

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 2 April 2004

Case Number: T 0559/01 - 3.2.4

Application Number: 94201169.3

Publication Number: 0622019

IPC: A01K 1/12

Language of the proceedings: EN

Title of invention:

A construction for automatically milking animals

Patentee:

MAASLAND N.V.

Opponents:

Alfa Laval Agri AB
PROLION B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 123(2)
EPC R. 71(2)

Keyword:

"Amendments - not allowable"

Decisions cited:

-

Catchword:

-



Case Number: T 0559/01 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 2 April 2004

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

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

Respondent 1: Alfa Laval Agri AB
(Opponent 1) P.O. Box 39
S-147 21 Tumba (SE)

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

Respondent 2: PROLION B.V.
(Opponent 2) Kromme Spieringweg 289B
NL-2141 BS Vijfhuizen (NL)

Representative: Hoorweg, Petrus Nicolaas
Arnold & Siedsma
Advocaten en Octrooigemachtigden
Sweelinckplein 1
NL-2517 GK Den Haag (NL)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 18 April 2001
revoking European patent No. 0622019 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
M. K. S. Aúz Castro

Summary of Facts and Submissions

I. The European patent EP-B-622 019, against which two oppositions had been filed, was revoked by the decision of the opposition division because of lack of novelty of the subject-matter claimed in the patent. The decision was dispatched on 18 April 2001.

II. On 15 May 2001 the patent proprietor (hereinafter appellant) lodged an appeal against the decision of the opposition division and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 28 August 2001.

III. Oral proceedings were held on 2 April 2004.

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

During the oral proceedings the appellant filed six independent claims upon which a main request and five subsidiary requests were based.

IV. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of one of the six independent claims filed during the oral proceedings on 2 April 2004.

Claim 1 of the main request reads as follows:

"A construction for automatically milking animals, such as cows, comprising a milkbox (6) and an area where the

animals are allowed to move freely, the construction further being provided with one or more doors, gates or similar devices (A, B) forming a one-way passageway, characterized in that the milkbox (6) is provided with a milking robot, the area is divided in at least two sub-areas (2, 4, 5; 9, 10) and the doors, gates or similar devices (A, B) are arranged between said at least two sub-areas to allow the animals to walk around through said at least two sub-areas to, through and from the milkbox (6) defining a one-way walk-through system and at least one (B) of the passageways interconnecting the sub-areas is provided in a fence and comprises said doors, gates or similar devices (A, B) and a feeding device for feeding animals."

Claim 1 of the first subsidiary request reads as follows:

"A construction for automatically milking animals, such as cows, comprising a milkbox (6) and an area where the animals are allowed to move freely, the construction further being provided with one or more doors, gates or similar devices (A, B) forming a one-way passageway, characterized in that the milkbox (6) is provided with a milking robot, the area is divided in at least two sub-areas (2, 4, 5; 9, 10) interconnected through passageways comprising the said doors, gates or similar devices which open in one direction and the doors, gates or similar devices (A, B) are arranged between said at least two sub-areas to allow the animals to walk around through said at least two sub-areas to, through and from the milkbox (6) defining a one-way walk-through system and at least one (B) passageway

being provided in a fence and with a feeding device for feeding animals."

Claim 1 of the second subsidiary request reads as follows:

"A construction for automatically milking animals, such as cows, comprising a milkbox (6) and a pasture area where the animals are allowed to move freely, the construction further being provided with one or more doors, gates or similar devices (A, B) forming a one-way passageway, characterized in that the milkbox (6) is provided with a milking robot, the pasture area is divided in at least two sub-areas (2, 4, 5; 9, 10) interconnected through passageways comprising the said doors, gates or similar devices which open in one direction and the doors, gates or similar devices (A, B) are arranged between said at least two sub-areas to allow the animals to walk around through said at least two sub-areas to, through and from the milkbox (6) defining a one-way walk-through system and at least one (B) passageway being provided in a fence and with a feeding device for feeding animals."

Claims 1 of the third, fourth and fifth subsidiary requests correspond to the wordings of claims 1 of respectively the main, first subsidiary and second subsidiary requests, with the following added feature at the end of the claim:

"and a counting device to count the number of animals that has gone through the passageway."

V. Opponent I (hereinafter respondent I) and respondent II requested that the appeal be dismissed.

VI. The appellant essentially argued that none of the six independent claims upon which his requests were based contravened the requirements of Articles 100(c) and 123 EPC.

Respondent I argued that each of the independent claims upon which the appellant's requests were based contravened the requirements of Article 123(2) EPC.

Reasons for the Decision

1. The appeal is admissible.

2. *The relationship of the claimed subject-matter to the patent as granted*

2.1 Claim 1 of the patent as granted contains *inter alia* features D^{PG}, E^{PG}, F^{PG} and G^{PG} which read as follows:

(D^{PG}) "the construction ... being provided with one or more doors, gates or similar devices (A, B) forming a one-way passageway",

(E^{PG}) "the area is divided in at least two sub-areas (2, 4, 5; 9, 10)",

(F^{PG}) "the doors, gates or similar devices (A, B) are arranged between said at least two sub-areas to allow the animals to walk around through said at least two sub-areas to and from the milkbox (6)",

(G^{PG}) "at least one (B) of said doors, gates or similar devices (A, B) being provided with a feeding device for feeding animals".

2.2 The independent claims 1 of the main request and of the third subsidiary request differ from claim 1 of the patent as granted (at least) in that feature F^{PG} and G^{PG} have been replaced by the following features F, G and E:

(F) the doors, gates or similar devices (A, B) are arranged between said at least two sub-areas to allow the animals to walk around through said at least two sub-areas to, **through** and from the milkbox (6) **defining a one-way walk-through system,**

(G) at least one (B) of **the passageways is provided in a fence and comprises said doors, gates or similar devices (A, B) and a feeding device for feeding animals,**

(E) **the passageways interconnect the sub-areas.**

2.3 Each of the independent claims 1 of the first, second, fourth and fifth subsidiary requests differs from claim 1 of the patent as granted (at least) in that feature F^{PG} has been replaced by the above mentioned feature F and in that features E^{PG} and G^{PG} have been replaced by the following features E' and G':

(E') said at least two sub-areas are **interconnected through passageways comprising the said doors,**

gates or similar devices which open in one direction,

(G') at least one (B) **passageway** being **provided in a fence** and **with a feeding device for feeding animals.**

2.4 Features E^{PG} and E (which are present in the independent claims 1 of the main request and the third subsidiary request) as well as feature E' (which is present in the independent claims 1 of the first, second, forth and fifth subsidiary requests) refer to the expressions "at least two sub-areas" and "passageways".

Feature G (which is present in the independent claims 1 of the main request and the third subsidiary request) and G' (which is present in the independent claims 1 of the first, second, forth and fifth subsidiary requests) refer to the expression "at least one passageway".

Feature D^{PG} (which is present in claim 1 of the patent as granted and in the independent claims 1 of all appellant's requests) refers to the expression "doors, gates or similar devices forming a one-way passageway".

2.4.1 In order to identify the meaning of the expressions "doors ... forming a one-way passageway", "passageways", "at least two sub-areas" and "at least one of the passageway" or "at least one passageway", it has to be noted that:

(i) the expression "doors ... forming a one-way passageway" can be found in the introductory portion of the description of the patent as

granted, in a first passage which recites the preamble of claim 1 (column 1, lines 3 to 8) and in a further passage which refers to the prior art known from document GB-A-1 158 016, which concerns "a cow-milking installation having at an entrance thereto a turnstile which is rotatable in only one direction" (see claim 1 of document GB-A-1 158 016);

- (ii) the passageway referred to in each of the independent claims 1 upon which the appellant's requests are based defines a structure connecting two sub-areas which constitute, in conjunction with the milking box and/or further sub-areas, the one-way pass(walk)-through system defined by feature F;
- (iii) due to the expression "at least two sub-areas", each of the independent claims 1 upon which the appellant's requests are based can be interpreted as defining a construction comprising an area which can be divided in two or more sub-areas;
- (iv) due to the expression "at least one passageway" (or "at least one of the passageways"), each of the independent claims 1 upon which the appellant's requests are based can be interpreted as defining a construction provided with **either** only one passageway comprising a feeding device **or** with more passageways each comprising a feeding device.

Furthermore, it has to be considered that two different embodiments or ways of carrying out the claimed

invention are disclosed in the portion of the description of the patent which refers to the drawings. The first embodiment (Figure 1) concerns a construction comprising a pasture area divided in ten pasture fields (i.e. sub-areas) 2, a cowshed 3 with a milking box 6, the pasture fields 2 being interconnected through one-way passageways A and B, wherein the ten pasture fields 2, the passageways and the cowshed 3 with the milking box 6 constitute a one-way pass(walk)-through system. The second embodiment (Figure 2) concerns a construction comprising a pasture area comprising twelve pasture fields constituting a rotational grazing system. In this construction the one-way pass(walk)-through system is constituted each time by two pasture fields 9 and 10 (i.e. two sub-areas) which are connected by a one-way passageway B1 and by the cowshed with the milking box. Thus, according to the description and the drawings of patent the one-way pass (walk)-through system comprises either ten sub-areas (Figure 1) or only two sub-areas (Figure 2).

2.4.2 Having regard to the above comments, it has to be assumed that:

- (a) the expression "at least two sub-areas" refers to the sub-areas which constitute the one-way pass (walk)-through system;
- (b) the term "one-way passageway" in the expression "doors ... forming a one-way passageway" defines the walking direction of the animals through the doors, while the term "passageway" defines a structure connecting two sub-areas;

(c) the expressions "at least one (B) of passageways" and "at least one (B) passageway" (in feature G or in feature G') refer **either** to the only passageway connecting the two sub-areas 9 and 10 of the construction represented in Figure 2 **or** to one or more of the passageways interconnecting the sub-areas 2 of the construction represented in Figure 1.

3. *The relationship of the amendments to the application as filed (Article 123(2) EPC)*

3.1 With respect to the admissibility of the amendments, respondent I asserted that the application as filed (hereinafter AAF) discloses **either** a construction provided with **only one passageway** which interconnects two sub-areas and comprises a feeding device **or** a construction provided with more passageways interconnecting a plurality of sub-areas wherein **only one of these passageways** comprises a feeding device. In these respects, respondent I argued that the amendments leading to the claims 1 upon which the appellant's requests are based have no basis in the AAF in so far as these claims also define a construction provided with more passageways, each comprising a feeding device.

3.2 With respect to the admissibility of the amendments, the appellant referred to claims 16, 14 and 5 of the AAF and argued that these claims provide a basis for the amendments.

3.3 Each of the claims 1 upon which the appellant's requests are based refers to "doors, gates or similar

devices forming a one-way passageway" and to "passageways", wherein

not only the passageways are defined as

(a) comprising the said doors, gates or similar devices,

and

(b) interconnecting the sub-areas,

but it is also stated that at least one of the passageways

(c) is provided in a fence

and

(d) comprises (or is provided with) a feeding device for feeding animals.

3.4 It is clear that claim 1 of the patent as granted and, thus, each of the independent claims 1 upon which the appellant's requests are based has been derived from the independent claim 1 of the AAF, since this claim is the only independent claim of the AAF which refers to "one or more doors, gates or similar devices".

3.4.1 The board cannot accept the appellant's argument according to which the independent claims 1 upon which the appellant's requests are based can also be derived from the independent claim 3 of the AAF. Indeed claim 3 of the AAF does not refer to "doors, gates or similar

devices" on the one hand and specifies on the other hand the feature that "the construction comprises a pasture with a rotational grazing system, wherein the animals are prevented from entering a particular pasture". This feature, which is not specified in the claims 1 upon which the appellant's requests are based, can be attributed to the embodiment according to Figure 2 but not to the embodiment according to Figure 1. Claim 3 of the AAF, therefore, cannot be a proper basis for one of the new claims 1.

- 3.5 The word "passageway" can be found in claims 2 to 5, 7 to 9, 14 and 16 to 19 of the AAF, while claim 1 of the AAF refers to "one or more doors, gates or similar devices (A, B) for determining the walking path and the walking direction of the animals through the construction and through the milkbox (6)".

It has to be noted that the term "passageway" is used in the description of the AAF to indicate a structure connecting two sub-areas (see for instance page 5, lines 11 to 23).

- 3.5.1 In claims 16 and 14 of the AAF, the word "passageway" is preceded by the article "the". According to claim 16 of the AAF, which contains a reference to "claim 14 or 15", "**the** passageway (11) comprises a feeding device (21) for feeding the animals" (emphasis added). According to claim 14 "**the** passageway (11) is provided in a fence..." (emphasis added).

However, neither claim 16 nor claim 14 refers to the "passageway (11)" as comprising "doors, gates or similar devices (A, B)". Therefore, these claims cannot

be considered as providing a basis for a passageway as referred to in section 3.3 above.

According to the independent claim 5 as well as to dependent claim 4 of the AAF, "the construction comprises at least one fence provided with a passageway (B) and a feeding device". This claim can be considered as establishing a relationship of the "feeding device" either to the "construction" or to the "at least one fence" but does not disclose the passageway as comprising the feeding device. Moreover, this claim is inconsistent with claim 16, which establishes a relationship of the feeding device to the passageway. Thus, claim 5 of the AAF, either alone or in conjunction with claims 14 and 16, cannot provide a basis for a passageway as referred to in section 3.3 above. The same applies for claim 4.

Therefore, the arguments submitted by the appellant in these respects (see section 3.2 above) cannot be accepted.

- 3.5.2 Claims 17 to 19, which contain a reference to claims 14 and 16, as well as to claim 4, which can be considered as referring to claim 1, do not permit that a relationship between the "passageway" and the "doors, gates or similar devices" or between "passageway" and "feeding device" be clearly established.

3.5.3 Claims 2, 3 and 8 relate to a construction comprising a pasture with a rotational grazing system or with farm buildings arranged about centrally as shown in Figure 2. Moreover, no relationship between "passageways" and "doors, gates or similar devices" can be derived from these claims.

3.5.4 Claim 9 is the only claim of the AAF which refers to a "passageway" and to "doors". According to this claim the construction comprises "at least one fence (12) provided with a passageway (11) equipped with **two** doors (22, 23) to be opened in one direction" (emphasis added), i.e. with a specific door (folding doors). However, this claim cannot provide a general disclosure of "at least one passageway comprising the said doors, gates or similar devices".

3.6 Having regard to the above comments, the only claim of the AAF establishing a relationship between "feeding device" and "passageway" which is analogous to the relationship defined by features E, G, E' and G' (see also the above section 3.3) is claim 16, according to which "the passageway (11) comprises a feeding device (21) ...". However, due to the article "the" which precedes the word "passageway", this claim has to be interpreted having regard to the claims to which it can be considered as being linked by its reference and to the description and the drawings of the AAF.

Having regard to the fact that claim 1 of the AAF does not refer to the term "passageway" and that the further claims of the AAF do not refer to the expression "doors, gates or similar device", the claims of the AAF do not clearly and unequivocally disclose a

relationship between the "doors, gates and similar devices" and "passageways". The same applies for the introductory portion of the description of the AAF (page 1, line 1 to page 3, line 4).

The portion of the description of the AAF which refers to the drawings (page 3, line 5 to page 8, line 31) discloses two specific embodiments concerning a construction for automatically milking animals, namely a "pasture area divided into a plurality of pastures fields" (Figure 1) and a "rotational grazing system" (Figure 2), an embodiment of a "passageway" (Figures 3 to 5) and an embodiment of "folding doors" (Figure 6).

In the embodiment according to Figure 1 there are ten sub-areas 2 interconnected through one-way passageways, which constitute with the milking box 6 a one-way pass(walk)-through system. The two sub-areas situated most remotely from the milking box 6 are connected by a passageway B which is of a nature different from that of the passageways which comprise a set of "folding doors A" interconnecting the other sub-areas, "since the passageway B comprises a feeding device in addition to such a set of folding doors" (see page 4, lines 18 to 22).

In the embodiment according to Figure 2 there are twelve pasture fields constituting a rotational grazing system. However, the one-way pass(walk)-through system is constituted each time by the cowshed and two sub-areas (for instance the pasture fields 9 and 10) which are connected by a one-way passageway B1. It can be understood that the passageway B1 is of the same nature

as the passageway B of the embodiment according to Figure 1.

Thus, the one-way pass(walk)-through system disclosed in the description and the drawings of the AAF is provided **either** with only one passageway connecting two sub-areas and comprising a feeding device (Figure 2) **or** with more passageways interconnecting the (more than two) sub-areas but with only one of these passageways comprising a feeding device (Figure 1).

The amendments, in particular features G and G', in so far as they refer to **at least one passageway** comprising (or provided with) a feeding device represent a generalisation of a specific feature disclosed in the application as filed according to which in the one-way pass(walk)-through system there is **only one passageway** comprising a feeding device. Having regard to the above comments the AAF does not provide a basis for this generalisation. Therefore, each of the independent claims 1 upon which the appellant's requests are based contravenes the requirements of Article 123(2) EPC.

Therefore, none of the independent claims 1 upon which the appellant requests are based constitutes a basis upon which the patent can be maintained.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries