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D E C I S I O N
of 29 August 2000

Case Number: T 0459/00 - 3.2.4

Application Number: 95200606.2

Publication Number: 0673596

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:
A construction including an implement for milking animals

Applicant:
MAASLAND N.V.

Opponent:
-

Headword:
Milking/MAASLAND

Relevant legal provisions:
EPC Art. 123(2), 111(1)

Keyword:
"Remittal"

Decisions cited:
-

Catchword:
-

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Case Number: T 0459/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 29 August 2000

Appellant: MAASLAND N.V.
Weverskade 10
NL-3155 PD Maasland (NL)

Representative: Corten, Maurice Jean F.M.
Octrooibureau Van der Lely N.V.
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 9 December 1999 refusing European patent application No. 95 200 606.2 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
C. Holtz

Summary of Facts and Submissions

I. The European patent application No. 95 200 606.2 was refused by a decision of the examining division dispatched on 9 December 1999.

The reasons the examining division gave for the refusal was that the description (page 1) of the application was amended in such a way that it contained subject-matter extending beyond the content of the application as originally filed (Article 123(2) EPC).

II. The appellant lodged an appeal against this decision on 26 January 2000 and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was filed on 31 March 2000.

III. The main request of the appellant reads as follows: "It is requested that the Examining Division rectifies its decision and allows applicant to file a further reply to deal with the objections made under 2.1 in the communication of 29 January 1999. If this request is allowed, reimbursement of appeal fees is requested, ...".

Auxiliarily, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the following documents:

Claims: No. 1 filed with the letter of 27 May 1999; No. 2 to 7 filed with the letter of 28 July 1998;

Description: page 1 as filed with the statement of grounds of appeal; pages 2 to 4 as filed with the letter of 27 May 1999; pages 5 to 10 as filed with the letter of 28 July 1998;

Drawings: Figures 1 to 6 (Sheets 1/4 to 4/4) as originally filed.

IV. Claim 1 according to the auxiliary request of the appellant reads as follows:

"1. A construction including at least one implement for milking animals, such as cows, while the implement further comprises a detector (15) for determining the position of the teats of an animal, the teat cups being arranged such that they are controllable and movable relative to the detector during the determination of the teats, the attachment of pairs of teat cups to the robot arm including common pivotal arms, characterized in that a teat cup is attached to the pivotal arms for rotation about its own axis."

V. In the statement setting out the grounds of appeal the appellant, referring to the main request, expressed *inter alia* the view that the decision under appeal contravened the principle of fair proceedings, particularly with respect to Article 113(1) EPC.

VI. With respect to the main request, the board in a communication dispatched on 16 June 2000 expressed the view that the main request of the appellant did not concern the board but the department which was responsible for the decision (i.e. the examining division), in so far as the appellant had requested

that the appealed decision be rectified by this instance (Article 109 EPC).

Moreover, the board also expressed the opinion that the decision under appeal was based on a ground on which the appellant had had the opportunity to present its comments.

VII. With this communication the appellant was informed that the amendments to the description upon which the auxiliary request was based clearly met the objections on which the decision under appeal was based and that - having regard to the nature of the amendments concerning Claim 1 of this auxiliary request - the board considered it as being expedient to remit the case to the first instance for further examination (Article 111(1) EPC) and therefore intended to continue the proceedings in writing with a decision for remittal provided the appellant had not maintained its request for oral proceedings.

The appellant in its reply dated 30 June 2000 withdrew its auxiliary request for oral proceedings so that the case could "be continued in writing for the examining division".

Reasons for the Decision

1. The appeal is admissible.

2. *Main request*

The appellant in its reply dated 30 June 2000 did not reply to the provisional comments raised by the board

in its communication dispatched on 16 June 2000 (see section VI above). The board sees no reason to change its opinion in these respects.

Therefore, the main request of the appellant cannot be allowed.

3. *Auxiliary request*

This request is based *inter alia* upon the amended page 1 filed with the statement of grounds of appeal. The passages objected to by the examining division, upon which the appealed decision is based, have been excised from the amended description. Thus, the only objections upon which the decision to refuse the application was based did not apply any longer for the description as presently amended.

However, it is not clear to the board whether the claims according to the auxiliary request have been examined by the examining division. In particular, it has to be noted that Claim 1 according to this request was amended with respect to Claim 1 as filed with the letter dated 28 July 1998 not only as suggested by the examining division in its communication dated 29 January 1999 but also by excision of features concerning the connection of the teat cups to the robot arm **via three pivotal arms**.

Therefore the board considers it to be appropriate to set aside the decision under appeal and, in the exercise of its discretion under Article 111(1) EPC to remit the case to the examining division for further prosecution on the basis of the auxiliary request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the examining division for further prosecution.

The Registrar: The Chairman:

N. Magouliotis C. Andries