in section 5.5.4 above. Moreover it is not the raising of the car (which is the equivalent of the container of the present invention) which raises the cage but it is the cage that raises the car (whereas in the invention the hoisting of the container raises the safety means).

- 7.3.10 The remaining documents on file are not prior art but experts' opinions.
- 7.3.11 D6 is the opinion of an expert who however is in a field which is not the same as that of the invention.

The board could agree with Mr de Boer's opinion that a fence must be provided around the hole for the container but cannot agree with his opinion that "The movement of the fence has to be linked to the removal of the container" otherwise "the risk of human error (for instance through negligence) becomes too great." If the opinion were correct then **all** holes in the road would also have to be protected by such fences, which is plainly not the case.

While the board agrees with the final paragraph of D6 referring to automatically moving lift shaft doors (and indeed advances similar arguments in the above section 5.5.3), the existence of such doors does not render the more precisely defined subject-matter of claim 1 of the third auxiliary request obvious (see the above section 7.3.1).

7.3.12 The arguments in Mr Mulder's report D11 have been also made by respondent II and already dealt with in this decision.

7.3.13 The two solutions set out in D15 are not completely clear. Unlike the claimed device however, it is clear that Professor Steinauer's first solution employs a motor. While his other solution needs no motor it appears to be no more than conventional fences inserted in holes in the ground around the pit. Neither solution involves a spring device or counterweights.

Thus neither of these solutions is even remotely similar to the presently claimed device.

7.3.14 Mr Ariesen's statement D16 concerns development in 1995 when his team should have been aware of the present patent application because this was published in 1994. Whether his team arrived at the same or a similar solution to that of the invention and whether this was done in a obvious manner or not is therefore irrelevant.

7.3.15 Accordingly the board cannot see that any combination of the prior art documents on file could (let alone would) lead the skilled person in an obvious manner to the claimed subject-matter.

7.3.16 Thus, as required by Article 56 EPC, the subject-matter of the independent claim 1 involves an inventive step.

8. The patent may therefore be maintained amended, based on independent claim 1 of the third auxiliary request, claims 2 to 4 dependent thereon, the granted description and the granted drawings.

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 to 4 submitted as the third auxiliary request during the oral proceedings,

Description: columns 1 and 2 as granted, and

Drawings: Figures 1 and 2 as granted.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries