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**D E C I S I O N**  
**of 10 January 2005**

**Case Number:** T 0254/03 - 3.2.4

**Application Number:** 93200620.8

**Publication Number:** 0562655

**IPC:** A01K 15/02

**Language of the proceedings:** EN

**Title of invention:**

A milking machine for automatically milking animals

**Patentee:**

MAASLAND N.V.

**Opponents:**

DeLaval International AB

Prolion B.V.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 106(1), 108, 112(1)(a)

EPC R. 64(a), 65

**Keyword:**

"Admissibility of the appeal (no)"

"Referral to the Enlarged Board (no)"

**Decisions cited:**

T 0154/90, J 0016/94, T 0460/95

**Catchword:**

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Case Number: T 0254/03 - 3.2.4

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.4  
of 10 January 2005

**Appellant:** Prolion B.V.  
(Opponent) Kromme Spieringweg 248B  
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**Representative:** 't Jong, Baastian Jacobus  
Arnold & Siedsma  
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**Respondent:** MAASLAND N.V.  
(Proprietor of the patent) Weverskade 10  
NL-3155 PD Maasland (NL)

**Representative:** Corten, Maurice Jean F.M.  
Octrooibureau van der Lely N.V.  
Weverskade 110  
NL-3147 PA Maassluis (NL)

**Party as of right:** DeLaval International AB  
(Opponent) P.O. Box 39  
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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 11 December 2002  
rejecting the opposition filed against European  
patent No. 0562655 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** M. Ceyte  
**Members:** C. Scheibling  
H. Preglau

## Summary of Facts and Submissions

I. By its decision dated 11 December 2002 the Opposition Division rejected the opposition which was filed against the patent as a whole and based on Article 100(a), (b) and (c) EPC. On 10 February 2003 the Appellant (opponent II) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 22 April 2003.

II. The Appellant made the following request: "If the Board of Appeal agrees that the implicit feature linking the detection means and the expelling means forms no part of claim 1 under review, the Appellant requests to allow the public disclosure of prior art as specified in D15 (Affidavit of Mr Dessing) in the proceedings and request revocation of the patent due to lack of novelty or lack of inventive step based on the documents and arguments filed during the opposition proceedings".

The Appellant further requested that the following questions be referred to the Enlarged Board of Appeal: "The question of differences in interpretation of claims according to Article 69 EPC and its protocols, and whether this interpretation allows features not mentioned in the wording of the claim to be introduced in the scope of the claim when reviewing novelty and inventive step. Also review of the consequences of this interpretation for the application of Article 84 is requested."

III. The Respondent (patentee) requested that the appeal be dismissed as inadmissible. Oral proceedings were also provisionally requested by the Respondent.

- IV. On 7 May 2004 the Board issued a communication indicating that the appeal appeared to have been filed conditionally and that, in these circumstances, the appeal was likely to be considered inadmissible. A period of two months was given to the parties to file observations.
- V. The Appellant requested an extension of two months of the given period. This extension was granted and elapsed the 19 September 2004 without any observations being filed by the Appellant.

### **Reasons for the Decision**

1. *Admissibility of the appeal*
- 1.1 An appeal has not only to be filed, but it has also to fulfil all the formal requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC.
- 1.2 One of the main objects of the provisions of Article 108 EPC, first sentence, and of Rule 64(b) EPC is to provide legal certainty as to whether or not a decision of the EPO is contested. A notice of appeal must not therefore raise or leave doubts whether a party indeed wished to contest a decision by means of an appeal. This is not only important in view of the time limit under Article 108 EPC, first sentence but, in particular, in view of the suspensive effect of pending appeals according to Article 106(1) EPC, last sentence, which may affect the rights of third parties.

1.3 Thus, the question arises as to whether the appeal complies with Rule 64(b) EPC which stipulates that the notice of appeal should contain a statement identifying the extent to which amendment or cancellation of the decision is requested.

According to the case law of the Boards of appeal, such a statement must be an **explicit** and **unequivocal statement of a definite** (i.e. firm) **intention to contest the decision** (see T 460/95, OEB OJ 1998, 588, section 5, ultimate paragraph).

In the present case, the Appellant's letter reads: "If the Board of Appeal agrees that the implicit feature linking the detection means and the expelling means forms no part of claim 1 under review, the Appellant requests ..."

In the Board's view this cannot be understood otherwise than that the Appellant wished to have his appeal considered **only** if the Board did agree "that the implicit feature linking the detection means and the expelling means forms no part of claim 1 under review".

Thus, in the present case, the appeal is filed conditionally. As such, it does not comply with the requirements of Rule 64(b) EPC (see J 16/94, OEB OJ 1997, 331, sections 6.1 and 6.5).

1.4 Although the Appellant criticised the Opposition Division's view that claim 1 comprised, *de facto*, an implicit feature linking the detection means and the expelling means, this interpretation had no direct influence on the final decision.

As a matter of fact, with respect to novelty, the Opposition division found that D9 (DE-B-1 782 215) failed to disclose detection means able to detect the partial removal of a cow and that the expelling means of D9 were not designed such as to be movable towards the exit of the milking parlour. With respect to inventive step, the Opposition Division found that the sensor configuration shown in D2 (Operating manual for "Autotandem") did not allow a differentiated detection of a cow standing half way out of the box but not yet out of the parlour. Even if the parlour were to be considered as a single box, the Opposition division found that the photocell of D2 would have been unable to tell whether the cow was partly or totally out. Therefore, the Opposition division concluded that even if combining the teaching of D2 with the expelling means of D3 (US-A-3 805 742) or the teaching of D9 with the pusher gate of D10 (US-A-3 703 884) a skilled person would not have arrived at the claimed solution.

1.5 Consequently, the Appellant has left it entirely to the Board and the Respondent (patentee) to conjecture why the Appellant has considered the decision relating to the maintenance of the patent in the amended form to be defective. It is precisely this situation which, according to the established jurisprudence of the Boards of Appeal of the EPO, the requirement that grounds for appeal be filed is designed to prevent.

The Opposition division in its decision came to the conclusion that the subject-matter of claim 1 was novel and inventive over the cited prior art. The written statement of the Appellant gives no reasons seeking to demonstrate that the subject-matter of claim 1 lacks novelty or inventive step having regard to the cited prior art. The Appellant merely "requests revocation of the patent due to lack of novelty or lack of inventive step based on the documents and arguments filed during the opposition proceedings."

It follows that the mere reference in the written statement to what was set out by the opponent during the opposition proceedings for revocation of the impugned patent does not comply with the requirement of Article 108 EPC, last sentence, for a written statement setting out the grounds of appeal (see T 154/90, OEB OJ 1993, 505, section 1.2.3).

2. *Conclusion*

The notice of appeal does not comply with the requirements of Article 108 EPC first and second sentences and Rule 64(b) EPC.

Consequently, and in accordance with Rule 65(1) EPC, the appeal has to be rejected as inadmissible.

3. According to Article 112(1) EPC, a Board of Appeal, during proceedings on a case, may refer a question of law to the Enlarged Board of Appeal if it considers that a decision is "required". In the present case the Board considers that a decision of the Enlarged Board

of Appeal is not required since the questions to be referred stated in section II above, are immaterial to the issue of admissibility of the appeal. Expressed differently, the present decision that the appeal is inadmissible, reached on the basis of the notice of appeal and the written statement, remains the same, regardless of the answers of the Enlarged Board of Appeal to these questions, which are thus not "required". The referral to the Enlarged Board of Appeal is therefore refused.

**Order**

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

1. The appeal is rejected as inadmissible.
2. The request for referral of questions to the Enlarged Board of Appeal is refused.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte