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D E C I S I O N
of 1 February 2002

Case Number: T 1193/00 - 3.2.4

Application Number: 93200620.8

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IPC: A01K 15/02

Language of the proceedings: EN

Title of invention:

A milking machine for automatically milking animals

Patentee:

MAASLAND N.V.

Opponent:

Alfa Laval Agri AB
Prolion B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 123(2), 111(1)
EPC R. 71(2)

Keyword:

"Added subject-matter (no)"
"Novelty with respect to D7 (yes)"

Decisions cited:

T 0396/99

Catchword:

-



Case Number: T 1193/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 1 February 2002

Appellant: MAASLAND N.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 17 November 2000
revoking European patent No. 0 562 655 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: C. D. A. Scheibling
H. Preglau

Summary of Facts and Submissions

- I. The Opposition Division's decision to revoke the patent was posted on 17 November 2000.

The appellant (patentee) filed an appeal and paid the appeal fee on 20 December 2000, the statement setting out the grounds of appeal was filed on 16 March 2001.

- II. The opposition was based on Articles 100(a) (lack of novelty and inventive step); Article 100(b) and 100(c) EPC.

The Opposition Division held that the subject-matter of claim 1 did not meet the requirements of Article 52(1) EPC in conjunction with Article 54(1), (3) and (4) EPC in view of document:

D7: EP-A-0 575 608 (published under number WO-A-93/13651)

- III. Independent claim 1 as granted reads as follows:

"1. A milking machine for automatically milking animals, such as cows, comprising a milking parlour (2), characterized in that the milking parlour (2) includes detection means (61), by means of which it can be detected whether an animal (1) has completely or at least partly been removed from the milking parlour (2), while furthermore computer controlled expelling means (43) for removing an animal (1) from the milking parlour (2) are provided, the expelling means (43) being movable towards an exit of the milking parlour (2), such that the animal (1) is forced to leave the milking parlour (2)."

IV. During the appeal proceedings the appellant countered the findings of the Opposition Division. Respondent 01 (opponent 01) presented arguments to substantiate the grounds for opposition based on Articles 100(a) and (c) EPC. Respondent 02 (opponent 02) put forward arguments to substantiate the ground for opposition based on Article 100(a) EPC and declared to maintain those arguments presented before the opposition division.

V. In a communication dated 2 November 2001 the Board informed the parties that it intended to discuss during the scheduled oral proceedings solely the arguments relating to Articles 100(b) and (c) and 123(2) EPC as well as those relating to novelty with respect to D7 cited under the provision of Article 54(3) and (4) EPC and that if the Board did not dismiss the appeal, it intended to remit the case to the first instance for further prosecution.

VI. Oral proceedings were held on 1 February 2002.

Although duly summoned respondent 02 did not appear. Respondent 02 informed the Board by letter of 15 January 2002 that it would not be attending the oral proceedings. In accordance with the provisions of Rule 71(2) EPC the proceedings were continued without Respondent 02.

VII. The appellant (patentee) requests to set aside the decision under appeal and to maintain the patent as granted.

The respondents 01 and 02 (opponents 01 and 02) request to dismiss the appeal.

Reasons for the Decision

1. The appeal is admissible.
2. *Interpretation of the independent claim 1*
 - 2.1 When considering a claim, a skilled person should rule out interpretations which are illogical or which do not make technical sense. He should try to arrive at an interpretation of the claim which is technically sensible and takes into account the whole disclosure of the patent (Article 69 EPC). The patent must be construed by a mind willing to understand not a mind desirous of misunderstanding (T 396/99, ultimate paragraph of section 3.5).
 - 2.2 In claim 1 it is stated on the one hand that "the milking parlour (2) includes detection means (61), by means of which it can be detected whether an animal (1) has completely or at least partly been **removed** from the milking parlour (2)" and on the other hand that "while furthermore computer controlled expelling means (43) for **removing** an animal (1) from the milking parlour (2) are provided" (emphasis added). Therefore, in the light of the description and due the fact that both the detection means and the expelling means are concerned with the removal of the animal, it becomes clear for a skilled person that, in order to make technical sense (see section 2.1 above), the detection means and the expelling means must cooperate to achieve the aimed effect, i.e. that the expelling means are actuated in response to a signal provided by the detection means. Therefore, the expression "it can be detected whether an animal (1) has completely or at least partly been removed from the

milking parlour (2)" should be interpreted as meaning that the detection means must be able to indicate if the animal is staying within the milking parlour, that it has stopped on its way out, or that it has completely left.

Indeed the purpose of such a detection is the actuation of the movable expelling means if needed.

- 2.3 Claim 1 further states that "the expelling means (43) being movable towards an exit of the milking parlour (2), such that the animal (1) is forced to leave the milking parlour (2)". The word "forced" should be interpreted as meaning "driven" and the expression should be interpreted as meaning that it is possible to move the expelling means to drive the animal to as far as the exit, until the animal effectively leaves the milking parlour (see description as filed, page 2, lines 21 to 25).

Interpretations of the wording of a broad claim should at least be such that the aims of the patent are met, i.e. that the problem to be solved is in fact solved.

Interpretations of the wording of a claim which do not contribute anything to the solution, although according to the patent this wording should clearly do so, cannot reasonably be accepted by the Board. In the present case, it is clear from the teaching of the patent in suit that the expelling means must be able to expel, i.e. to drive the animal up to the extreme end of the milking parlour, i.e. the exit, so that it is guaranteed that the animal is forced/driven to (completely) leave the milking parlour.

3. *Article 100(b) EPC*

Although objected during the Opposition proceedings, no objection based on Article 100(b) EPC was raised by the respondents during the appeal proceedings (neither during the written nor during the oral proceedings).

Therefore the Board sees no reason to raise this objection again.

4. *Article 100(c) EPC*

4.1 In the claim as granted, the passage of claim 1 as filed that reads: "the milking parlour (2) includes expelling means (43) for removing an animal (1) from the milking parlour (2), the expelling means (43) being movable towards an exit of the milking parlour (2)" has been replaced by: "the milking parlour (2) includes detection means (61), by means of which it can be detected whether an animal (1) has completely or at least partly been removed from the milking parlour (2), while furthermore computer controlled expelling means (43) for removing an animal (1) from the milking parlour (2) are provided, the expelling means (43) being movable towards an exit of the milking parlour (2), such that the animal (1) is forced to leave the milking parlour (2)".

These amendments are based on claims 1 and 2 as filed and the description as filed page 1, lines 1 to 3; page 2, lines 15 to 27 and page 9, lines 3 to 5.

Claims 2 to 6 of the main request, are based on claims 19 to 23 as filed.

4.2 Respondent 01 argued that the feature "computer

controlled expelling means" of claim 1 as granted is not disclosed in the application as filed.

In the application as filed it is said, page 1, lines 1 to 3: "The invention relates to a milking machine for automatically milking animals, such as cows, comprising a milking parlour". Thus, since the milking machine is "automatically milking animals", it is clear for a skilled person that no operator has to intervene, thus that all operations are performed automatically and that implicitly the whole machine is computer controlled, particularly since it is furthermore stated on page 9, lines 3 to 5 that "The implement is further provided with a computer, not shown, by which the cylinders, motors, sensors, and automatic feeder of the implement can be controlled".

Therefore, taking into account the patent disclosure, it is, for a skilled person, beyond any doubt that the expelling means, which in the disclosed embodiment is actuated by motors 52 and 46, is computer controlled.

Respondent 01 further argued in that respect that the expelling means according to claim 1 are not limited to the embodiment of the description and that a skilled person could contemplate means not comprising any motor. However, as stated under section 2.2 above, the detecting means and the expelling means are not only functionally linked to each other, but also so linked to each other that there is a follow-up of measurements (... in how far an animal has left the milking parlour ...), evaluation (... has left... or ... whether the expelling means must be moved...) and actions, as indicated in the originally filed description (see page 2, lines 15 to 27). Such an approach cannot be compared to a single switch-type

actuation as suggested by respondent 01. Since the detection means in general, as well as the telemeter in the specific embodiment, is a sensor and therefore computer controlled (see page 9, lines 3 to 5) and since the expelling means are activated in response to the detection means in general or the telemeter signal in the specific embodiment, it is clear that the expelling means are activated by the computer as well and thus, computer controlled.

Finally respondent 01 argued that the patentee has generalised the original specific disclosure by using the term "computer-controlled expelling means" since said expression covers hydraulic or electric shock expelling means which are not disclosed in the application as filed.

This cannot be accepted since claim 1 as filed already included expelling means in general that were not limited to a specific embodiment and thus, did already cover any type of expelling device. The question if there was from the beginning a sufficient support to claim any type of expelling device, is rather a matter of Article 84 EPC and thus, is not a ground for opposition.

4.3 Respondent 02 argued during opposition proceedings that the feature of claim 4 as granted, according to which the distance between an animal and the milking parlour is detected is not disclosed in the application as filed.

This argument cannot be accepted since this feature is based on claim 21 and on the description page 2, lines 15 to 18 of the application as filed.

4.4 Consequently, claims 1 to 6 as granted meet the

requirements of Article 100(c) EPC.

5. *Novelty with respect to D7*

5.1 D7 discloses

- a milking machine for automatically milking animals, such as cows (WO-A-93/13651: page 1, lines 4 to 6 and 11, 12), comprising a milking parlour (1),
- which includes detection means detecting the presence of the cow (page 4, lines 14 to 16),
- while furthermore a swinging fence part (11) for compelling/stimulating/forcing an animal to leave the milking parlour (1) is provided (page 1, lines 31 to 33; page 5, lines 22 to 25; page 6, lines 7 to 9),
- the swinging fence part (11) being movable (page 4, line 35 to page 5, line 1).
- the swinging fence part (11) is computer controlled.

5.2 The milking machine according to Claim 1 further comprises the features:

- a- by means of which (detection means) it can be detected whether an animal has completely or at least partly been removed from the milking parlour, and
- b- the expelling means being movable towards an exit

of the milking parlour, such that the animal is forced to leave the milking parlour.

5.3 Concerning feature (a)

In the meaning of the patent as interpreted in section 2.2 above, the detection means are used to actuate the expelling means. Therefore the detection means must be able to indicate if the animal is still within the milking parlour, that it has stopped on its way out, or that it has completely left, in order to determine whether the expelling means must be actuated and/or moved.

D7 discloses a detection means that is able to state whether an animal is within the detection beam or not. There is no indication that could lead to the assumption that it can detect **where** the animal is effectively positioned within the milking parlour. Furthermore, D7 does not give any indication that there is a link between the detection means and the expelling means, i.e. that the signal of the detection means is used to actuate the expelling means. Thus, the information given by the detector means of D7 as well as the use of that information are different from the information and the use of the information of the detector means according to the patent in suit.

Both respondents argued that the wording of the claim 1 of the patent in suit does not state that the detector must be able to distinguish between the conditions "completely" or "at least partially removed".

However, according to the interpretation made in section 2.2 above, which implies the detection of

different situations, this argument cannot be accepted because it would not correspond to an interpretation of claim 1 of the patent in suit which is technically sensible and takes into account the whole disclosure of the patent in suit (see also section 2.1, above).

Respondent 01 further added that if the above mentioned detection means of D7 makes no detection, it could be said that said means detected that the animal has been completely or partly removed.

The reading of D7 however, makes clear that a signal is solely obtained if there is a reflection of the metal frame, i.e. when the cow has passed the location of the detection means. Although in such a situation it may be possible to state that the cow must either have left the milking parlour or still be present between the detection means location and the exit, it can however not be concluded that it corresponds to the above interpretation as set out in section 2.2.

Therefore the detector of D7 cannot be said to be able to detect that an animal has completely or at least partly been removed from the milking parlour in the meaning of the patent in suit.

5.4 Concerning feature (b)

Due to the fact that Figure 2 is missing in document D7, there is no clear teaching as to how exactly the expelling means act. Although it is said in D7 that the swing fence can serve to compel or to force the cow out of the milking parlour (page 1, lines 31 to 33; page 6, lines 7, 8) and although respondent 01 argued that the swing fence can be swung through over the floor of the

milking parlour (page 4, line 36 to page 5, line 2) and that therefore it can be said to be movable towards an exit of the milking parlour, there is, apart the indicated position A (page 5, line 2) apparently to be found on the non-available Figure 2, no further indication in D7 as to how far the swing fence can be swung in direction of the exit and thus, it cannot be deduced from the disclosure of D7 (due to the fact that Figure 2 is lacking) how far said fence can drive an animal. Especially, there is no indication that the expelling means can move towards the exit to drive the animal to as far as the exit. However, according to the interpretation of feature (b) made in section 2.3 above, the expelling means must not only be movable, but be movable to drive the animal to as far as the exit.

Thus, the expelling means of D7 cannot be said to be movable towards an exit of the milking parlour, such that the animal is forced to leave the milking parlour, in the meaning of the patent in suit.

The Board wants to emphasize that a lack of clarity in a patent document due to the fact of the non-availability of a drawing (Figure 2), which is nevertheless described in the description of that patent, results in a skilled person not being presented with a clear and unequivocal teaching necessary to assess novelty.

5.5 Consequently, claim 1 as granted is novel with respect to document D7.

6. Since the arguments of the Opposition Division leading to the decision under appeal cannot be upheld, the Board remits the case to the first instance for further prosecution (Article 111(1) EPC), as indicated in the

Board's communication dated 2 November 2001.

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 on the basis of the patent as granted.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries