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D E C I S I O N
of 1 July 2004

Case Number: T 0384/02 - 3.2.4

Application Number: 94201622.1

Publication Number: 0628244

IPC: A01J 9/00

Language of the proceedings: EN

Title of invention:

A method of milking animals, as well as a construction for
applying same

Patentee:

MAASLAND N.V.

Opponent:

DeLaval International AB
Prolion B.V.

Headword:

Milk separation/MAASLAND

Relevant legal provisions:

EPC Art. 84

Keyword:

"Clarity of the amendments"

Decisions cited:

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Catchword:

-



Case Number: T 0384/02 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 1 July 2004

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 13 March 2002
revoking European patent No. 0628244 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
M. Aúz Castro

Summary of Facts and Submissions

- I. The European patent No. 628 244, against which two oppositions had been filed, was revoked by the decision of the opposition division dispatched on 13 March 2002, because it was found that the grounds for opposition lack of novelty and inventive step (Article 100(a) EPC) prejudiced the maintenance of the patent on the basis of claim 1 pursuant to the main request and auxiliary requests 1 to 3.
- II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 8 April 2002, paid simultaneously the appeal fee and subsequently filed a statement setting out the grounds of appeal which was received on 19 July 2002.
- III. Oral proceedings before the board were held on 1 July 2004.

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

During the oral proceedings the appellant submitted two amended independent claims 1 upon which a main and an auxiliary request were based.

The independent claim 1 according to the main request reads as follows:

"A construction comprising a milking machine (1) with teat cups (2) which are connectable to the teats of an

animal to be milked and a milk meter (4), via which the milk is transferred from the teat cups (2) to means (6) for collecting same, whereby these means comprise a plurality of storage containers (7, 7') for the separate collection of milk of a different quality and/or composition from milk obtained from different animals, the quality and/or composition being based on the course of the lactation period, characterized in that the construction further is provided with a measuring unit (11) with a measuring element (11) for establishing during the milking procedure the somatic cell count and the colour of the milk and optionally with a measuring element (11) for establishing during the milking procedure the albumen content or the fat content or the light absorption of the milk, or several of these elements."

The independent Claim 1 according to the auxiliary request reads as follows:

"A construction comprising a milking machine (1) with teat cups (2) which are connectable to the teats of an animal to be milked and a milk meter (4), via which the milk is transferred from the teat cups (2) to means (6) for collecting same, whereby these means comprise a plurality of storage containers (7, 7') for the separate collection of milk of a different quality and/or composition from milk obtained from different animals, the quality and/or composition being based on the course of the lactation period, characterized in that the construction further is provided with a measuring unit (11) with a measuring element (11) for establishing during the milking procedure the somatic cell count and the colour of the milk and optionally

with a measuring element (11) for establishing during the milking procedure the albumen content or the fat content or the light absorption of the milk, or several of these elements, the one or more measuring elements and/or the one or more sensor measuring units being arranged in a line (3) constituting the connection between a teat cup (2) and the milk meter (4)."

- IV. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of claim 1 filed during oral proceedings as main request or, auxiliarily, on the basis of claim 1 filed during oral proceedings as auxiliary request.

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

Respondent II had also requested in writing that the appeal be dismissed.

- V. The appellant maintained that the amended claim 1 of the main request and that of the auxiliary request complied with Article 84 EPC and did not contravene Article 123(2) and (3) EPC.

Respondent I criticized the amendments which led to claim 1 of the main request by arguing that they lacked clarity (Article 84) and contravened the requirements of Articles 123(3), 123(2) and 100(c) EPC. Respondent I also submitted that the arguments concerning the main request also applied to claim 1 of the auxiliary request of the appellant.

Reasons for the Decision

1. The appeal is admissible.
2. *The claimed subject-matter*
 - 2.1 The **patent as granted** contains two independent claims, namely claim 1, directed to a "method of milking animals", and claim 3, directed to a "construction for applying the method as claimed in any one of the preceding claims".
 - 2.1.1 Claim 1 of the patent as granted relates to a method of milking animals having the following features:
 - (A) the milk obtained from different animals is collected in different storage containers after having been separated according to quality and/or composition,
 - (B) the quality and/or composition is based on the albumen content,
 - (B') **or** the quality and/or composition is based on the course of the lactation period.

Due to term "or" in feature B', it has to be understood that claim 1 of the patent as granted defines a first method of milking animals provided with features A and B and a second (alternative) method provided with features A and B'.

2.1.2 Claim 3 of the patent as granted is interpreted as defining a construction with the following features:

- (C) the construction is suitable for applying the method as claimed in any one of the preceding claims,
- (D) the construction comprises a milking machine (1) with teat cups (2) which are connectable to the teats of an animal to be milked,
- (E) the construction comprises a milk meter (4),
- (F) the construction comprises means (6) for collecting the milk to which the milk is transferred via the milk meter from the teat cups,
- (F1) the means (6) for collecting the milk comprise a plurality of storage containers (7, 7') for the separate collection of milk of different quality and/or composition,
- (G) the construction is provided with a measuring unit,
- (G1) the measuring unit is provided
 - (i) either with a (first) measuring element for establishing during the milking procedure the albumen content of the milk,
 - (ii) or with a (second) measuring element for establishing during the milking procedure the fat content of the milk,

- (iii) or with a (third) measuring element for establishing during the milking procedure the somatic cell account of the milk,
- (iv) or with a (fourth) measuring element for establishing during the milking procedure the colour of the milk,
- (v) or with a (fifth) measuring element for establishing during the milking procedure the light absorption of the milk,
- (vi) or with several of the measuring elements G1(i) to G1(v).

2.2 Each of the requests of the appellant contains a sole independent claim which is directed to "a construction". These independent claims have been arrived at by amendments to claim 3 of the patent as granted.

2.3 The text of the independent claim 1 according to the **main request** of the appellant differs from that of claim 3 of the patent as granted in that

- (a) the wording "for applying the method as claimed in any one of the preceding claims" (see feature C as referred to in section 2.1.2 above) has been deleted;

- (b) at the end of the pre-characterising portion of the claim the following wording has been added:

"from milk obtained from different animals, the quality and/or composition being based on the course of the lactation period";

- (c) the wording corresponding to features G1(iii) and G1(iv), as referred to in section 2.1.2 above, has been replaced by the wording according to which:

"the construction **further** is provided with a measuring unit (11) with a measuring element (11) for establishing during the milking procedure the somatic cell count **and** the colour of the milk" (emphasis added);

- (d) the wording corresponding to features G1.(i), G1.(ii), G1.(v) and G1.(vi), as referred to in section 2.1.2 above, has been replaced by the wording according to which:

"**and optionally** with a measuring element (11) for establishing during the milking procedure the albumen content or the fat content or the light absorption of the milk or several of these elements" (emphasis added).

- 2.3.1 The wording of the amendment according to item (c), as referred to in section 2.3 above, refers to "a measuring element (11) for establishing during the milking procedure the somatic cell count **and** the colour of the milk" (emphasis added).

During the oral proceedings the appellant explained that the purpose of this amendment was to define a measuring unit provided with at least two different **measuring elements**, namely a (first) element for establishing during the milking procedure the somatic cell count and a further (second) element for establishing the colour of the milk. In this respect the appellant submitted that the description of the patent consistently referred to different measuring elements and that the application as filed did not disclose a measuring element capable of establishing during the milking procedure both the somatic cell count and the colour of the milk.

2.3.2 It can be understood from the wording of the amendment according to item (b), as referred to in section 2.3 above, that there is a relationship between claim 1 of the main request and the method which is defined in claim 1 of the patent as granted as being provided with features A and B' (see section 2.1.1 above, last paragraph).

2.4 The text of the amended claim 1 according to the **auxiliary request** differs from that of claim 1 of the main request only in that the wording of claim 12 of the patent as granted has been added.

3. *Admissibility of the amendments (main request)*

3.1 Due to the amendment according to item (b), as referred to in section 2.3 above, claim 1 of the main request contains the wording according to which "[the means for collecting the milk] comprise a plurality of storage containers (7, 7') for the separate collection of milk

of different quality and/or composition from milk obtained from different animals, the quality and/or composition being based on the course of the lactation period" (this wording will be referred to hereinafter as the "wording of the amendment").

In order to examine the admissibility of this amendment with respect to Article 84 EPC, it has to be established whether the "wording of the amendment" has a clear and unambiguous technical meaning.

In the present case, this examination is particularly important, because of the deletion of the reference to "any of the preceding claims" (see amendment according to item (a) as referred to in section 2.3 above). This reference makes it clear that claim 3 of the patent as granted defines a construction suitable for applying at least the method provided with features A and B' as defined by claim 1 of the patent as granted.

3.1.1 The respondent criticized the amendments by arguing as follows:

- (i) Due to feature C, claim 3 of the patent as granted implicitly defines a construction provided with means for separating the milk. Since claim 1 of the main request does not refer to means for separating the milk, the amendments according to items (a) and (b), as referred to in section 2.3 above, result in the extension of the protection conferred (Article 123(3) EPC).

(ii) The introduction of the "wording of the amendment" into claim 1 of the main request makes the claim unclear in so far as the skilled reader cannot clearly understand whether this wording results in a limitation of the claimed subject-matter. In particular, the description of the patent does not contain further information allowing the meaning of the expression "the quality and/or composition being based on the course of the lactation period" to be determined.

(iii) The application as filed neither refers to the "wording of the amendment" nor discloses a construction for milking animals in which the milk obtained from different animals is separated on the basis of the course of the lactation period. Therefore, due to the amendment according to item (b), as referred to in section 2.3 above, claim 1 of the main request contains subject-matter extending beyond the content of the application as filed (Article 123(2) and 100(c) EPC).

3.1.2 The appellant defended the admissibility of the amendments essentially by arguing as follows:

(i) The "wording of the amendment" has been introduced into the claim in order to compensate for the deletion of the feature C. This wording makes it clear that the construction claimed in claim 1 of the main request is suitable for applying the method defined in claim 1 of the patent as granted. Moreover, since claim 1 refers to means for collecting the milk comprising a plurality of storage containers for the separate collection of

milk, it implicitly defines means for separating the milk.

(ii) The expression "the quality and/or composition being based on the course of the lactation period" means that the quality and/or composition of the milk changes in the course of the lactation period. This information represents the general knowledge in the technical field of milking, in so far as it is well known to a skilled person that the quality and/or composition of the milk changes during the lactation period of an animal.

(iii) According to claim 4 as well as to a passage in the description of the application as filed (see EP-A-628 244, column 1, lines 43 to 48), "the milk obtained from an animal in the course of the lactation period is collected in different containers", and according to claim 5 of the application as filed, "the milk obtained is collected in different storage containers, depending on the fat content". The skilled person, on the basis of his general knowledge (see item 3.3.1(ii) above), would derive the information corresponding to the "wording of the amendment" from the content of claims 4 and 5 of the application as filed.

3.1.3 The board finds that the amendments according to items (a) and (b), as referred to in section 2.3 above, lead to an independent claim 1 which is not admissible with respect to Article 84 EPC for the following reasons:

- (i) It is not clear whether the "wording of the amendment" results in a limitation of the claimed subject-matter and, if so, what the extent of the limitation is. If the "wording of the amendment" were to be interpreted according to the assertions of the appellant (see section 3.1.2(ii) above), this wording would only define a characteristic of the milk obtained by an animal during the lactation, without defining a clear structural or functional feature capable of limiting a construction for milking animals.
- (ii) Furthermore, in the context of claim 1 of the main request, the interpretation referred to in section 3.1.2(ii) above is not the sole possible interpretation. The "wording of the amendment" can also be understood as defining a parameter upon which the decision can be based of whether the milk has to be collected in a first storage container or in a different one. In other words, the "wording of the amendment" - in the context of a claim directed to a construction for milking animals provided with a plurality of storage containers for separate collection of milk of a different quality and/or composition - can also define the construction as being suitable for basing the separate milk collection on the course of the lactation period in so far as the criterion for the separate collection would be solely dependent on the time, as asserted by the appellant himself in the letter dated 19 July 2002 (see page 1: "In case the lactation period is being used, the separation criterion is determined by the point in time"). Therefore, a different

interpretation of the "wording of the amendment" is possible.

- (iii) The deletion of the reference to "the method as claimed in any of the preceding claims" (i.e. the amendment according to item (a) as referred to in section 2.3 above) was necessary because the main request of the appellant no longer contained the method claims of the patent as granted.

The expression "construction for applying the method as claimed **in any one of the preceding claims**" (in claim 3 of the patent as granted) makes it clear that the construction is suitable for applying a method of milking animals provided with features A and B' as defined in claim 1 of the patent as granted (see section 2.1.1 above). Therefore, this expression - due to the reference to claim 1 - clearly implies the wording "construction for applying a method in which the milk obtained from different animals is collected in different storage containers after having been separated according to quality and/or composition, wherein the quality and/or composition is based on the course of the lactation period" (hereinafter this wording will be referred to as the "wording implied by the reference").

If the "wording implied by the reference" were to be inserted in an amended claim directed to a construction, the resulting amendment would be merely formal without having any substantial character.

The appellant, however, in order to compensate for the deletion of the reference to "the method as claimed in any of the preceding claims", did not introduce the "wording implied by the reference" but the "wording of the amendment". The board cannot see any valid reason for allowing this amendment.

Furthermore, having regard to the respondent's argument referred to in section 3.3.1(i) above, the "wording of the amendment" makes it possible to interpret the amended claim so as to extend the protection beyond that of the patent as granted. The board cannot accept a wording which allows a possible interpretation of the amended claim for which even a slight doubt concerning its admissibility with respect to Article 123(3) EPC can arise.

3.2 Having regard to the comments in section 3.1.3 above, the arguments of respondent I as referred to in section 3.1.1(iii) and those of the appellant as referred to in section 3.1.2(iii) above are not relevant for the finding of the present decision.

3.3 During the oral proceedings, respondent I also submitted that the amendment according to item (c), as referred to in section 2.3 above did not clearly define a measuring unit provided with a **first measuring element** for establishing during the milking procedure the somatic cell count **and** with a **second measuring element** for establishing during the milking procedure the colour of the milk and that this amendment allowed an interpretation of claim 1 according to which the

same measuring element could establish both the somatic cell count and the colour of the milk, for which interpretation there was no basis in the application as filed.

The board considers that the amended independent claim 1 of the main request of the appellant lacks clarity also in these respects. However, since the present decision is based upon the reasons referred to in section 3.1 above, this argument of the respondent is not relevant for the findings of the present decision. Moreover, since the board during the oral proceedings understood that the appellant was prepared to re-formulate the claim in order to make it clear that the measuring unit is provided with two different measuring elements (see also the comments in section 2.4 above), this lack of clarity would not have been decisive for the finding of the present decision.

3.4 Having regard to the comments in section 3.1.3 above, the amendments made by the patent proprietor do not lead to a claim meeting the requirement of the Article 84 EPC. Thus, pursuant to Article 102 EPC, the patent cannot be maintained on the basis of the main request of the appellant.

4. *Admissibility of the amendments (auxiliary request)*

Since also the text of claim 1 of the auxiliary request of the appellant differs from that of claim 3 of the patent as granted by the amendments according to items (a) and (b) as referred to in section 2.3, the comments in section 3.1.3 above and the conclusion in section 3.4 above also apply for claim 1 of this

request. Thus, having regard to Article 102 EPC, the patent cannot be maintained on the basis of the auxiliary request of the appellant either.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte