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D E C I S I O N
of 17 June 2005

Case Number: T 0655/03 - 3.2.4

Application Number: 94203280.6

Publication Number: 0640282

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:

An implement for milking an animal

Patentee:

MAASLAND N.V.

Opponents:

DeLaval International AB
Prolion B.V.

Headword:

Closed control loop/MAASLAND

Relevant legal provisions:

EPC Art. 100(c), 123(3), 108

Keyword:

"Admissibility of the appeal (yes)"

"Extension of the protection (main request): yes"

"Subject-matter extending beyond the content of the
grandparent and parent applications as filed (auxiliary
request): yes"

Decisions cited:

T 0717/01, T 0934/02

Catchword:

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Case Number: T 0655/03 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 17 June 2005

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 8 April 2003
revoking European patent No. 0640282 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
H. Preglau

Summary of Facts and Submissions

- I. The European patent No. 640 282 was revoked by decision of the opposition division dispatched on 8 April 2003. This European patent was based upon the European patent application No. 94 203 280.6 filed as a divisional application of the previous application EP-A-467 489 (hereinafter called parent application) which in turn was filed as a divisional application of the earlier application EP-A-360 354 (hereinafter called grandparent application).
- II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 6 June 2003 and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 20 July 2003.
- III. Oral proceedings before the board were held on 17 June 2005.

The Board was informed by letter dated 13 May 2005 that opponent II (hereinafter respondent II) duly summoned, would not be attending the oral proceedings. In accordance with the provisions of Rule 71(2) the proceedings were continued without him.

During the oral proceedings the appellant submitted two amended independent claims upon which his main and auxiliary requests were based.

Claim 1 of the main request reads as follows:

"1. An implement for milking an animal, such as a cow, comprising a milking parlour, a robot arm arrangement (5, 6) with a robot arm (6) able to carry teat cups (45 to 48), sensor means (51) with the aid of which the position of the teats of the animal relative to the robot arm (6) can be determined, and control means (18, 22, 26, 36, 40, 80 to 83) for conveying the robot arm (6) in such a position under the animal's udder that the teat cups (45 to 48) can be connected to the teats of the animal, the control means (18, 22, 26, 36, 40, 80 to 83) comprising a closed positional control loop (80 to 83) for determining in a searching procedure the position of the teats relative to a reference position and for individually tracking the teats in a tracking procedure and operating cylinders (18, 22, 36, 40) controlled by said control loop (80 to 83), characterized in that the control loop (80 to 83) includes a microprocessor (80) and cylinder control electronics (81), the determined position of a first teat during the tracking procedure being used to obtain a corrected initial sensor position for a second teat."

Claim 1 of the auxiliary request reads as follows:

"1. An implement for milking an animal, such as a cow, comprising a milking parlour, a robot arm arrangement (5, 6) with a robot arm (6) able to carry teat cups (45 to 48), sensor means (51) comprising a laser with the aid of which the

position of the teats of the animal relative to the robot arm (6) can be determined, and control means (18, 22, 26, 36, 40, 80 to 83) for conveying the robot arm (6) in such a position under the animal's udder that the teat cups (45 to 48) can be connected to the teats of the animal, the control means (18, 22, 26, 36, 40, 80 to 83) comprising a closed positional control loop (80 to 83) for determining in a searching procedure the position of the teats relative to a reference position and for individually tracking the teats in a tracking procedure and operating cylinders (18, 22, 36, 40) controlled by said control loop (80 to 83), characterized in that the control loop (80 to 83) includes a microprocessor (80) and cylinder control electronics (81), the determined position of a first teat during the tracking procedure being used to obtain a corrected initial sensor position for a second teat."

IV. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of either claim 1 of the main request or claim 1 of the auxiliary request.

Opponent I (hereinafter respondent I) requested that the appeal be rejected as inadmissible or be dismissed. Respondent II requested in writing that the appeal be dismissed.

V. The appellant essentially argued that the subject-matter of claim 1 of the main request as well as of the auxiliary request did not contravene the requirements of Articles 100(c) and 123 EPC.

VI. Respondent I essentially argued that the appeal was inadmissible because the statement setting out the grounds of appeal did not indicate the legal and factual reasons why the decision under appeal should be set aside.

Reasons for the Decision

1. *Admissibility of the appeal*

1.1 In accordance with the jurisprudence of the boards of appeal (see for instance T 717/01 or T 934/02), an appeal of the patent proprietor is to be considered as sufficiently substantiated to satisfy the requirements of Article 108 EPC, third sentence, even if it does not state any specific reason why the decision is contested, provided that two criteria are met:

(i) there is a change in the subject of the proceedings due to the filing of amended claims together with the statement setting out the grounds of appeal,

(ii) the reasons for the decision are no longer relevant in view of the amended claims.

1.2 In the present case, the appellant filed with the statement setting out the grounds of appeal amended claims 1 to 8.

This statement contains the following sentence which refers to the amended claim 1 and to two passages of the decision under appeal:

" ... in the newly formulated claim 1 we have added the features as suggested by the Opposition Division on page 3, point b) and page 4, point d) of the Grounds of the decision".

The features added "in the newly formulated claim 1" specify that the sensor means is of the type "comprising a source of electromagnetic radiation, such as a source of infrared radiation or a laser" and that the position of a first teat is determined "during the tracking procedure".

In its decision, the opposition division *inter alia* considered that the subject-matter of claim 1 as granted - due the absence of the above quoted features - extended beyond the content of the earlier applications from which the patent has been derived.

Thus, the statement setting out the grounds of appeal shows that there is a causal relationship between the amended claim 1 and the reasons given in the decision under appeal. In other words, the reader of the statement setting out the grounds of appeal - bearing also in mind the content of the decision under appeal - will immediately understand that the reasoning in the decision under appeal, in view of the amended claim 1, no longer applies.

- 1.3 Respondent I submitted that the appeal had to be deemed as inadmissible because it was not *prima facie* clear

that the amended claim 1 submitted with statement setting out the grounds of appeal met the objections raised by the opposition division in the decision under appeal.

1.3.1 The board cannot accept this argument because it relates to the prospect of success of the appeal rather than to its admissibility. In other words, the irrelevancy of an amendment with respect to the reasons given in the appealed decision may lead to an unsuccessful outcome of the appeal but cannot of itself render it inadmissible.

1.4 Accordingly, the appeal complies with the requirements of Article 108 EPC, third sentence. Since it meets the further criteria set out in Articles 106 to 108 and in Rule 64 EPC, the appeal is admissible.

2. *Main request (Article 123(3) EPC)*

2.1 Claim 1 of the main request differs from claim 1 as granted in that the terms "electromagnetic sensor means" have been replaced by the terms "sensor means (51)".

2.2 This amendment results in an extension of the scope of protection in so far as the amended claim 1 also covers implements comprising a sensor means which is not "electromagnetic".

2.3 In these respects the appellant argued as follows:

Since the description of the patent (columns 5, lines 35 and 40) discloses "sensor means" in a general way,

the expression "electromagnetic sensor means" in claim 1 as granted has to be construed as defining "sensor means". Therefore, this amendment does not result in an extension of the scope of protection and serves to eliminate an inconsistency between claim 1 and the description of the patent as granted.

- 2.3.1 The board cannot accept this argument for the following reasons:

The word "electromagnetic" characterises the expression "sensor means" in so far as it defines the nature of the sensor.

The description of the patent refers not only to a "sensor means" in a general way but also to a sensor means comprising "a transmitter element constituted by a laser" (see column 6, lines 30 to 39). Since the terms "electromagnetic sensor means" represent a generalisation of the a more specific electromagnetic sensor referred to in the description of the patent, i.e. of an electromagnetic sensor which comprises *inter alia* a laser, there is no inconsistency between the claims and the description of the patent as granted.

- 2.4 Therefore, the main request cannot be allowed because claim 1 contravenes the requirements of Article 123(3) EPC.

3. *Auxiliary request (Article 100(c) EPC)*

- 3.1 Claim 1 of the auxiliary request contains the following features which were also specified in claim 1 as granted:

"... the control means (18, 22, 26, 36, 40, 80 to 83) comprising **a closed positional control loop** (80 to 83) for determining in a searching procedure the position of the teats relative to a reference position and for individually tracking the teats in tracking procedure and operating cylinders (18, 22, 36, 40) controlled by said control loop (80 to 83), characterized in that the control loop (80 to 83) includes a microprocessor (80) and a cylinder control electronics (81) ..." (emphasis added).

3.2 With respect to these features, it has to be noted that the expression "closed positional control loop" cannot be found either in the parent application as filed or in the grandparent application as filed.

3.3 In these respects, the appellant essentially argued that Figures 9 to 11 and the corresponding text of the description of parent and grandparent applications implicitly disclose a closed positional control loop and represent a basis for the features referred to in section 3.1 above.

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

According to the description of the parent application (see column 3, lines 56 to 58) as well as of the grandparent application (column 6, lines 16 to 18) as filed, "Figure 9 shows a block diagram in illustration of the position of the teats of an animal's udder", while Figure 10 and 11 respectively show flow diagrams of the teat searching and tracking procedures "effected

in the microprocessor constituting part of the circuit shown in Figure 9".

Figure 9 shows four operating cylinders 40, 36, 22 and 18 and a circuit comprising **four cylinder control electronics 81**, each being associated with the corresponding operating cylinder. Each cylinder control electronics 81 supplies the actual position of the corresponding operating cylinder via **a multiplexer/analog-digital converter 82** to **a microprocessor 80**, wherein the microprocessor supplies the desired position of operating cylinders 40 and 36 via **a converter/multiplexer 83** to the control electronics corresponding to cylinder 36 and 40, while the desired position of operating cylinders 22 and 18 is supplied from the microprocessor directly to the control electronics corresponding to cylinders 22 and 18 (grandparent application as filed , column 13, lines 19 to 47; parent application as filed: column 11, lines 2 to 30). Thus, the circuit shown in Figure 9 includes at least four closed positional control loops.

Furthermore, the microprocessor 80 is represented in Figure 9 as being connected to **the microprocessor 76** (shown in Figure 7) from which the data d (distance from the sensor means 51 to the object), α_1 and α_2 (initial angle and final angle of the laser beam moving across the object) are supplied (grandparent application as filed: column 12, line 56 to column 13, line 5; parent application as filed: column 10, lines 39 to 46). By means of this circuit not only the searching procedure (as diagrammatically shown in Figure 10) but also the tracking procedure (as diagrammatically shown in Figure 11) are carried out.

Thus, the above mentioned feature in claim 1 as granted - in so far it defines "a closed positional control loop" controlling "operating cylinders (18, 22, 36, 40) and including "a microprocessor (80)" and "cylinder control electronics (81)" (without indicating that there is a control loop for each operating cylinder and without referring to a further microprocessor 80, to a multiplexer/analog-digital converter 82 and to a converter/multiplexer 83) represents a generalisation of specific features described in detail in the description of the parent and grandparent applications, without there being a basis for such a generalisation either in the grandparent application or in the parent application as filed.

3.3.2 Thus, due to the features mentioned in section 3.1 above, the subject-matter of claim 1 of the auxiliary request extends beyond the content of the grandparent application as well as of the parent application as filed.

3.4 During the oral proceedings the appellant declared to be prepared to amend the features mentioned in section 3.1 so as to define a first closed positional control loop for determining the position of the teats in a searching procedure and a second closed positional control loop for determining the position of the teats in a tracking procedure.

3.4.1 The board did not take into consideration this appellant's proposal because - having regard to the considerations in section 3.3.1 above - it would not have lead to amended features which have a clear and

unambiguous basis in the grandparent application and in the parent application as filed.

3.5 Therefore, the ground for opposition mentioned in Article 100(c) EPC prejudices the maintenance of the patent on the basis of the auxiliary request.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte