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**D E C I S I O N**  
**of 12 November 2003**

**Case Number:** T 0555/02 - 3.2.4

**Application Number:** 94201454.9

**Publication Number:** 0626129

**IPC:** A01J 7/00

**Language of the proceedings:** EN

**Title of invention:**

A construction for milking animals

**Patentee:**

MAASLAND N.V.

**Opponent:**

DeLaval International AB

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 100(a), 100(c), 111(1), 113(1)

EPC R. 66(2)(g)

**Keyword:**

"Added subject-matter - main request (yes) - first auxiliary request (no)"

"Novelty - first auxiliary request (yes)"

"Inventive step - first auxiliary request (yes)"

"Remittal (no)"

**Decisions cited:**

T 0249/93

**Catchword:**

-



Case Number: T 0555/02 - 3.2.4

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.4  
of 12 November 2003

**Appellant:** MAASLAND N.V.  
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**Representative:** Harrison, Michael Charles  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 18 April 2002  
revoking European patent No. 0626129 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** C. A. J. Andries  
**Members:** C. D. A. Scheibling  
M. K. S. Aúz Castro

## Summary of Facts and Submissions

I. By its decision dated 18 April 2002 the Opposition Division revoked the patent No. 0 626 129, opposed on the grounds based on Articles 100(a) (54 and 56) EPC and 100(c) EPC, because the subject-matter of claim 1 was not found to involve an inventive step.

On 23 May 2002 the appellant (patentee) filed an appeal and paid the appeal fee simultaneously.

The statement setting out the grounds of appeal was received on 14 August 2002.

II. The appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained in one of the versions according to the main, first, second or third auxiliary request, all filed during the oral proceedings which took place on 12 November 2003, as well as the sole figure according to the patent specification.

Claim 1 according to the main request reads as follows:

"1. A construction for milking animals, comprising one or more milking units (1) connected to a supply line (2) leading to a milk tank (3), as well as a rinsing fluid reservoir (14) from which a rinsing fluid can be passed through at least a portion of a milking unit (1) and the supply line (2), while a three-way valve (13) is incorporated in the end portion of the supply line (2) near the milk tank (3), and a rinsing fluid discharge line (15) connected to said valve (13) can return the rinsing fluid to the rinsing fluid reservoir

(14), said three-way valve (13) being adjustable into a first position wherein milk obtained by means of a milking unit (1) can be transferred to the milk tank (3) and into a second position wherein a rinsing fluid ring line system is established characterized in that the rinsing fluid ring line system is formed by the rinsing fluid reservoir (14), a line (18) which extends from the reservoir (14) and is provided with a valve (17) and which leads to the upper end of the milk meter (6), the milk meter (6) itself, the line section in which a pump (11) is incorporated and the supply (2) and rinsing fluid discharge (15) line and in that there is incorporated in the supply line (2) an air inlet valve (22) for the purpose of removing milk or rinsing fluid therefrom".

Claim 1 according to the first auxiliary request reads as follows:

"1. A construction for milking animals, comprising one or more milking units (1) connected to a supply line (2) leading to a milk tank (3), as well as a rinsing fluid reservoir (14) from which a rinsing fluid can be passed through at least a portion of a milking unit (1) and the supply line (2), while a three-way valve (13) is incorporated in the end portion of the supply line (2) near the milk tank (3), and a rinsing fluid discharge line (15) connected to said valve (13) can return the rinsing fluid to the rinsing fluid reservoir (14), said three-way valve (13) being adjustable into a first position wherein milk obtained by means of a milking unit (1) can be transferred to the milk tank (3) and into a second position wherein a rinsing fluid

ring line system is established characterized in that the rinsing fluid ring line system is formed by the rinsing fluid reservoir (14), a line (18) which extends from the reservoir (14) and is provided with a valve (17) and which leads to the upper end of a milk meter (6) constituted by a collecting glass, the milk meter (6) itself, the line section in which a pump (11) is incorporated and the supply (2) and rinsing fluid discharge (15) line and in that there is incorporated in the supply line (2) an air inlet valve (22) for the purpose of removing milk or rinsing fluid therefrom".

The second and third auxiliary requests concerned further restrictions.

The appellant argued that the modifications introduced in the main request were deducible from the figure. Concerning the first auxiliary request, the appellant argued that even if a skilled person had contemplated to combine D8 with the teaching of D1 he would not have arrived at a construction according to claim 1 of the first auxiliary request.

III. The respondent (opponent) requested that the appeal be dismissed or by way of an auxiliary request that the case be remitted to the first instance for further prosecution.

Concerning the main request, the respondent (opponent) mainly forwarded that there was no basis in the application as originally filed for the following statement: "a line (18) ... which leads to the upper end of the milk meter".

Concerning the first auxiliary request the respondent argued that the subject-matter of claim 1 of the first auxiliary request did not involve an inventive step with respect to D8 in combination with the teaching of D1.

IV. The following documents played a role in the appeal proceedings:

D1: EP-A-385 539

D8: Machine Milking, NIRD, 1977, ISBN 0902219065;  
pages 297 to 301

### **Reasons for the Decision**

1. The appeal is admissible.

2. *Interpretation of the claims:*

2.1 "Supply line" : according to the wording of claim 1 (of the main and first auxiliary request), the one or more milking units are connected to the supply line. Furthermore, the rinsing fluid ring line system is formed by the rinsing fluid reservoir, a line which extends from the reservoir and is provided with a valve and which leads to the upper end of a milk meter (constituted by a collecting glass: according to the first auxiliary request), the milk meter itself, the line section in which a pump is incorporated and the supply and rinsing fluid discharge line. Thus, there is made a clear distinction between the line section in which a pump is incorporated and the supply line.

Therefore, the line section in which the pump is incorporated is not part of the supply line.

This is also confirmed by the description in relation to the figure. As a matter of fact, in column 3, lines 38 to 41, it is indicated that: "An air inlet valve 22 is incorporated in the supply line 2 near the point in which that milking unit 1 that is most remote from the milk tank 3 is connected to the supply line". When turning now to the figure, it can be seen that said point is located downstream of the line section in which the pump is incorporated. This confirms that the point of the supply line most remote from the milk tank, i.e. the point nearest to the beginning of the supply line is located downstream of the line section in which the pump is incorporated.

Therefore, in the meaning of the patent in suit, the supply line is the part of the milk pipeline, to which all milking units are connected and which is common to all milking units, i.e. the part of the pipeline where the milk originating from different milking units mixes, excluding the line sections in which the pumps are incorporated.

- 2.2 "Inlet valve" : as it is clear from the figure in relation to the description (column 1, lines 43 to 50), the air inlet valve is a valve which selectively connects an air pipe (not being part of the milk supply line) to the milk supply line. This means that upstream of the inlet valve, the pipe exclusively contains (compressed) air, which has to be entered in the ring line system. In other words the inlet valve is the

valve which selectively allows introduction of (compressed) air into the ring line system.

3. *Amendments - Objection under Article 100(c) EPC*

3.1 Main request (appellant)

3.1.1 Claim 1 of the main request comprises the feature according to which "the rinsing fluid line (18) leads to the upper end of the milk meter (6)".

3.1.2 Although it is stated in claim 6 as originally filed that: "... the rinsing fluid ring line system is formed by ..., a line (18) which extends from ... and which leads to the milk meter (6), ..." no precise indication of where it exactly leads to, can be found in the description or the claims as originally filed. The only possible basis to assert that said line leads to the upper end of the milk meter, is the figure. However, the figure does not represent an indefinite type of milk meter, but a milk meter constituted by a collecting glass. Therefore, the fact that the line leads to the upper end of the milk meter, if really deducible from the figure, can by no means be dissociated from the specific milk meter represented in said figure, i.e. the collecting glass.

Therefore, there is no basis to allege that the line leads to the upper end of the milk meter, irrespective of the type of milk meter involved.

A possible implicit disclosure, deduced from both the figure and the function of that feature (i.e. leading to the upper end), namely the cleaning of the



collecting glass, only leads to a disclosure related to a collecting glass, not to a milk meter in general.

3.1.3 Consequently, the amendment, which led to the subject-matter of claim 1 of the main request does not meet the requirements of Article 123(2) EPC and consequently, the main request is not allowable.

3.2 First auxiliary request (appellant)

3.2.1 Claim 1 of the first auxiliary request differs from claim 1 as originally filed by the following additional features:

- (a) the features of claim 6 as originally filed,
- (b) the feature according to which the line which extends from the reservoir leads to the upper end of the milk meter,
- (c) the feature according to which the milk meter is constituted by a collecting glass,
- (d) the features of claim 2 as originally filed,
- (e) the features of claim 3 as originally filed,

and in that:

- (f) the expression "rinsing fluid supply line" has been changed into "rinsing fluid discharge line".

3.2.2 Concerning features (a), (d) and (e)

The introduction of these features does not contravene the requirements of Article 123 (2) EPC.

### 3.2.3 Concerning features (b) and (c)

Feature (c) is disclosed in the description as originally filed, page 3, lines 15 and 16.

Concerning feature (b), it is indicated in the description as originally filed, that the object of the invention is to improve the cleaning system for a construction for milking animals (page 1, lines 8 to 10). Moreover, the passage page 4, lines 4 to 22 discloses a fluid ring line system which incorporates rinsing line 18 and indicates firstly that "In this manner a portion of the milking unit, i.e. the collecting glass 6 and the units connected thereto, as well as the supply line 2 can be cleaned" (page 4, lines 13 to 16 ) and secondly that there is also provided a by-pass line to clean the teat cups (page 4, lines 16 and 17) which leads from the rinsing fluid reservoir 14 via line 19 ... to the collecting glass 6.

Thus, the collecting glass is part of both rinsing circuits. However, only the fluid ring line system, incorporating rinsing line 18, is said to clean the collecting glass.

When now referring to the figure, a person skilled in the art notices that the rinsing fluid line 18 which is said to clean the collecting glass 6, leads to the upper end of the collecting glass 6, whereas the by-pass line 19 ends in milk tubes 5 which do not lead to the upper end of the collecting glass 6.

It is therefore obvious for a person skilled in the art that the cleaning of the collecting glass can only be achieved by the rinsing fluid ring line and this only because line 18 leads to the upper end of the said collecting glass. All the more because it is clear for a person skilled in the art, that if cleaning of the collecting glass could likewise be achieved by the bypass line 19 which does not lead to the upper end of the collecting glass, the rinsing line 18 would serve no purpose at all.

Thus, from the description and the figure as originally filed a skilled person is given the unambiguous information that the rinsing line 18 is only needed because it leads to the upper end of the collecting glass.

The addition of features (b) and (c) therefore does not contravene the requirements of Article 123(2) EPC.

The respondent argued that rinsing line 18 does not lead to the upper end of the collecting glass but to a different unspecified device.

However, the claims as originally filed are also part of the disclosure. In claim 6 as originally filed it is stated: "... the rinsing fluid ring line system is formed by ..., a line (18) which extends from ... and which leads to the milk meter (6) ..." An analogous, more specific disclosure can be found in the description as originally filed (page 4, lines 4 to 6) which makes clear that line 18 leads from the rinsing fluid reservoir to the collecting glass. Thus, the fact that

the line leads to the milk meter (in general), i.e. the collecting glass (more specifically) is clearly disclosed.

The respondent further argued that a part of the rinsing line could be hidden behind the collecting glass, with respect to the view shown in the figure, and end at the bottom or middle of the collecting glass, where a spray arrangement could be arranged.

This allegation is purely speculative. There is no indication with respect to said rinsing line and its function as described in the description or with respect to the figure, that the rinsing fluid could enter the milk meter via line 18 somewhere else than at the upper end or that a spray arrangement can be foreseen in the middle or bottom of the collecting glass. Moreover, the use of spray arrangements, located at the middle or the bottom of the collecting glass, would presuppose that the rinsing fluid is under positive pressure when arriving at the sprayers (otherwise the fluid would not be able to reach and clean the top of the collecting glass). However, as indicated in the description (column 2, lines 28 to 31 and column 3, lines 31 and 32), the rinsing fluid is sucked-up by the pump 11. However, said pump is located downstream of the collecting glass and thus, the fluid is drawn into the collecting glass by means of the depression created at the suction side of the pump. It is obvious for a skilled person that such a depression would not be able to provide for the positive fluid pressure necessary to properly operate sprayers located at the middle or the bottom of the collecting glass. Thus, spray arrangements located at the bottom or

middle of the collecting glass (as suggested by the respondent) are clearly not contemplated by the patent in suit. On the contrary the figure seems to disclose a transparent collecting glass.

3.2.4 Concerning amendment (f)

Amendment (f) was introduced to adapt the terminology in order to be consistent, the expression "rinsing fluid discharge line" being already used in claim 6 as originally filed and in the description as originally filed (e.g. page 3, line 36 or page 4, lines 10 and 11).

3.2.5 Since the amendments made contribute to limit the protection conferred by claim 1 of the first auxiliary request, the requirements of Article 123(3) EPC are also met.

3.2.6 The description has been amended to adapt it to the wording of the new claims of the first auxiliary request. These amendments fulfil the requirements of Article 123 EPC.

3.2.7 Consequently, the objection based on Article 100(c) EPC does not prejudice the maintenance of the patent in suit on the basis of the first auxiliary request.

4. *Novelty of the first auxiliary request (appellant)*

The novelty of the subject-matter of claim 1 of the first auxiliary request has not been challenged in the present proceedings. As a matter of fact, none of the

cited prior art documents discloses all of the features of claim 1 of the first auxiliary request.

5. *Inventive step of the first auxiliary request (appellant)*

5.1 The respondent considered that D8 represents the closest prior art document.

5.2 From D8 (page 299, figure X 3; page 301, basic routine for the procedure after each milking) there is known a construction for milking animals, comprising one or more milking units connected to a common transfer pipeline (figure X 3) leading to a milk tank (step 6 of the basic routine: bulk tank), as well as a rinsing fluid reservoir (figure X 3: wash trough) from which a rinsing fluid can be passed through at least a portion of a milking unit, the common transfer pipeline, the common receiver and a common releaser milk pump, while a delivery pipeline can return the rinsing fluid to the rinsing fluid reservoir, the rinsing fluid ring line system being formed by the rinsing fluid reservoir, a line which extends from the reservoir and is provided with a valve (figure X 3: 3 way valve) and which leads to the upper end of a milk meter (figure X 3: recorder jar) constituted by a collecting glass, the milk meter itself, the common transfer pipeline, the common receiver, the line section in which a pump (figure X 3: releaser milk pump) is incorporated and a milk or rinsing fluid discharge line.

D8 further discloses page 301 in the steps 1 and 6 of the basic routine for the procedure after each milking, that the cleaning routine is started and that the milk

delivery pipe is removed from the bulk tank and arranged for discharge to waste. In figure X 3 the delivery pipe is shown in the cleaning position, where it is connected to the wash trough, whereas the milking position is indicated in dotted lines.

5.3 The subject-matter of claim 1 of the first auxiliary request differs from that of D8 in that:

(i) the supply line is only located downstream of the line section in which the pump is incorporated,

(ii) a three-way valve is incorporated in the end portion of the supply line near the milk tank, and a rinsing fluid discharge line connected to said valve can return the rinsing fluid to the rinsing fluid reservoir,

(iii) the three-way valve being adjustable into a first position wherein milk obtained by means of a milking unit can be transferred to the milk tank and into a second position wherein a rinsing fluid ring line system is established,

(iv) there is incorporated in the supply line an air inlet valve for the purpose of removing milk or rinsing fluid therefrom.

5.4 The appellant considered that it was not known from D8 to have a valve in the line which extends from the rinsing fluid reservoir and which leads to the upper end of the milk meter. However, as clearly indicated in figure X 3 there are two valves identified as "three way valve" in the line extending from the fluid

reservoir (wash trough) and leading to the milk meter (recorder jar).

The appellant further argued that it was possible, in the patent in suit, with the aid of said valve 17, to supply rinsing fluid to both the milk meter and the milk units or only to the milk units. However, the construction according to claim 1 includes solely a rinsing fluid line ring system for rinsing the milk meter, a rinsing line to rinse the milk unit is not part of the claimed construction. Thus, that function of the said valve is not relevant, since it is not claimed in claim 1 under examination.

- 5.5 According to the respondent, starting from D8, a first problem to be solved by the construction of claim 1 of the first auxiliary request is to improve automation when switching between milking and cleaning modes, whereas another problem to be solved is to empty the supply line after milking or cleaning.
- 5.6 The respondent brought forward that from D1 (column 11, lines 51 to 54; column 12, lines 11 to 21; figure 2) there is known a construction for milking animals comprising a computer controlled cleaning program. Said construction comprising a rinsing fluid ring line system including a three-way valve (60) incorporated in the end portion of the common supply line (9) near the milk tank (6), and a rinsing fluid discharge line (61) connected to said valve (60) that can return the rinsing fluid to the rinsing fluid reservoir (56), said three-way valve being adjustable into a first position wherein milk obtained by means of a milking unit can be



transferred to the milk tank and into a second position wherein a rinsing fluid ring line system is established.

Consequently, a skilled person is given the information that when using a three-way valve for switching the fluid flow from the tank to the reservoir, no manual operation has to be performed.

The Board can agree to this.

5.7 The Board also agrees that it is obvious for a skilled person when the same result is to be obtained, namely to avoid a manual operation (which is to disconnect, to displace and to reconnect the delivery pipe) to provide the construction according to D8 with a three way valve as disclosed in D1 and, consequently, that features (ii) and (iii) cannot contribute to the inventive step of claim 1.

5.8 The respondent also argued that D8 clearly recommends, page 301, step 5 of the basic routine as well as on page 302, last paragraph of section (a) of the "Notes" to take great care to drain the machine completely, whereas D1 (column 11, line 54 to column 12, line 2) teaches to empty the discharge lines by passing compressed air through the measuring chamber and the discharge lines. He concluded that it would therefore be obvious for a person skilled in the art to apply the teaching of D1 to a construction according to D8. The Board can agree so far.

The respondent further argued that, in D1, the lifting magnet 26 and the spherical body 23 constitute an inlet valve in the meaning of the patent in suit, and that a person skilled in the art, when applying the teaching

of D1 to D8, would locate this valve in the circuit of D8, in the manner disclosed in D1, i.e. at the outlet of the collecting glass. The Board cannot accept this.

The two known systems (i.e. D8: figure X 3; D1: figure 2) are so different in concept and therefore also in their flow-circuitries, that it is difficult to find in these documents corresponding conduits, which could allow an obvious transfer from a feature in one known system into a corresponding location in the other known system.

Furthermore, the Board firstly does not consider the valve in D1 constituted by the magnet 26 and the spherical body 23, to be an air inlet valve in the meaning of the patent in suit.

As a matter of fact, the valve the respondent refers to, does not introduce the compressed air into the circuit but is responsible for selectively allowing the compressed air, already present in the circuit, to progress further in the circuit. Indeed, in D1, the inlet valve which corresponds with the air inlet valve of the patent in suit (see section 2.2 above) is constituted by valve 17 (see D1: column 8, line 15 to 17; figure 2).

Secondly, in D1, the valve 17 is connected to the inlet of the milk measuring device 4. Thus, when applying the teaching of D1 to the construction according to D8 a skilled person would incorporate the inlet valve upstream of the recorder jar (collecting glass) of D8. Consequently, the inlet valve would not be located in the supply line in the meaning of the patent in suit.

Indeed, in D8, the part of the circuit to which all the milking units are connected, i.e. the common line, is the so-called "transfer pipeline" as well as the downstream located common devices, i.e. receiver, releaser milk pump and delivery pipeline. Only one of these downstream located devices, namely the delivery pipeline is located downstream of the used pump, and can therefore be compared to the "supply line" in the meaning of the patent in suit.

Thus, even if a skilled person would try to combine the teaching of D1 with the construction disclosed in D8, he would not arrive at a construction disclosing feature (iiii) of claim 1 of the first auxiliary request.

5.9 Therefore, the subject-matter of claim 1 according to the first auxiliary request involves an inventive step.

6. *Second and third auxiliary requests*

Since the first auxiliary request is allowable, examination of the second and third auxiliary requests is superfluous.

7. *Remittal to the first instance for further prosecution*

7.1 Article 111(1) EPC reads as follows: "Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution".

7.2 In the present case, the respondent confirmed to the Board, that the amendments resulting in claim 1 of the first auxiliary request did not take him by surprise, since the new claim 1 is mainly a combination of claims 1, 2 and 3 as granted and since the patentability of all these claims has already been challenged during opposition proceedings. Furthermore, the respondent indicated that he saw no need to search for and introduce further documents because of these amendments, nor did he intend to change his line of argument with respect to this new claim 1.

The respondent indicated that he requested that the case be remitted to the first instance for further prosecution, solely to have an issue decided upon by two instances.

7.3 However, remittal lies within the discretion of the Board and there is no right for the parties to have each issue decided upon by two instances (see also T 249/93, section 2.2).

Since in the present case, there are neither new facts or new evidence, nor a surprising situation (fresh case) so that the respondent would have been unable to present his comments in the meaning of Article 113(1) EPC and since the question of inventive step has already been discussed before the first instance with respect to the same documents as in the appeal proceedings, the Board decides in the interest of the overall procedural economy and effectiveness not to remit the case to the first instance for further prosecution.

**Order**

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

1. The decision under appeal is set aside
2. The request to remit the case to the first instance for further prosecution is refused
3. The case is remitted to the department of the first instance with the order to maintain the patent in amended form in the following version:

Claims: 1 to 8 according to the first auxiliary request filed in the oral proceedings,

Description: columns 1 to 4 according to the first auxiliary request filed in the oral proceedings,

Drawings: the sole figure according to the patent specification.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries