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D E C I S I O N
of 16 September 2004

Case Number: T 0643/02 - 3.2.4

Application Number: 94203288.9

Publication Number: 0643908

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:

An implement for milking animals

Patentee:

MAASLAND N.V.

Opponent:

Prolion B.V.

Headword:

Deflecting/MAASLAND

Relevant legal provisions:

EPC Art. 76(1), 100(c), 123(2),

Keyword:

"Subject-matter extending beyond the content of the grandparent application as filed"

Decisions cited:

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Catchword:

-



Case Number: T 0643/02 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 16 September 2004

Appellant: Prolion B.V.
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
7 June 2002 concerning maintenance of European
patent No. 0643908 in amended form.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
M. B. Tardo-Dino

Summary of Facts and Submissions

- I. The European patent No. 643 908 is based upon the European patent application EP 94 203 288.9 which was filed as a divisional application of the previous application EP 91 203 326.3 (EP-A-479 397), hereinafter referred to as the PA (parent application), which in turn was filed as a divisional application of the earlier application EP 89 202 372.2 (EP-A-360 354), hereinafter referred to as the GPA (grandparent application).
- II. An opposition, which was based *inter alia* upon Article 100(c) EPC), was filed against this patent which was maintained in an amended version by the decision of the opposition division dispatched on 7 June 2002.

The amended version of the patent was based upon claim 1 of the patent as granted which reads as follows:

- "1. An implement for milking animals, such as cows, comprising a milking parlour, a robot arm (6) carrying teat cups (45 to 48) and extending in a substantially horizontal plane, coupling means (50) for applying each teat cup to a relevant teat of the animal's udder, a vertically directed frame beam along which the robot arm is movable up- and downwards, and sensor means (51) able to determine the position of the animal's teats, as well as control means (56, 18, 22, 36, 40, 80 to 83) for conveying, on the basis of the teat position as determined by the sensor means (51), the robot arm in such a position under the animal's udder that a

teat cup (45 to 48) can be applied to the relevant teat, characterized in that the robot arm (6) comprises a robot arm end portion (34), carrying the teat cups (45 to 48), and a further portion, while deflecting means are provided to render said robot arm end portion (34) to move downwardly relative to the further portion, when e.g. an animal kicks against it."

III. On 21 June 2002 the opponent (hereinafter referred to as the appellant) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 17 October 2002.

IV. Oral proceedings were held on 16 September 2004.

The appellant, who had been duly summoned to oral proceedings and had communicated to the board with a letter dated 2 August 2004 his intention to not participate to the oral proceedings, was not present. Pursuant to Rule 71 (2) EPC, the oral proceedings were continued without him.

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

VI. As a main request, the proprietor of the patent (hereinafter referred to as the respondent) requested that the appeal be dismissed. Auxiliarily, he requested that the patent be maintained on the basis of either claims 1 to 6 filed in the course of the oral proceedings as a first auxiliary request or claims 1 to

6 filed in the course of the oral proceedings as a second auxiliary request.

Claim 1 of the first auxiliary request of the respondent reads as follows:

"1. An implement for milking animals, such as cows, comprising a milking parlour, a robot arm (6) carrying teat cups (45 to 48) and extending in a substantially horizontal plane, coupling means (50) for applying each teat cup to a relevant teat of the animal's udder, a vertically directed frame beam along which the robot arm is movable up- and downwards, and sensor means (51) able to determine the position of the animal's teats, as well as control means (56, 18, 22, 36, 40, 80 to 83) for conveying, on the basis of the teat position as determined by the sensor means (51), the robot arm in such a position under the animal's udder that a teat cup (45 to 48) can be applied to the relevant teat, characterized in that the robot arm (6) comprises a robot arm end portion (34), carrying the teat cups (45 to 48), and a further portion, while deflecting means are provided to render said robot arm end portion (34) to move downwardly relative to the further portion, when e.g. an animal kicks against it, the deflecting means comprising a springlike element (29) acting against a force exerted on the robot arm end portion (34) in the downward direction."

Claim 1 of the second auxiliary request of the respondent reads as follows:

"1. An implement for milking animals, such as cows, comprising a milking parlour, a robot arm (6) carrying teat cups (45 to 48) and extending in a substantially horizontal plane, coupling means (50) for applying each teat cup to a relevant teat of the animal's udder, a vertically directed frame beam along which the robot arm is movable up- and downwards, and sensor means (51) able to determine the position of the animal's teats, as well as control means (56, 18, 22, 36, 40, 80 to 83) for conveying, on the basis of the teat position as determined by the sensor means (51), the robot arm in such a position under the animal's udder that a teat cup (45 to 48) can be applied to the relevant teat, characterized in that the robot arm (6) comprises a robot arm end portion (34), carrying the teat cups (45 to 48), and a further portion, while deflecting means are provided to render said robot arm end portion (34) to move downwardly relative to the further portion, when e.g. an animal kicks against it, the deflecting means comprising a pivoting element (30) between two robot arm portions (28, 32) and a spring (29) acting against a force exerted on the robot arm end portion (34) in the downward direction."

VII. In relation to the admissibility of Claim 1 of the patent as granted with respect to Article 100(c) EPC the appellant, in the statement setting out the grounds of appeal, had essentially argued that the feature defining the "deflecting means" in the characterising portion of claim 1 of the patent as granted extended beyond the content of the PA as filed.

VIII. With respect to the relationship between the GPA as filed and the independent claims upon which the main, the first auxiliary and the second auxiliary requests were based, the respondent during the oral proceedings essentially argued as follows:

(i) The feature "deflecting means" in the characterising portion of claim 1 of the patent as granted can be clearly and unambiguously derived from column 8, lines 3 to 7 of the GPA as filed.

(ii) The amendments leading to claim 1 of the first auxiliary request as well as to claim 1 of the second auxiliary request can be clearly and unambiguously derived from a passage in the description of the GPA as filed (column 8, lines 3 to 15).

Reasons for the Decision

1. The appeal is admissible.
2. *The main request of the respondent (Article 100(c) EPC)*
 - 2.1 Article 100(c) provides that, if the patent is granted on a divisional application, the European patent may not be amended in such a way that it contains subject-matter which extends "beyond the content of the earlier application as filed". This provision does not include a definition of "earlier application as filed" which e.g. in the case of a divisional application from a divisional application may be either the parent application or the GPA as filed. However, in the case

to be decided, the European patent in suit was accorded the same filing date (20 September 1989) and the date of priority (21 September 1988) as the GPA (EP-A-360 354). Article 76(1) EPC provides that insofar the divisional application does not extend beyond the content of the earlier application as filed, this divisional application is deemed to have been filed on the date of filing of the earlier application and shall have the benefit of any right of priority. In the light of this article, the "earlier application" which article 100(c) EPC refers to, is the application whose date of filing is claimed in the divisional application upon which the patent in suit is based (with the correspondent priority right). Accordingly, "the content of the earlier application as filed" beyond which according to Article 100(c) the subject-matter of the European patent may not extend as a result of amendments is that of the GPA as filed.

2.2 Claim 1 of the patent as granted specifies in its characterising portion the following features:

- (A) the robot arm (6) comprises a robot arm end portion (34), carrying the teat cups (45 to 48), and a further portion;
- (B) deflecting means are provided to render said robot arm end portion (34) to move downwardly relative to the further portion, when e.g. an animal kicks against it.

Neither the claims (1 to 35) nor the introductory part of the description (column 1, line 1 to column 5,

line 53) of the GPA as filed (EP-A-360 354) refer to deflecting means as defined by feature B.

2.3 The parts of the description of the GPA as filed (EP-A-360 354) which describe in detail (referring to the drawings) a way of carrying out the invention, in particular the parts referring to Figures 2 and 3, relate to a robot arm which is essentially described as follows:

- (i) The robot arm is connected to a frame portion 25 which is movable up- and downwardly by means of a cylinder 22 along a vertical directed frame beam 5, so that the height of the robot arm can be roughly determined by means of said first cylinder 22 (see particularly column 7, lines 39 to 54; as well as column 13, lines 25 to 28).
- (ii) The robot arm consists of a first portion 28, a second portion 32, a third portion 33 and fourth (or end) portion 34 which carries the teat cups (see particularly column 7, lines 54 to 58; as well as column 8, lines 16 to 18).
- (iii) The first portion 28 (and, thus, the whole robot arm) is capable of pivoting by means of a cylinder 26 about a vertical pivot pin 24 relative to the frame portion 25, so that the robot arm can pivoted from a rest position in an operational position (see particularly column 7, line 49 to column 8, line 3).
- (iv) The second portion 32 is capable of pivoting relative to the first portion 28 about a

horizontal pin 30 against the action of an excess load spring 29 (see particularly column 8, lines 7 to 11).

- (v) The third portion 33 is capable of pivoting by means of a cylinder 36 relative to the second portion 32 about a vertical pin 35 (see particularly column 8, lines 16 to 25).
- (vi) The fourth (or end) portion 34 is movable axially relative to the third portion 33 by means of the cylinder 49 (see particularly column 8, lines 34 to 38).
- (vii) The cylinders 22, 26, 36 and 49 can be pneumatically operable (see particularly column 13, lines 55 to 57).

2.4 The word "deflect" can be found only in the part of the description of the GPA as filed which describes a way of carrying out the invention referring to the drawings, in particular in the paragraph bridging columns 7 and 8 (see particularly column 7, line 49 to column 8, line 15) and referring to Figures 2 and 3.

The fifth sentence of this paragraph (column 8, lines 3 to 7) reads as follows:

"It may be of importance for the robot arm, or a part thereof, to be fixed under spring load, i.e. in such a manner that it, or the said portion thereof, can deflect when e.g. an animal kicks against it".

2.5 The respondent essentially argued that feature B can be derived from this fifth sentence.

2.5.1 The board cannot accept this argument for the following reasons:

(i) The above mentioned fifth sentence represents a generalisation of the specific example described by the paragraph in which the sentence is included, in so far as it describes in a functional way a result to be achieved, namely the fact that the robot arm or a portion of it are fixed under spring load so that it can deflect when an animal kicks against it. However, this sentence does not indicate the direction of the deflecting movement.

(ii) The description and the drawings of the GPA as filed refer to many possibilities of protecting the robot arm against kicks of the animal.

A first possibility is explicitly disclosed in the part of the description which refers to Figures 2 and 3 (see sections 2.3.(ii) and 2.3.(iii) above) consists in providing a pivoting pin 30 between a first portion 28 of the robot arm and a second portion 32 of the robot arm, which (second portion) forms with a third portion and a fourth (or end) portion 34 the remaining portion of the robot arm, so that this remaining portion of the robot arm is capable of **pivoting** relative to the first portion 28 about the pin 30 **in a downward direction** against the action of **an excess load spring**.

Two further possibilities are implicitly disclosed in a further passage of the description of the GPA (column 13, line 55 to column 14, line 17), according to which the cylinders 36 and 26 (see sections 2.3.(iii) and 2.3.(v) above) can be either pneumatically or hydraulically or electromagnetically operable, wherein hydraulically or electromagnetically operable cylinders may include "an additional overload protection against kicks from the animal". The skilled person reading this passage will immediately realize that, if the cylinders 36 and 26 are pneumatically operable (due to the compressibility of the pneumatic medium), they can act as a spring and allow **sidewardly directed movements** of the third portion 33 relative to the second portion 32 and of the first portion 28 (and, thus, of the whole robot arm) relative to frame portion 25 when an animal kicks against the robot arm.

A further possibility which was indicated by the respondent himself during the oral proceedings is due to the fact that also the cylinder 22 can be pneumatically operable (see section 2.3.(vii) above). The skilled person reading the description of the GPA will realize that also the cylinder 22 can act as a spring and allow a **vertical movement** of the whole robot arm when an animal kicks against it.

- (iii) Therefore, the above mentioned fifth sentence represents a generalisation of all these

specifically disclosed possibilities, which generalisation does not specify the direction of the movement.

Since the word "downwardly" in feature B clearly indicates the direction of the movement, feature B represents an "intermediate generalisation", i.e. a statement having a greater degree of generalisation with respect to what has been described in detail referring to the drawings of the GPA as filed and a lower degree of generalisation with respect to the above mentioned sentence.

However, the GPA as filed does not contain a clear and unequivocal basis for this intermediate generalisation.

2.6 Thus, feature B cannot be clearly and unambiguously derived from the GPA as filed.

3. *First auxiliary request (Article 123(2) EPC)*

3.1 Claim 1 of the first auxiliary request differs from claim 1 of the patent as granted in that the following feature has been added:

(B') "the deflecting means comprising a springlike element (29) acting against a force exerted on the robot arm end portion (34) in the downward direction".

3.1.1 Feature B' further specifies the deflecting means defined by feature B in so far as it introduces a

springlike element as a part of the deflecting means referred to in feature B.

3.2 The respondent essentially argued that the sixth sentence of the paragraph bridging columns 7 and 8 of the description of the GPA as filed in conjunction with the above mentioned fifth sentence constitutes a basis for this amendment. In particular, the respondent argued that the expression "... fixed under spring load" in the fifth sentence defines a general function which can be performed not only by a spring element but also by any springlike element.

3.3 The board cannot accept these arguments for the following reasons:

(i) Feature B', in conjunction with feature B, represents a generalisation of a specific example described in the description of the GPA as filed. This specific example is referred to *inter alia* by the sixth sentence of the paragraph bridging columns 7 and 8 of the description of the parent application, according to which the deflecting movement of a further portion (i.e. of the portions 32, 33 and 34) of the robot arm is achieved by arranging this further portion capable of **pivoting** relative to the first portion 28 about a horizontal pin (so as to deflect **downwardly**) against the action of **an excess load spring**.

(ii) Feature B' refers to a **springlike element** without referring to any **pin** about which the further portion of the robot arm is capable of **pivoting**.

Therefore, feature B' (in conjunction with feature B) represents an intermediate generalisation whose generalisation level is between the features described in detail referring to the drawings of the GPA as filed and the content of the above mentioned fifth sentence. However, there is no explicit basis in the GPA as filed for this intermediate generalisation.

- (iii) Although the above mentioned fifth sentence can be considered as defining a general function, as submitted by the respondent (see section 3.2 above), it cannot represent an implicit basis for this generalisation because it does not refer to a **downwardly directed** movement.

In other words, the expression "springlike element" in feature B' can be interpreted not only as covering an "excess load spring" against whose action the further portion of the robot arm can move downwardly relative to the first portion as referred to in the above mentioned sixth sentence but also as covering e.g. a "pneumatically operable cylinder". However, although the GPA as filed describes the use of a pneumatically operable cylinder (namely the cylinder 36) allowing an deflecting movement of a portion of the robot arm with respect to a further portion (see sections 2.3.(v) and 2.3.(vii) above) **in a horizontal plane**, it does not disclose the use of a "springlike element" other than an "excess load spring" allowing a **downwardly directed** deflecting movement.

3.4 Therefore, the GPA as filed does not contain a clear and unequivocal basis for feature B'.

4. *Second auxiliary request (Article 123(2) EPC)*

4.1 Claim 1 of the second auxiliary request differs from claim 1 of the patent as granted in that the following feature has been added:

(B") "the deflecting means comprising a pivoting element (30) between two robot arm portions (28, 32) and a spring (29) acting against a force exerted on the robot arm end portion (34) in the downward direction".

4.1.1 Feature B" further specifies the deflecting means defined by feature B in so far as it refers to a pivoting element and to a spring as parts of the deflecting means referred to in feature B.

4.1.2 Feature B" refers to a pivoting element "between two robot arm portions (28, 32)", while feature B refers to a relative movement between "a robot arm end portion (34)" and a "further portion". Furthermore, it has to be noted that claim 1 of the second auxiliary request does not specify the number of portions of which the robot arm consists.

Thus, according to feature B", read in conjunction with feature B, the downwardly directed movement of the robot arm end portion (34) defined by feature B can be achieved by having a pivoting element arranged between any adjacent portions of the robot. In these respects, it has to be noted that the reference signs "(28, 32)"

following the term "portions" in feature B" cannot be construed as limiting the claim (Rule 29 (7) EPC).

4.2 The respondent argued that the passage consisting of sixth and seventh sentences (see column 8, lines 7 to 15) of the paragraph bridging columns 7 and 8 of the description of the GPA as filed in conjunction with the above mentioned fifth sentence constitutes a basis for this amendment. In these respects, the respondent essentially argued that a skilled reader will immediately realize that the protection of the robot arm against kicks of the animal can be achieved by arranging a pivot element between two adjacent portions of the robot arm and not necessarily between the first portion 28 and the second portion 32 as shown in Figures 2 and 3.

4.2.1 The board cannot accept this argument for the following reasons:

(i) Feature B" represents a generalisation of the specific example of robot arm referred to in the description of the GPA as filed (see section 2.3 above) in so far as it also defines possible ways of arranging a "pivoting element (30)" other than that shown in Figures 2 and 3.

(ii) The passage in the description of the GPA to which the respondent referred (column 8, lines 7 to 15) reads as follows:

"In this embodiment, this can be achieved by having the further portion of the robot arm 6 arranged capably of pivoting relative to

the first portion thereof about a pin 30 against the action of an excess load spring 29. In the unloaded condition, the further portion of the robot arm 6 is pulled against the first portion 28 of the robot arm 6 by the intermediary of a rubber buffer 31 (see Figure 3)".

This passage, which is inserted in the paragraph bridging column 7 and 8 which clearly relates to Figures 2 and 3 (see particularly column 7, line 49: "Figure 2 shows ..."; and column 8, line 15: "(see Figure 3)") , refers to reference signs (6, 28, 39, 30 and 31) which are used in Figures 2 and 3. Therefore, this passage cannot be isolated from the context of Figures 2 and 3, which show a pin 30 arranged between the first portion 28 and the second portion 32 of the robot arm.

Thus, the passage itself cannot disclose a pivoting element which is arranged between two portions of the robot arm which are other than the first portion 28 and the second portion 32.

- (iii) In order to ensure a downwardly directed deflecting movement of the end portion of a robot arm consisting of four portions as shown in Figure 2, it could be possible not only to arrange a horizontal pivoting pin between first and second portions but also between second and third portion as well as between third and fourth (or end) portion of the robot arm.

However, it has to be noted that the second portion 32 and third portion 33 are already connected by means of a vertical pivoting pin 35 and that the end portion 34 is movable axially relative to third portion 33. Thus, the arrangement of a horizontal pivoting pin between second and third portions or between third and fourth portions would lead to a complicate structure.

Therefore, the skilled reader would not find in the passage referred to by the respondent any suggestion to arrange the pivoting element between two portions of the robot arm which are other than the first portion 28 and the second portion 32.

- 4.3 Therefore, the GPA as filed does not contain a clear and unequivocal basis for feature B".

- 4.4 Moreover, it has to be noted that feature B" refers to the expressions "pivoting element" and "spring" which are not identical with the expressions "[pivoting] pin" in "excess load spring" used in the passage in column 8, lines 7 to 15 of the description of the GPA.
 - 4.4.1 The expression "pivoting element" is clearly more general than the expression "[pivoting] pin" and has no basis in the GPA as filed so that it would contravene Article 123(2) EPC. However, since the appellant during the oral proceedings declared to be ready to amend the expression "pivoting element" into "[pivoting] pin" this further violation of Article 123(2) EPC would not

have been decisive for the finding of the present decision.

5. Having regard to the above considerations, Article 100(c) EPC prejudices the maintenance of the patent on the basis of claim 1 of the patent as granted upon which the main request of the respondent is based, while the subject-matter of each of the independent claims 1 upon which first and second auxiliary request are based - due to amendments made by the respondent - extends beyond the content of the GPA and, thus, contravenes Article 123(2) EPC.

Therefore, none of the requests of the respondent can be allowed.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte