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

Case Number: T 0773/01 - 3.2.4

Application Number: 96201820.6

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Language of the proceedings: EN

Title of invention:
A method of milking animals

Patentee:
MAASLAND N.V.

Opponent:
DeLaval International AB
Prolion B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 56, 100(a)
EPC R. 71(2)

Keyword:
"Inventive step (yes)"

Decisions cited:
-

Catchword:
-



Case Number: T 0773/01 - 3.2.4

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

Appellant: DeLaval Internationa AB
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 4 May 2001
concerning maintenance of European patent
No. 0 753 249 in amended form.

Composition of the Board:

Chairman: C. A. J. Andries
Members: C. D. A. Scheibling
C. Holtz

Summary of Facts and Submissions

- I. By its interlocutory decision dated 4 May 2001 the Opposition Division maintained the European Patent 0 753 249 in amended form. On 2 July 2001 the appellant (opponent I) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 21 August 2001.
- II. The patent was opposed on the grounds based on Articles 100 (a), 100 (b) and 100 (c) EPC. During the appeal proceedings the appellant only referred to grounds based on Article 100(a) (Article 56) EPC.
- III. The following documents played a role in the appeal proceedings:
- D1: EP-A-0 091 892
- D2: EP-A-0 566 201
- D4: CA-A-1 256 760
- D12: EP-A-0 567 191
- IV. The appellant and the respondent (patentee) attended oral proceedings on 1 August 2002. Although duly summoned opponent II did not appear. According to the provisions of Rule 71(2) the proceedings were continued without it. Opponent II which did not file any submissions in these proceedings, informed the Board with a letter dated 3 June 2002 that it would not participate in the oral proceedings.

V. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed.

VI. Independent claim 1 as maintained by the opposition division (which is claim 1 as granted) reads:
"A method of milking animals, such as cows, in a milk box (7) in which a milking robot (10) is arranged, whereby a system of fences, gates, doors, or similar means is set up in such a way that from a first point of time (t_1) animals can go freely from a first area (A) to the milk box (7) in order to be milked there and are guided back from there to the said area (A), that afterwards from a second point of time (t_2) animals can go freely from the first area (A) to the milk box (7) in order to be milked there and are guided from there to a second area (B) and that afterwards animals still being present in the first area (A) at a third point of time (t_3) are driven to the milk box (7) in order to be milked there and are guided from there to the second area (B)".

Independent claim 7 as maintained by the opposition division (which is claim 7 as granted) reads:

"A construction for milking animals, such as cows, comprising a milk box (7) with a milking robot (10), a computer (12), two separate areas (A, B) and a system of computer-controlled fences, gates, doors, or similar means (1 to 6, 8, 9) via which both areas (A, B) can communicate with the milk box (7), characterized in that the computer works such that the method according to any one of claims 1 to 6 can be applied".

Reason for the Decision

1. The appeal is admissible.

2. *Interpretation of the independent claim 7:*

The expression of claim 7: "the computer works such that the method according to any of claims 1 to 6 can be applied" has to be interpreted as meaning that the computer is already programmed such that the method can be applied, i.e. that the method is already part of the computer programm, otherwise the computer would not be able to "**work such that**" said method can be applied. This interpretation is in line with the description of the patent in suit, see column 2, lines 15 to 23, especially lines 21 to 23 where it is stated: "the computer is programmed in such a way that the method according to any one of claims 1 to 6 can be applied".

This interpretation has been confirmed by the respondent (patentee) as being the sole intended one.

3. *Novelty:*

None of the cited documents discloses both the possibility during a first period of time ($t_1 - t_2$) to go from a first area to the milk box and to be guided back to the same area and the possibility during a second period of time ($t_2 - t_3$) following the first one when leaving the milk box to be guided back to a second area. Thus, the subject-matter of claim 1 is novel. The subject-matter of claim 7 comprising a computer programmed to carry out the said method is likewise

novel. Also taking into consideration the above interpretation (see section 2, above) the appellant did not dispute novelty of the subject-matter of both independent claims.

4. *Closest prior art:*

The Board, in agreement with the appellant, considers D1 to be the closest prior art document.

5. *Inventive step of claim 1:*

5.1 From D1 there is known a method of milking animals, such as cows (page 1, lines 1, 2), in a milk box (1) in which a milking robot (6, 8) is arranged, whereby a system of fences, gates, doors, or similar means (Figure 2) is set up in such a way that animals can go freely from an area to the milk box (1) in order to be milked there and are guided back from there to said area (page 1, lines 1 to 4; page 2, lines 10 to 20; page 6, lines 24 to 33).

5.2 The method according to claim 1 differs from that known from D1 in that:

- free access to the milk box from a first area is only possible from a first point of time (t_1) to a third point of time (t_3),
- from a second point of time (t_2), being before the third point of time (t_3) animals which went freely from the first area to the milk box in order to be milked there, are guided from there to a second area, and

- afterwards animals still being present in the first area at the third point of time (t_3) are driven to the milk box in order to be milked there and are guided from there to the second area.

5.3 Thus, the problem to be solved by the distinguishing features is to ensure that all animals are milked at least once within a given period of time.

That the method according to claim 1 solves the said problem is not disputed by the appellant and beyond doubt in the view of the Board.

5.4 D2 identifies the problem of having all animals milked by the milking robot in time (D2, column 1, lines 3 to 6) and proposes to solve said problem by a method for milking animals, such as cows, where animals can go freely from a first area (9) to the milk box (26) in order to be milked there and are guided from there to a second area (13), and where animals still being present in the first area (9) at a given point of time are driven (expelling implement 35) to the milk box (26) in order to be milked there and are guided from there to the second area (13) (D2, column 5, lines 25 to 57).

In fact D2 discloses a number of sub-areas, and the presence of groups of animals which are treated in such a way that intermingling of the groups of animals is prevented.

5.5 The appellant concludes that to ensure that all animals are milked within a given period of time, without renouncing free access for the animals to the feeding and milking stall which has to be considered as being the most essential advantage of D1, a skilled person

would combine the teaching of D1 and D2 by putting them timely one after the other and thus to arrive at a method according to claim 1.

5.6 However the Board does not share this point of view, since even if applying (adding) the solution proposed by D2 to a method according to D1 a skilled person would not arrive at a method according to claim 1 of the patent in suit.

5.7 As a matter of fact, in order to ensure that all animals are milked in time i.e. within eight hours if the cows have to be milked three times a day, D2 teaches that at the time when all animals should have been milked i.e. at the end of the eight hours period, all animals still present in the first area are driven to the milk box to be milked and from there are guided to the second area.

Thus, from D1, a skilled person must start from a single area where the animals are free to accede the milk box at will. When trying to apply the teaching of D2 to D1, a skilled person would, according to the teaching of D2, firstly have to add a second area, secondly have to provide expelling means to force the animals to go to the milk box and thirdly have to provide guiding means for guiding the cows from the milk box either to the first area or to the second area, when time has come.

5.8 Thus, in the Board's view the combination of D1 and D2 results in a method of milking animals in a milk box in which a milking robot is arranged, whereby a system of fences, gates, doors, or similar means is set up in such a way that from a first point of time animals can

go freely from a first area to the milk box in order to be milked there and go back from there to the said first area and that afterwards from a second point of time animals are driven to the milk box in order to be milked there and are guided from there to the second area.

Indeed the indicated problem with respect to D1 (see section 5.3, above), as well as the problem mentioned in D2, both define a given period of time (e.g. eight hours) wherein a cow should at least be milked once. Thus, if both systems are combined since both use the same time period (e.g. eight hours) said periods start and end at the same points of time, so that during a first period (e.g. the beginning of the eight hours time period) the cows have free access to the milking box and at the end of said (eight hours) period the cows are driven to the milking box. Such a combination takes into account the advantage of free access, put forward by the appellant as being an essential feature of D1. The Board agrees that such an essential feature should not be lost in a combination of the teachings of D1 and D2. Therefore free access should be available as long as possible, that means up to the moment when it should be guaranteed that all the animals are milked once, i.e. at the end of the (eight hours) time period. Fixing now another earlier moment in time, from which moment the cows, which have still free access to the milk box, are not allowed anymore to return to the first area would deprive these animals, being now in the second area, of free access to the milking box during a period of time which is longer than needed.

5.9 Thus, the method step referred to in the claim 1 in suit as being the second period of time ($t_2 - t_3$), where

animals can go freely from the first area to the milk box in order to be milked there and are guided from there to a second area is missing from the said combination.

- 5.10 The appellant argues that a skilled person would recognise that the method resulting from a combination of D1 and D2 has a drawback since at the moment the expelling means are to be actuated (e.g. at the end of an eight hours time period), all animals will still be present in the first area and that therefore a skilled person would introduce a supplementary step to improve this method, consisting in allowing the animals free access to the milk box but after milking, guiding them from the milk box to the second area.
- 5.11 The Board however considers that such an additional step would not contribute to solve the problem of the patent in suit (which is to ensure that all animals are milked at least once within a given period of time and which is already solved) so that there would be no need for adding this supplementary step to this method in order to solve the problem as stated. Therefore, there is no objective reason for a skilled person to provide such a supplementary step. On the contrary the essential feature of free access of D1 would be lost early in the time period, so that a skilled person would not be guided by the teaching of D1 to do so.
- 5.12 The Board considers this supplementary step to solve a further different problem which is to ensure that only a few animals which have not been milked within the given period of time (and not all the animals) have to be driven to the milk box (see patent in suit, column 3, lines 50 to 53).

5.13 The Board further considers that it would not be obvious for a skilled person to combine said supplementary method step with the method resulting from the combination of D1 and D2 as suggested by the appellant.

Indeed, neither D1 nor D2 can give a skilled person a hint how to combine such a supplementary step with the method step providing for free access to the milk box, i. e. to determine on which criterion it should be decided, after milking, whether the already present method step has to be applied (the animal is to be guided back to first area) or whether the new supplementary method step has to be applied (the animal is to be guided to the second area). To base said decision on a time criterion (as proposed in the patent in suit) would clearly be an ex-post-facto analysis, since there is no time limit disclosed in D1 at all and no other time limit disclosed in D2 than the time limit for activating the expelling means and since other criteria like the number of times an animal has been milked already would also be suitable for the given purpose.

5.14 Therefore, it would not be obvious for a skilled person to add a step consisting in allowing the animals free access to the milk box but after milking, guiding them from the milk box to the second area, to a method resulting from the combination of D1 and D2 in the way suggested by the appellant.

5.15 The teaching of D12 does not go beyond the teaching of D2. Therefore, a combination of D1 with D12 would not lead to another conclusion than that reached with respect to the combination of D1 with D2.

5.16 Consequently, the subject-matter of claim 1 involves an inventive step.

6. *Inventive step of claim 7:*

6.1 For a person skilled in the art, the normal understanding of claim 7 is that claim 7 relates to a construction for carrying out the claimed method, which implies that the computer is programmed in such a way that the method can be applied (see also section 2, above). This was also so considered by the appellant during the opposition proceedings, see grounds of opposition, page 8, section 7.1, where it is stated "claim 7 relates to a construction for carrying out the previously claimed method".

6.2 The appellant argues that the computer disclosed in D4 could, if programmed accordingly, carry out the method of the patent in suit. However, D4 does neither disclose nor render obvious the method claimed in the patent in suit and therefore D4 cannot disclose a computer already programmed to apply the same.

Consequently, D4 cannot prejudice the patentability of the subject-matter of claim 7.

6.3 Since the computer used in the construction for milking animals according to claim 7 is programmed to carry out a method according to any one of claims 1 to 6, and since the method of claim 1 involves an inventive step the subject-matter of claim 7 is patentable by virtue of claim 1.

Order

For these reasons it is decided:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries