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D E C I S I O N
of 23 September 1997

Case Number: T 0776/96 - 3.2.4

Application Number: 92200314.0

Publication Number: 0501544

IPC: A23N 15/01

Language of the proceedings: EN

Title of invention:

A device for removing crop from a stalk of a plant

Patentee:

Janssen, Wilhelmus Henricus Johannes

Opponent:

TUMOBA B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56

Keyword:

"Novelty (yes)"

"Inventive step (yes)"

Decisions cited:

G 0002/88, T 0450/89, T 0677/91, T 0447/92, T 0511/92,

T 0002/83, T 0056/87

Catchword:

-



Case Number: T 0776/96 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 23 September 1997

Appellant: TUMOBA B.V.
(Opponent) Gebroken Meeldijk 77d
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Representative: Reynvaan, Lambertus Johannes
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Respondent: Janssen, Wilhelmus Henricus Johannes
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Representative: Van kan, Johan Joseph Hubert, Ir.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 24 June 1996
rejecting the opposition filed against European
patent No. 0 501 544 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: R. E. Gryc
M. Lewenton

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal, received on 23 August 1996 against the decision of the Opposition Division, dispatched on 24 June 1996 on the rejection of the opposition against the European patent EP B 0 501 544.

The appeal fee was paid on 23 August 1996 and the statement setting out the grounds of appeal was received at the EPO on 24 October 1996.

II. The appellant filed an opposition against the patent as a whole on the grounds of lack of novelty and inventive step (Article 100(a) EPC) of the subject-matter of Claim 1 mainly in view of the following prior art documents:

E1: NL-A-8105684

E2: GB-A-1 267 929 and

E3: page 58 of the Catalogue ABS HYDRAULICS B.V.
VEENDAM of 1990.

The opposition division held that these grounds for opposition did not prejudice the maintenance of the patent unamended and rejected the opposition .

III. In his statement setting out the grounds of appeal, the appellant acknowledged that E1 disclosed the closest prior art and that said prior art was an improvement of the device described in E2.

He pointed out that the technical teaching of E1 was incomplete and not correct insofar it suggests that the pressure exerted by the knives on the stalk can be controlled by varying the number of revolutions of the motors whereas the discs are mechanically interconnected by the knives and must therefore rotate at the same speed.

The appellant contended that the pressure exerted by the knives of the device of E1 on the stalk was not dependent on the difference in number of revolutions as described in E1 but was dependent on the difference in drive couple of the motors. The appellant contended also that the skilled person would inevitably be led to the use of pressure controlling means by the teaching of E1 since the usual way to control the drive couple of an hydraulic motor is to use a pressure control valve over said motor in order to adjust the pressure drop.

The appellant was also of the opinion that the skilled person would easily realise that the motors of E1 are influencing each other and also that a single pump and a single tank should be used for both motors in order to reduce the costs.

According to the appellant no inventive step can be seen in the choice of a particular connection of the motors among only two possibilities, ie in series or in parallel.

In reply, the respondent (patentee) contended that the argumentation of the appellant is merely the result of

an a posteriori analysis of the invention. He pointed out that, despite the fact that the appellant is active in the field of this type of device and despite his knowledge of the contents of E1 and E2, he did not find the favourable structure according to the invention within the period of ten years following the filing of E1. The respondent was also of the opinion that the argumentation of the appellant was based on a wrong starting point since, if there is no difference in number of revolutions of the two discs, they would float with respect to each other and there would be no tendency for the knives to move towards the stalk.

According to the respondent, the different speeds as mentioned in the claim are thus necessary for a good working of the structure claimed in Claim 1.

IV. In reply to a request of the Board in application of Rule 1(3) EPC, both parties filed an English translation of the Dutch patent application E1.

V. Oral proceedings took place on 23 September 1997.

The appellant did not dispute the novelty of the subject-matter of Claim 1 anymore and considered that the state of the art disclosed in E1 was the closest to the invention. According to him, the essential teaching of E1 resides in the use of two independent motors for driving the discs, the teaching of E1 being open as far as the type of mounting (parallel or series) of the motors is concerned.

The appellant was also of the opinion that the teaching

of E1 concerning the independency of the two motors could not be correct since the discs driven by the motors are mechanically interconnected. The only way to control independently the two motors would then be to provide pressure controlling means between said motors as according to the invention. Consequently, the appellant considered that the skilled person was placed in a one-way-street situation which led him automatically to the invention.

In reply the respondent pointed out that E1 taught only to control the number of revolutions of two independent motors, interpretations in a different way being speculative ones. Moreover, even if the teaching of E1 is wrong as contended by the appellant, the skilled person should have first to discover it, then to correct said teaching and thereafter to make further steps before reaching the invention so that the combination of these different steps cannot be considered as obvious.

At the end of the oral proceedings, the appellant requested that the decision under appeal be set aside and the European patent be revoked.

The respondent requested that the appeal be dismissed.

VI. The wording of Claim 1 as granted reads as follows:

"A device for removing crop from a stalk of a plant, said device being provided with two discs (7, 1) having a passage (15) for a stalk along their coinciding central axes, a plurality of arms (14) bounding said passage and carrying knives (16) projecting into said passage, said arms being pivotally coupled to the one disc (7), whilst said arms are pivotally and slidably coupled to the other disc (1), said two discs are rotatable with respect to each other about said coinciding axes for moving the knives away from or towards each other, each of said discs (7, 1) is driven by its own motor (22, 21) driven by a pressurised fluid, characterized in the two motors (22, 21) being connected in series, fluid pressure controlling means (24, 24') being provided for controlling the pressure between the two series-connected motors (22, 21), and the construction being such that when a stalk is to be processed the two discs (7, 1) initially rotate at different speeds and the knives (16) initially move towards each other until they touch the stalk, the pressure the knives (16) exert on the stalk being controlled by said fluid pressure controlling means."

Reasons for the Decision

1. Admissibility of the appeal.

The appeal is admissible

2. *Novelty (Article 54 EPC)*

According to established EPO Boards of Appeal case law,

a very restrictive interpretation of disclosure has consistently been applied when examining novelty. In Decision G 2/88, OJ EPO 1990, 93, the Enlarged Board of Appeal has emphasized (see the Reasons for the Decision, section 10.1) that under Article 54(2) EPC the question to be decided is: "what has been made available to the public", and is not: "what may have been inherent in what was made available".

A claimed subject-matter would lack novelty only if a "clear and unmistakable teaching" of a combination of the claimed features could be found in a prior art disclosure (see for example unpublished Decisions T 450/89, T 677/91, T 447/92 and T 511/92). In the present case, E1 discloses clearly and unequivocally neither to connect the motors in series nor to use fluid pressure controlling means. Therefore the subject-matter of Claim 1 must be considered as novel over the disclosure of E1.

It should also be recognised as novel with respect to the disclosure of E2 since the device described by E2 comprises only one driving motor instead of two as according to the invention.

Since E3 is a catalogue of hydraulic pressure valves and does not concern devices for removing crop from a stalk of a plant, it cannot anticipate the subject-matter of Claim 1.

The device as described in Claim 1 is therefore new in the meaning of Article 54 EPC with respect to the state of the art described in E1, E2 and E3.

3. *The closest state of the art*

In agreement with both parties, the Board considers that E1 discloses the state of the art closest to the invention because each of the two rotatable discs of the device described in E1 is driven by its own motor (see the appellant's English translation of E1: page 3, line 1) as according to the device of the invention.

Since E1 does not specify the connection of two hydraulic motors with respect to each other and does not describe the use of fluid pressure controlling means, the subject-matter of Claim 1 appears to differ from said state of the art by the connection of the motors in series and by the provision between them of fluid pressure controlling means to control the pressure that the knives exert on the stalks.

4. *Problem and solution*

When starting from the device described in E1, the problem to be solved appears to be to improve the accuracy of the control of the pressure exerted by the knives on the stalk (see the patent specification: column 1, lines 30 to 35) and the Board is satisfied that the implementation of the measures claimed in claim 1 brings a solution to the above-mentioned problem.

5. *Inventive step (Article 56 EPC)*

5.1 The questions to be answered as regards the inventive

step are not only whether the skilled person examining the prior art in the light of his general common knowledge would be provided with enough indications so that he could arrive at the solution claimed in Claim 1, but moreover whether, starting from the closest state of the art disclosed in E1, he would be incited to follow a particular teaching in order to modify the machine of E1 in the direction of the invention in expectation of the improvement he was searching (see Decision T 2/83, OJ EPO 1984, 265).

- 5.2 In his statement setting out the grounds of appeal and also at the oral proceedings, the appellant contended that the technical teaching of E1 was not correct and that, when the skilled person using his general knowledge would interpret it in the correct way, he would be placed in a one-way-street situation which would lead him inevitably to the invention.

The Board cannot agree with this appellant's argumentation. Indeed, the technical teaching of a disclosure must be taken into consideration as disclosed, whatever it may be, and not, without any basis therefor as it might have been interpreted or corrected by the skilled person using his general technical knowledge. The content of E1 should be examined strictly, in its own context, and any interpretation not clearly supported by the general teaching of the document should be avoided as being the result of an a posteriori analysis. If the teaching of an anticipation appears to be actually wrong, it should only be recognized as such and not, without any basis in the disclosure, be interpreted with hindsight of the

invention.

- 5.3 Either, the skilled person becomes already aware at first sight that the teaching of E1 might be completely wrong, then there is no reason why he should keep on consulting this document. He would just ignore it. Or, only parts of E1 are considered to be wrong, and then a person skilled in the art would have the rest of the disclosure left to try to find out the correct teaching. Anyway the interpretation should be based on the disclosure itself.

The skilled person would, in line with the established case law of the Boards of Appeal (see in particular decision T 56/87, OJ EPO 1990, 188), not be authorized to arbitrarily isolate parts of such document from their context in order to derive therefrom a technical information which would be distinct from the integral teaching of the document. Since, in particular, the conception of the device of E1 is based on the idea of providing each disc of the device of E2 with its own individual driving means so that each of said discs can be driven by its own driving means independently of the driving means of the other disc (see the appellant's English translation of E1: page 1, paragraphs 4 and 5, page 3, line 1 and Claim 1), the skilled person seeking to improve further the device of E1 cannot simply ignore this basic idea and go in the opposite direction by connecting in series the driving means of the discs so that they would influence each other hydraulically.

Since it is true, that E1 does not specify explicitly the way the motors should be connected, the skilled

person would be clearly incited either to use distinct motors, each with its own separate electric, pneumatic or hydraulic power supplying circuit or to connect the motors in parallel to a common power source. Indeed, the indication in E1, that the discs can be driven by separate driving means independently from each other, and that the number of revolutions of one disc can be totally independent from the number of revolutions of the other disc, clearly points away from putting hydraulic motors in series since such a connection would make the motors hydraulically dependent on each other in contradiction with the general teaching of E1.

According to the Board, it is therefore not correct, starting from the disclosure of E1, to state that although the hydraulic motors are independent from each other, they can nevertheless be connected in series. Indeed a series connection implies an hydraulic dependency which, in view of the disclosure of E1, was to be avoided. Without hindsight, the skilled person would therefore have no reason to connect the motors of E1 in series.

5.4 He would also not find in the left relevant prior art documents (i.e. E2 and E3) any hint for using two motors connected in series and fluid pressure controlling means to control the pressure the knives exert on the stalk as according to the invention.

5.5 Also if, following the logic of the appellant according to which in order to reduce the costs the skilled person would decide to use a single hydraulic pump and a single fluid tank for both motors, it would be

contradictory for him to decide then in favour of a connection in series of the motors which needs the provision of sophisticated fluid pressure controlling means in order to control the number of revolutions of the discs independently from each other, if that would be possible whatsoever.

5.6 For the foregoing reasons, the Board is convinced that to improve the device known from E1 according to the teaching of present Claim 1 does not follow plainly and logically either from the prior art or from the general knowledge of a skilled person.

5.7 The Board considers therefore that the subject-matter of Claim 1 implies an inventive step within the meaning of Article 56 EPC.

6. The European patent EP-B-501 544 can therefore be maintained unamended.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

N. Maslin

C. Andries