

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

D E C I S I O N
of 19 February 2004

Case Number: T 0263/01 - 3.2.4

Application Number: 93200108.4

Publication Number: 0551960

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:

An implement for automatically milking animals

Patentee:

MAASLAND N.V.

Opponent:

Prolion B.V.
DeLaval International AB

Headword:

Cleaning/MAASLAND N.V.

Relevant legal provisions:

EPC Art. 56, 111(1), 100(a), 100(c)
EPC R. 71(2)

Keyword:

"Novelty (yes) - remittal to the first instance for further prosecution"

Decisions cited:

-

Catchword:

-



Case Number: T 0263/01 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 19 February 2004

Appellant: MAASLAND N.V.
(Proprietor of the patent) Weverskade 10
NL-3155 PD Maasland (NL)

Representative: Corten, Maurice Jean F.M.
Octrooibureau Ven der Lely N.V.
Weverskade 110
NL-3147 PA Maassluis (NL)

Respondent I: Prolion B.V.
(Opponent I) Kromme Spieringweg 248B
NL-2140 AA Vijfhuizen (NL)

Representative: Uittenbogaart, Gustaaf Adolf
Indeig B.V.
P.O. Box 3
NL-2050 AA Overveen (NL)

Respondent II: DeLaval International AB
(Opponent) P.O. Box 39
S-147 21 Tumba (SE)

Representative: Harrison, Michael Charles
Albihns GmbH
Bayer Straße 83
D-80335 München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 8 February 2001
revoking European patent No. 0551960 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. Andries
Members: P. Petti
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. The European patent No. 551 960, against which two oppositions were filed, was revoked by the decision of the opposition division dispatched on 8 February 2001.

- II. The opposition division, which found that the grounds for opposition mentioned in Articles 100(b) and (c) EPC did not prejudice the maintenance of the patent, revoked the patent because of lack of novelty with respect to the European patent application EP-A-476 771 (hereinafter referred to as document D1) which was considered as belonging to the state of the art according to Articles 54(3) and (4) EPC.

- III. On 22 February 2001 the patent proprietor (hereinafter referred to as the appellant) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 14 May 2001.

- IV. The requests made by the appellant in the statement setting out the grounds of appeal were based upon the patent as granted (main request) as well as upon two amended independent claims (auxiliary requests) filed with the statement setting out the grounds of appeal.

- V. In a communication annexed to the summons to attend oral proceedings the board informed the parties about its intention to remit the case to the first instance for further prosecution (Article 111(1) EPC) if the conclusion could be reached that the subject-matter of one of the claims upon which the appellant had based his requests would not contravene Articles 100(c) EPC

(and/or Article 123 EPC) and would be novel with respect to document D1.

VI. Oral proceedings were held on 19 February 2004.

Opponent II (hereinafter referred to as respondent II) who was duly summoned to oral proceedings was not present. Pursuant to Rule 71(2) EPC the proceedings continued without him.

During the oral proceedings the appellant filed a further amended claim 1 upon which he based his sole request and which reads as follows:

"An implement for automatically milking an animal, comprising a milking parlour, a milking robot (5) with a carrier member (33) adapted to carry a number of teat cups (6) and a cleaning device (63) with cleaning elements (64) for cleaning the teats of the udder of an animal to be milked, characterized in that the milking robot (5) is mounted on a first straight guide member and the cleaning device (63) is mounted on a second straight guide member, both said first and second straight guide members being slidably disposed on a horizontal carrier which extends longitudinally at one of the longitudinal sides of the milking parlour, so that said first and second straight guide members are displaceable on said horizontal carrier independently of each other, while the carrier member (33) as well as the cleaning device (63) are rotatable about an upwardly directed axis from a position outside the milking parlour into a position under the animal."

VII. The appellant requested that the appealed decision be set aside and the patent be maintained in an amended version on the basis of Claim 1 as filed during the oral proceedings and of Claims 2 to 10 as granted.

Opponent I (hereinafter referred to as respondent I) and respondent II requested that the appeal be dismissed.

VIII. During the oral proceedings respondent I essentially argued that:

- (i) the ground for opposition according to Article 100(c) EPC prejudiced the maintenance of the patent on the basis of the amended Claim 1 because of the expression "independently of each other";
- (ii) document D1 had to be read in conjunction with document EP-A-300 582 (hereinafter referred to as document D2) in so far as this document is referred to in the description of document D1 (on column 5, lines 26 to 28);
- (iii) the information content of document D1 in conjunction with that of document D2 deprived of novelty the subject-matter of the amended claim 1;
- (iv) dependent claims 7 and 8 of the patent as granted needed to be amended so as to be adapted to the amended claim 1.

The appellant essentially contested the arguments of respondent I.

- IX. In the written phase of the proceedings respondent I also argued that the priority (NL 9200091) claimed in the patent in suit was not valid and, thus, having regard to the filing date of the patent in suit (15 January 1993), the content of document D1 had to be considered as belonging to the prior art according to Article 54(2) EPC and as being relevant both for novelty and inventive step.

The arguments submitted by respondent II during the written phase of the appeal proceedings related to the claims upon which the previous requests of the appellant were based (see the above section IV).

Reasons for the decision

1. The appeal is admissible.
2. *Analysis of the claimed subject-matter*
 - 2.1 Claim 1 of the patent as granted was directed to an implement defined by the following features:
 - A^{PG}) The implement is suitable for automatically milking an animal,
 - B^{PG}) the implement comprises a milking parlour,
 - C^{PG}) the implement comprises a milking robot (5),

- C1^{PG}) the milking robot is provided with a carrier member (33),
- C11^{PG}) the carrier member is adapted to carry a number of teat cups (6),
- E^{PG}) the implement comprises a cleaning device (63),
- E1^{PG}) the cleaning device is provided with cleaning elements (64),
- E11^{PG}) the cleaning elements (64) are suitable for cleaning the teats of the udder of an animal to be milked,
- CE^{PG}) the milking robot and the cleaning device are independently from each other displaceably mounted on a guide member arranged at one of the longitudinal sides of the milking parlour,
- C1E^{PG}) the carrier member of the milking robot as well as the cleaning device are rotatable about an upwardly directed axis from a position outside the milking parlour into a position under the animal.

2.1.1 According to feature CE^{PG} the milking robot and the cleaning device are "mounted **on a guide member**".

The following sentence in the part of the description of the patent which relates to Figure 9 (column 5, lines 25 to 31) refers to the expression "guide member" without indicating a reference sign for this expression:

"The milk robot 5 and the cleaning device 63 are displaceably mounted on a guide member arranged at one of the longitudinal sides of the milk box or milking parlour, while the carrier member 33 as well as the cleaning device 63 are rotatable about an upwardly directed axis from a position outside the milk box into a position under the animal."

The representation of Figure 9 - taken alone - does not allow "a guide member" to be clearly identified. However, Figure 9 not only is described as being "a schematic plan view of a milking parlour **as in Figure 1**, in which the milking robot **also** includes a cleaning implement ..." (column 1, lines 56 to column 2, line 2; emphasis added) but also presents many analogies with Figure 1. The part of the description which relates to Figure 1 defines the milking robot 5 as being "slidably disposed on a **horizontal carrier** 12 which forms part of the rear railing portion 2" or is "provided against or next to an existing railing" and as comprising "a straight **guide member** 22" as well as a stepper motor 23 driving a threaded spindle 24 (see column 2, lines 18 to 23 and 50 to 57; emphasis added), wherein it is clear from Figure 1 that the straight guide member 22 can be longitudinally displaced along the horizontal carrier 12. Figure 9 represents a longitudinal element (not provided with any reference sign) which is analogous to the horizontal carrier 12 shown in Figure 1 and two further elements (not provided with reference signs) - one for the milking robot 5 and the other one for the cleaning device 63 - which are analogous to the guide member 22 shown in Figure 1.

Thus, feature CE^{PG}, which refers to "a guide member" without specifying whether both the milking robot and the cleaning device are mounted on a common guide member or whether each of them is mounted on its own guide member, can be considered as being a disclosed generalisation of these specific features which are deductible from Figure 9.

It is also clear that the "guide member" referred to in feature CE^{PG} corresponds to the longitudinal element shown in Figure 9 without any reference sign and to the horizontal carrier 12 shown in Figure 1.

Moreover, according to feature CE^{PG}, milking robot and cleaning device are "**displaceably** mounted on a guide member".

It can be derived from the above mentioned passages of the description of the patent that each of the milking robot 5 and the cleaning device 63 is provided with a guide member (i.e. with an element which is analogous to the guide member represented in Figure 1 with the reference sign 22). Furthermore, Figure 9 represents each of these "guide members" as being provided with an arrow directed along the longitudinal element (i.e. along the element which is analogous to the horizontal carrier represented in Figure 1 with the reference sign 12).

Thus, it can be considered that the term "**displaceably** mounted on a guide member" in feature CE^{PG}, in so far as it refers to a "displacement" without indicating the direction of the "displacement", can be considered as a disclosed generalisation of a specific feature (which

is deductible from the description and the drawings of the patent), according to which the guide member can be moved longitudinally along a horizontal carrier.

Furthermore, according to feature CE^{PG}, milking robot and cleaning device are "**independently from** [sic] **each other** displaceably mounted ...". The terms "independently from each other", which cannot be found in the description of the figures of the patent, define the cleaning device and the milking robot in a **functional** way. In other words, according to feature CE^{PG}, the milking robot and the cleaning device are mounted on a guide member and are **capable** of being displaced on said guide member independently of each other.

Having regard to the above comments, these **functions** or **capabilities** of the milking robot and of the cleaning device are obtained on account of the structural features according to which both the first and second straight guide members, on which milking robot and cleaning device are respectively mounted, are slidably disposed on a horizontal carrier extending longitudinally at one of the longitudinal sides of the milking parlour. These structural features can be clearly derived from Figure 9 in conjunction with Figure 1 and with the above mentioned passages of the description of the patent (column 1, lines 56 and 57; column 2, lines 15 to 23 and 50 to 57; column 5, lines 21 to 31).

2.2 The amended Claim 1 is directed to an implement defined by the features A^{PG}, B^{PG}, C^{PG}, C1^{PG}, C11^{PG}, E^{PG}, E1^{PG} and C1E^{PG} as well as by the following features which replace feature CE^{PG}:

C2) the milking robot is mounted on a first straight guide member,

E2) the cleaning device is mounted on a second straight guide member,

C2E2) both said first and second straight guide members are slidably disposed on a horizontal carrier extending longitudinally at one of the longitudinal sides of the milking parlour, so that said first and second straight guide members are displaceable on said horizontal carrier independently of each other.

2.2.1 Features C2 and E2 make it clear that milking robot and cleaning device are mounted on **separate** straight guide members.

2.2.2 The group of features C2E2 essentially consists of a structural feature defining the "horizontal carrier extending ...", of relational features defining the relationship of the two separate straight guide members and the horizontal carrier ("slidably disposed on ...") and of a functional feature defining the result of these relational features ("so that ...").

2.2.3 It is clear from the wording of the amended claim 1 that feature C1E^{PG} has to be read in conjunction with features C2, E2 and C2E2. In other words, this feature

indicates that the carrier member of the milking robot is rotatable about a (first) upwardly directed axis and the cleaning device is rotatable about a (second) upwardly directed axis.

3. *Article 100(c) and 123 EPC*

3.1 Having regard to the comments in the above section 2.1.1, the terms "said first and second straight guide members are displaceable on said horizontal carrier independently of each other" represent a feature (having a mainly functional character) which clearly defines a result which can be obtained on account of the specific features (having a mainly structural character) according to which the first straight guide member on which the milking robot is mounted and the second straight guide member on which the cleaning device is mounted "are slidably disposed on a horizontal carrier extending longitudinally at one of the longitudinal sides of the milking parlour".

Having regard to the comments in the above section 2.1.1, the features referred above as having a mainly structural character can be clearly derived from Figure 9 in conjunction with Figure 1 and the passages of the description in column 1, lines 56 and 57; column 2, lines 15 to 23 and 50 to 57; column 5, lines 21 to 31, wherein Figures 9 and 1 as well as the mentioned passages can also be found in application as filed (see page 3, lines 16 to 18; page 3, line 36 to page 4, line 3; page 4, lines 29 to 37; page 8, lines 11 to 20).

Therefore, the amendments leading to claim 1 (features C2, E2 and C2E2) have a basis in the application as filed.

3.2 Respondent I alleged that the expression "displaceable ... independently of each other" in feature C2E2 contravenes Article 123(2) EPC by arguing essentially as follows (see the above section VIII, point (i)):

- (i) this expression means that milking robot and cleaning device are totally independent of each other;
- (ii) thus, this expression cannot be derived from the description of the application as filed according to which milking robot and cleaning device are dependent on each other in so far as they cannot be displaced simultaneously.

The board cannot accept these arguments because they are based upon an interpretation of the wording "displaceable ... independently of each other" which is defined only by its literal meaning and is inconsistent with the description of the patent. Indeed, it is clear from the description of the patent that milking robot and cleaning device not only are separately mounted in spatial configuration (by means of two separate guide members) but also cannot perform their respective functions (under the udder of an animal) simultaneously.

3.3 The result defined by feature C2E2 (in the amended claim 1) according to which "said first and second straight guide members are displaceable on said

horizontal carrier independently of each other" represent a more specific definition of the result defined by feature CE^{PG} (in claim 1 as granted) according to which "the milking robot and the cleaning device are independently from each other displaceably mounted on a guide member". Thus, the amendments to claim 1 do not extend the protection conferred (Article 123(3) EPC).

3.4 Therefore, the ground for opposition according to Article 100(c) EPC does not prejudice the maintenance of the patent on the base of the amended claim 1 and the amendments leading to this claim do not contravene the requirements of Article 123(2) and (3) EPC.

4. *The content of documents D1 and D2*

4.1 Document D2 discloses (see particularly Figures 1 and 2) an implement for automatically milking an animal having *inter alia* the following features:

- the implement comprises a milking parlour,
- the implement comprises a milking robot,
- the milking robot comprises a robot arm 7 provided with a teat cup carrier 54/76 adapted to carry a number of teat cups,
- the milking robot arm 7 is mounted on a slide block 45 which is arranged at one of the longitudinal sides of the milking parlour and slidably mounted on a vertical frame beam 6,

- the vertical frame beam 6 is secured to a horizontal frame beam 37 slidably disposed on a horizontal carrier 9 extending longitudinally at one of the longitudinal sides of the milking parlour so that the milking robot arm 7 is capable of moving longitudinally with respect to the milking parlour,
- the teat cup carrier 54/76 is rotatable about the vertical pin 46 from a rest position outside the milking parlour into a working position under the animal.

4.2 Document D1 discloses (see particularly Figures 1 to 4) an implement for automatically milking an animal, having *inter alia* the following features:

- the implement comprises a milking parlour (see column 5, lines 8 and 9),
- the implement comprises a milking robot,
- the milking robot comprises a robot arm 1 provided with a carrier member 10,
- the carrier member 10 is adapted to carry a number of teat cups 24,
- the implement comprises a cleaning device 33,

- the cleaning device is provided with cleaning elements 51 for cleaning the teats of the udder of an animal to be milked,
- the milking robot is mounted on a guide member (sliding sleeve 4) which is arranged at one of the longitudinal sides of the milking parlour and slidably mounted on a vertical frame beam 3,
- the carrier member 10 is rotatable about an upwardly directed axis 6 from a rest position outside the milking parlour into a working position under the animal.

In the description of document D1 it is referred to document D2 as extensively describing the robot arm 1. Thus, the board accepts the argument of respondent I according to which document D1 has to be read in conjunction with document D2 in respect of the robot arm (see the above section VIII, point ii)).

Thus, having regard to the comments in the above section 4.1, it can be assumed that the implement disclosed in document D1 also has the following feature:

- the milking robot is mounted on a guide member slidably disposed on a horizontal carrier extending longitudinally at one of the longitudinal sides of the milking parlour.

According to the description of Figures 1 to 4 of document D1 the cleaning device 33 is provided with a support 32 detachably mounted on an arm 26 so that it can be detached from the arm 26 and placed on the end

of the carrier member 10 of the milking robot 1. However, it is stated (column 5, lines 23 to 25) that "separate robot arms can also be used for cleaning the teats and for attaching the teat cups".

Moreover, according to the introductory portion of the description (see column 3, lines 20 to 24; column 4 lines 18 to 23;), the robot arm used for cleaning the teats can be "the same robot arm which is used in attaching the teat cups or a separate robot arm or a robot arm on which the cleaning tools ... are located"

5. *Novelty with respect to document D1*

5.1 Having regard to the comments in the above section 4.2, it can be assumed that the cleaning device of the implement disclosed in document D1 can be mounted on a guide member which is different from the guide member on which the milking robot is mounted (as defined by feature E2). However, document D1 does **not** disclose the feature that the guide member on which the cleaning device is mounted **is slidably disposed on the horizontal carrier which extends longitudinally at one of the longitudinal sides of the milking parlour and along which the robot arm can longitudinally move.**

5.2 In these respects respondent I essentially argued as follows (see the above section VII, point (iii)):

- (i) The skilled person reading document D1 would immediately understand that the "separate robot arm" on which the cleaning device can be mounted must have the same construction of the robot arm carrying the teat cups.

- (ii) Thus, document D1 implicitly discloses the features that both the (first) straight guide member on which the robot arm is mounted and the (second) straight guide member on which the cleaning member is mounted are slidably disposed on a horizontal carrier extending longitudinally at one of the longitudinal sides of the milking parlour, so that said first and second straight guide members are displaceable on said horizontal carrier independently of each other.

The board cannot accept this argument because it is clearly based upon an *ex post facto* analysis of document D1. This document generally discloses the possibility of using a separate robot arm without specifically indicating how the separate robot arm is arranged. The fact that the robot arm of the milking robot is arranged on a guide member which is slidably disposed on a horizontal longitudinal carrier does neither imply that an analogous construction has to be chosen for the guide member of the cleaning device nor that the same horizontal longitudinal carrier has to be chosen.

5.3 Therefore, the subject-matter of the amended claim 1 is novel with respect to document D1.

6. *Further prosecution of the proceedings*

6.1 In its decision, the opposition division dealt with the objections raised by the parties under Article 100(c) EPC and with an objection under Article 100(a) EPC relating to the lack of novelty of the claimed subject-

matter in view of document D1. Further objections (such as for instance objections concerning lack of inventive step of the claimed subject-matter), were not dealt with by the opposition division.

Thus, pursuant to Article 111(1) EPC, the board remits the case to the opposition division for further prosecution.

- 6.2 The arguments submitted by respondent I with respect to the validity of the priority claimed in the patent in suit (see the above section IX, first paragraph) were not considered by the board because they are not relevant for the issue of whether the claimed subject-matter is novel with respect to document D1 and, thus, could not influence the findings of the present decision. These arguments, however, could become relevant for the evaluation of inventive step.

The arguments submitted by respondent I with respect to claims 7 and 8 (see the above section VIII, point (iv)) are also irrelevant for the findings of the present decision in so far as the case is remitted to the opposition division for further prosecution.

- 6.3 The arguments submitted by respondent II during the written phase of the decision (see the above section IX, last paragraph) are also irrelevant for the findings of the present decision in so far as they do relate to the amended claim 1 upon which the unique request of the appellant is based.

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.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries