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**D E C I S I O N**  
**of 15 November 2002**

**Case Number:** T 0821/01 - 3.2.4

**Application Number:** 93202279.1

**Publication Number:** 0582350

**IPC:** A01K 1/12

**Language of the proceedings:** EN

**Title of invention:**

A construction for milking animals

**Patentee:**

MAASLAND N.V.

**Opponent:**

DeLaval International AB  
Prolion B.V.

**Headword:**

Sub-areas/MAASLAND

**Relevant legal provisions:**

EPC Art. 100(c), 123, 111(1)  
EPC R. 71(2)

**Keyword:**

"Added subject-matter"

**Decisions cited:**

T 0201/83

**Catchword:**

-



Case Number: T 0821/01 - 3.2.4

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.4  
of 15 November 2002

**Appellant:** MAASLAND N.V.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 1 June 2001  
revoking European patent No. 0 582 350 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** C. A. J. Andries

**Members:** P. Petti

C. Holtz

## Summary of Facts of Submissions

I. The European patent No. 582 350, against which two oppositions (both based upon Articles 100(a), (b) and (c) EPC) were filed, was revoked by the decision of the opposition division dispatched on 1 June 2001.

In the decision under appeal the opposition division found that the ground for opposition mentioned in Article 100(c) EPC prejudiced the maintenance of the patent.

II. On 12 July 2001 the proprietor of the patent (hereinafter appellant) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 10 October 2001.

III. Oral proceedings were held on 15 November 2002.

Opponent II (hereinafter respondent II), who had not replied to the statement setting out the grounds of appeal and who had been duly summoned to the oral proceedings, informed the board with the letter dated 18 October 2002 that he would not attend the oral proceedings. Respondent II indeed did not appear at the oral proceedings which, according to Rule 71(2) EPC, were continued without him.

IV. During the oral proceedings the appellant filed amended independent Claims 1 and 15 which form the basis of the requests of the appellant and which read as follows:

"1. A construction for milking cows, comprising a cow shed designed as a loose house (5), the cow shed

being provided with partitioning means dividing the cow shed area into sub-areas (6 to 9), the cow shed further comprising a milk box (17) having a milking robot (37) for automatically milking cows, which milk box (17) is accommodated in the cow shed and can be reached by the cows in consecutive groups either from the cow shed directly or from a pasture via the cow shed, characterized in that the cow shed includes at least three sub-areas (6 to 9), while connection means are provided to connect directly each of the sub-areas (6 to 9) with the milk box (17) in such a way that each of these sub-areas (6, 7, 8, 9) can be connected with one other sub-area (7, 8, 9, 6) via the milk box (17), so that cows which belong to one group and are still to be milked can consecutively enter the milk box (17) from any of the sub-areas and can leave the milking box (17) after having been milked and be guided to a different sub-area."

- "15. A method of milking cows, which walk freely in a pasture or in a cow shed, comprising the steps of dividing the cows into at least two groups and in the cow shed area defining at least three sub-areas, whereby the cows can reach a milk box arranged in the cow shed in consecutive groups either from a cow shed sub-area directly or from the pasture via a cow shed sub-area, and in which method the cows of each group, present in a corresponding sub-area, enter consecutively the milking box directly from said sub-area, are milked therein and guided to a different sub-area, such that the cows will remain separated in the same groups."

V. The appellant requested that the impugned decision be set aside and a patent be maintained on the basis of either Claims 1 to 17 filed during the oral proceedings (main request) or Claims 1 to 14 filed during the oral proceedings (first auxiliary request) or Claims 15 to 17 filed during the oral proceedings (second auxiliary request).

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

VI. The appellant argued that the independent Claims 1 and 15 did not contravene the requirements of Articles 100(c) and 123 EPC.

Respondent I argued that the ground for opposition mentioned in Article 100(c) EPC prejudiced the maintenance of the patent on the basis of Claim 1 and/or 15.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *The claimed subject-matter*
  - 2.1 Claim 1 is directed to a construction for milking cows comprising the following features:
    - (a) the construction comprises a cow shed,
      - (a1) the cow shed is designed as a loose house,
      - (a2) the cow shed is provided with partitioning

means,

- (a21) the partitioning means divide the cow shed area into sub-areas,
- (a3) the construction comprises a milk box,
- (a31) the milk box is accommodated in the cow shed,
- (a32) the milk box has a milking robot for automatically milking cows,
- (a33) the milk box can be reached by the cows in consecutive groups either from the cow shed directly or from a pasture via the cow shed,
- (a4) the cow shed includes at least three sub-areas,
- (b) connection means are provided to connect directly each of the sub-areas with the milk box
- (b1) in such a way that each of the sub-areas can be connected with one other sub-area via the milk box, so that cows which belong to one group and are still to be milked can consecutively enter the milk box from any of the sub-areas and can leave the milking box after having been milked and be guided to a different sub-area.

2.1.1.1 Feature a33 makes it clear that the cows may be accommodated either in the cow shed or in a pasture. This feature implicitly defines a connection between the pasture and the milk box (in so far as the cows can reach the milk box from the pasture via the cow shed) and a connection between the cow shed and the milk box

(in so far as the cow can reach the milk box directly from the cow shed).

- 2.1.2 Feature b defines more precisely the connection between the cow shed and the milk box in so far as it specifies that there are "connection means" for connecting **each** of the sub-areas of the cow shed with the milk box.

Moreover, according to feature b1 each sub-area can be connected with another one via the milk box. In other words, according to this feature, there are always two sub-areas of the cow shed which can be connected with each other via the milk box.

With respect to these connections, the description of the patent relates to two different embodiments.

The first embodiment, which is described relating to Figures 3 to 12 and which corresponds to dependent Claim 6 relates to a pivotal milk box which forms - itself - the connection between two sub-areas (see column 7, lines 12 to 14), so that the cows can go from a sub-area via the pivotal milk box to a different sub-area. The pivotal movement of the milk box ensures that the location of the entrance of the milk box changes so that - when the entrance is in a first position - the cows can go to the milk box from a first selected sub-area and - after milking - from the milk box to a second selected sub-area. The board considers the features making possible the pivotal movement of the milk box as being part of the "connection means" between sub-areas and milk box.

The second embodiment, which is described relating to Figures 13 to 16 and which corresponds to dependent



Claim 14, relates to a milk box which is located near a corridor system with passageways and doors. The doors of the corridor system are controlled by a computer so as to establish a communication between the milk box and a selected sub-area, so that the cows can go from the selected sub-area via the passageways of the corridor system to the milk box and - after milking - from the milk box to a different sub-area.

Thus, in the construction according to the first embodiment, each of the sub-areas is adjacent to the milk box, while the construction according to the second embodiment is provided with an intermediate zone between each sub-area and the milk box.

Therefore, the expression in Claim 1 "connecting means to connect directly each of the sub-areas with the milk box", which defines a technical means in terms of functional features, has to be interpreted with respect to the meaning of the term "directly" having regard to the description of the patent.

The word "directly" is used in the following sentences which refer to the milk box and a sub-area:

- "[the cows] "can at all time reach the milk box both from a pasture section via the relevant sub-area in the loose house or directly from a sub-area" (column 2, lines 6 to 9),
- "... the cows can reach a milk box ... either from a cow shed sub-area directly or from the pasture via a cow shed sub-area" (column 3, lines 38 to 41),

- " the cows of each group, present in a corresponding sub-area, enter ... the milking box directly from said sub-area" (column 3, lines 41 to 44).

Therefore, having regard to the description of the patent, the word "directly" in feature b indicates that the connection means between the milk box and each of the sub-areas make it possible in both embodiments that the cows of a group, when the group resides in a cow shed sub-area, can go to the milk box without having to enter another sub-area or even a specific sub-area having a permanent connection with the milk box, while the cows of a group, when they graze in the pasture, can have access to the milk box only via a cow shed sub-area.

2.2 Claim 15 is directed to a method of milking cows, comprising the following features:

- (A) the cows walk freely in a pasture or in a cow shed,
- (B) the cows are divided into groups,
- (B3) there are at least two groups of cows,
- (A1) in the cow shed area sub-areas are defined,
- (A11) there are at least three sub-areas (in the cow shed area),
- (C) the cows can reach a milk box in consecutive groups either from a cow shed sub-area directly or from the pasture via a cow shed sub-area,

- (C1) the milk box is arranged in the cow shed,
- (C2) the cows of each group, present in a corresponding sub-area, enter consecutively the milking box directly from said cow shed sub-area,
- (D) the cows of each group, present in a corresponding sub-area, are milked in the milk box,
- (E) the cows of each group, which were present in the corresponding sub-area, are then guided to a different sub-area, such that the cows will remain separated in the same groups.

2.2.1 Features B3 and A11 define ranges. Feature B3 defines a plurality G of groups of cows, wherein  $G \geq 2$ . Feature A11 defines a plurality S of sub-areas, wherein  $S \geq 3$ . However, these features do not define a relationship between the number G of groups and the number S of sub-areas.

3. *The amendments to Claim 1 (Article 123 EPC)*

3.1 Claim 1 (main and first auxiliary request) differs from Claim 1 of the patent as granted in that

- (i) feature a31 has been added and
- (ii) features a3 and a32 have replaced the features **that the construction** comprises a milk box (feature a3<sub>p</sub>) and that the milk box is provided **with** a milking robot for automatically milking cows (a32<sub>p</sub>).

3.2 Features a3, a31 and a32 have a basis in the application as filed, see for instance Claim 3 or Claim 11.

Feature a3 is more specific than feature a3<sub>p</sub>. Feature a32 is equivalent in meaning and scope with feature a32<sub>p</sub>.

Therefore, the amendments to Claim 1 of the patent as granted do no contravene the requirements of Article 123 EPC.

4. *The relationship of Claim 1 (of the main and of the first auxiliary request) to the application as filed (Article 100(c) EPC)*

4.1 Claim 1 can be derived from independent Claim 1 of the application as filed in combination with dependent Claim 5.

Claims 1 and 5 of the application as filed specify the following features:

(a') the construction comprises a cow shed (see Claim 1),

(a'1) the cow shed is designed as a loose house (see Claim 1),

(a'2) the cow shed includes partitioning means, such as, for example, fences or dividing walls (see Claim 5),

(a'21) the partitioning means divide the cow shed area into a number of, for example four, sub-areas

(see Claim 5),

(a'3) at least one milk box is accommodated in the cow shed (see Claim 1),

(a'32) the milk box has a milking robot (see Claim 1),

(a'33') the cow shed includes means which have their effect that the animals can reach the milk box in consecutive groups from a pasture via the loose house (see Claim 1),

(b') each sub-area can be put into connection with the milk box (see Claim 5).

4.2 Claim 1 differs from the combination of features specified in Claims 1 and 5 of the application as filed in that:

(i) features a2 and a21 have replaced features a'2 and a'21;

(ii) features a3, a31 and a32 have replaced features a'3 and a'32;

(iii) features a33, b and b1 have replaced features a'33 and b';

(iv) feature a4 has been added.

4.3 The respondent asserted that the ground for opposition according to Article 100(c) EPC prejudices the maintenance of the patent on the basis of Claim 1 in so far as the amendments according to items (iii) and (iv) above define subject-matter extending beyond the

content of the application as filed. In particular, the respondent argued that the application as filed neither contains a basis for the range defined by feature a4 nor discloses "connecting means" as defined by feature b.

4.4 Having regard to the following comments, the board finds that the ground for opposition according to Article 100(c) EPC does not prejudice the maintenance of the patent on the basis of Claim 1:

(i) Since the expression "such as, for example ..." in feature a'2 has to be considered as defining facultative features and the word "include" in feature a'2 is considered as being equivalent in meaning and scope with the expression "be provided with" in feature a2, the amendment according to item 4.2(i) above has no substantial character.

(ii) Since the expression "a milk box" in features a3 and a31 is equivalent to the expression "at least one milk box" in feature a'3, the amendment according to item 4.2(ii) above consists only in the addition of the expression "for automatically milking cows". This amendment has a basis in the application as filed, see for instance Claim 11.

(iii) Feature b' in Claim 5 of the application as filed ("each sub-area can be put into connection with the milk box") implicitly defines means for connecting each sub-area with the milk box. In other words, feature b' defines a function which implies the means for

performing the function, while feature b explicitly refers to the means for performing that function. Thus, feature b can be derived from feature b' in combination with a passage in the description of the application as filed which refers to the word "directly" ("[the cows] can at all times reach the milk box both from a pasture section via the relevant sub-area in the loose house or **directly** from a sub-area"; page 2, lines 20 to 23, emphasis added).

Feature b1 can be derived from Claim 11 of the application as filed in so far as this claim refers to a milk box to be accommodated in a cow shed divided into a number of sub-areas, wherein "always two of these sub-area can be connected with each other via the milk box, so that animals which belong to one group ...".

- (iv) Since the expression "for example four" in feature a'21 (Claim 5 of the application as filed) has to be considered as facultative, this feature itself - by the indication "into a number of sub-areas" - defines a plurality S of sub-areas, ie the range  $S \geq 2$  in the set of the natural numbers (at least two sub-areas). Moreover, the description of the application as filed refers to an embodiment in which there are four sub-areas or, alternatively three or five sub-areas (see page 6, lines 35 to 38). In other words, the application as filed discloses the value  $S = 3$ . Therefore, the explicit disclosure of the range  $S \geq 2$  and of the value  $S = 3$  represents an implicit disclosure of the

sub-range  $S \geq 3$  (see in this context the decision T 201/83, EPO OJ 1984, 481).

- 4.4.1 With regard to the item 4.4.iv) above, the respondent argued that the application as filed cannot be considered as disclosing the range  $S \geq 3$ , because the skilled person reading the application would immediately realize that the division of the cow shed area into two sub-areas has no technical sense.

The board considers this argument of the respondent as being irrelevant because, if the skilled person were to derive from the application as filed that a division of the cow shed area into two sub-areas cannot be carried out, then he would immediately realize that the plurality of sub-area referred to in Claim 5 of the application as filed (feature a'21) means "at least three sub-areas".

5. *The relationship of Claim 15 (of the main and of the second auxiliary request) to the application as filed (Article 100(c) EPC)*

- 5.1 Claim 15 can be derived from Claim 23 of the application as filed which was directed to a method of milking animals, such as cows, comprising the following features:

(A') the animals walk freely in a pasture or in a cow shed,

(B') the animals have been divided into groups,

(B'2) there are, for example, three groups,



- (B'3) the groups are, for example, of seventeen animals,
- (C') the animals of a given group can go from a pasture section or a cow shed sub-area consecutively into a milk box (17),
- (D') the animals of a given group can be milked in the milk box,
- (E') the animals of a given group can thereafter go to a pasture section or a cow shed sub-area other than the one to which the animals of a subsequent group, which is milked thereafter, can go.

5.2 Claim 15 differs from Claim 23 of the application *inter alia* in that

- (i) feature A11 has been added;
- (ii) feature E has replaced feature E'.

5.2.1 Since Claim 15 is directed to a method of milking cows, in which the cows are divided in groups (feature B), each of which can be present in a sub-area, feature A11 has to be considered in combination with feature B3. In other words, the expressions "at least two groups of cows" and "at least three sub-areas" define a plurality of combinations of groups and sub-areas, for instance two groups and three sub-areas, two groups and four sub-areas, three groups and four sub-areas, three groups and six sub-areas, *et cetera*.

The application as filed does not explicitly refer to a

method in which the cow-shed area is divided into at least three sub-areas and the cows into at least two groups.

A passage of the description of the application as filed clearly describes a method (see the passage from page 8, line 26 to page 10, line 36) in which the cow-shed area is divided into four sub-areas and the cows into three groups. In the second last sentence of this passage (page 10, lines 30 to 35) it is stated that the "the invention is not limited to ... the number of groups ...". However, this statement has to be read in the general context of the passage which relates to a method in which there is always one of the four sub-areas without cows. Therefore, this statement could at best be considered as disclosing a method in which the cows are divided into N groups of cows and the cow shed into N + 1 sub-areas, wherein N is at least two. However, this statement cannot be considered as implicitly disclosing all the combinations of groups and sub-area defined by features B3 and A11.

5.2.2 Feature E is not referred to in the application as filed. According to this feature (read in combination with features C2 and D), the cows of each group go from a first sub-area via the milk box to a second sub-area, ie to a sub-area different from the first sub-area in which they were before milking, so that the groups remain separated. According to feature E' in Claim 23 of the application as filed, the cows of a given group go from a first sub-area via the milk box to a sub-area which is different from the one to which the animals of a subsequent group can go, so that the first group and the subsequent one are separated. In other words, feature E does not make it clear that the "different"

sub-area to which the cows of each group are guided after milking is different from the sub-area to which the animals of a subsequent group are guided. Thus, Claim 15 could also encompass a method in which the cows of each group go via the milk box to a transit sub-area common to all groups and then from this transit sub-area back to the sub-area in which they were before milking in order to free the transit sub-area for the subsequent group. For such a method there is no basis in the application as filed. Therefore, feature E represents a unjustified generalisation of feature E'.

- 5.3 Having regard to the comments above, the ground for opposition according to Article 100(c) EPC prejudices the maintenance of the patent on the basis of the method Claim 15. Therefore, the main request of the appellant is rejected.

Since the second auxiliary request is based upon Claim 15, this request should also have to be rejected.

6. Having regard to the comments in sections 3 and 4 above, the ground for opposition according to Article 100(c) EPC and the requirements of Article 123 EPC does not prejudice the maintenance of the patent on the basis of the first subsidiary request of the appellant.
7. The respondents also referred in their notices of opposition to the grounds for opposition according to Articles 100(a) and (b) EPC, these grounds not having been dealt with in the decision under appeal. Therefore, the Board exercising the discretionary power according to Article 111(1) EPC remits the case to the

opposition division for further prosecution on the basis of the first auxiliary request of the appellant.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The appellant's main request is rejected.
3. The case is remitted to the first instance for further prosecution (Article 111(1) EPC) on the basis of Claims 1 to 14 of the first auxiliary request as submitted in the oral proceedings.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries