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D E C I S I O N
of 29 September 2005

Case Number: T 1008/03 - 3.2.04

Application Number: 98200711.4

Publication Number: 0853875

IPC: A01J 5/017

Language of the proceedings: EN

Title of invention:

Device and method for automatically milking animals

Patentee:

PROLION B.V.

Opponent:

Maasland N.V.

Headword:

-

Relevant legal provisions:

EPC Art. 84, 100(a), 100(b), 100(c), 123(2)

Keyword:

"Added subject-matter - main request, first and second
auxiliary request (yes), fourth auxiliary request (no)"

"Clarity, sufficiency of disclosure - fourth auxiliary request
(yes)"

"Novelty and inventive step - fourth auxiliary request (yes)"

Decisions cited:

G 0009/91, T 0409/91

Catchword:

-



Case Number: T 1008/03 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 29 September 2005

Appellant:
(Opponent)

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Representative:

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Respondent:
(Proprietor of the patent)

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Representative:

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 8 August 2003
rejecting the opposition filed against European
patent No. 0853875 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
T. Bokor

Summary of Facts and Submissions

I. The European patent 0 853 875 is based on the European patent application 98 200 711 filed as a divisional application of the earlier application D1: WO-A-96 03031 (parent application).

By its decision dated 8 August 2003 the Opposition Division rejected the opposition. On 22 September 2003 the Appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 11 December 2003.

II. Opposition was filed on the grounds based on Article 100(a) and (c) EPC.

III. The following documents played a role in the present proceedings:

D2: EP-A-0 566 201

D3: EP-A-0 567 191

D4: EP-A-0 582 350

IV. Oral proceedings took place on 29 September 2005.

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

He mainly argued as follows: The object of the present patent is different from the object of the parent application D1. Furthermore, there is no basis in D1 for the statement that a cow can be guided back to the

waiting area independently of the detection of an unsuccessful teat cup connection. Moreover there is no basis in D1 for claiming a "switchable" gate which is broader than the term "swing gate" disclosed in D1. The device according to claim 1 does not comprise an "identification system" which is one of the essential features needed to define the invention. It is unclear between which areas the "exit fence" is located.

The invention as defined in the fourth auxiliary request does not meet the requirements of Article 100(b) EPC because it is not indicated on what basis the access sluice is operated.

The device according to claim 1 of the fourth auxiliary request lacks inventive step, since it is obvious for a skilled person confronted with the problem of unsuccessful milking to provide a "return" gate between the milking stall and the waiting area and to control said gate accordingly. For the same reasons the subject-matter of independent method claim 3 also lacks an inventive step.

The Respondent (patentee) countered the Appellant's arguments and mainly argued as follows:

The object of the present invention is described in D1 with respect to claim 5. The switchable gate is part of the exit fence 7 which is a separating device. Therefore, the disclosure in the earlier application of the exit fence is not limited to swivel gates. The "identification system" is not considered to be essential to the invention. The relation between the

exit fence and the different areas is clear from claim 1 seen in the light of the description.

The method claim has been limited to the situation specified in D1 where an animal is guided back to the waiting area if the attachment of the teat cups is unsuccessful.

None of the documents D2 to D4 discloses or suggests the subject-matter of claim 1, whether seen alone or in combination with each other.

The Respondent requested that the patent be maintained as amended in accordance with the main request or in accordance with one of the first, second, fourth or fifth auxiliary requests as filed during the oral proceedings. The former third auxiliary request was withdrawn.

V. The independent claims read as follows:

Main request:

"1. Device for automatically milking animals comprising inter alia one or more milking stalls (5', 5") each provided with an entrance gate (21) and an exit gate (22), a waiting area (2) where the animals are waiting before entering the milking stalls (5', 5") and a feeding and watering area (3), connectible to the exit gate of a milking stall, characterized in that there are provided a control system (25) for controlling the automatic milking of the animal and an exit fence (7) with a switchable gate (19) for connecting a milking stall (5', 5") with the waiting area (2) in such a way

that the animal can walk from the milking stall to the waiting area"

"3. Method for automatically milking animals, comprising admitting the animals from a waiting area (2) into a milking stall (5', 5"), and opening, after milking, gates (17, 19, 22) so that the animal can walk from the milking stall (5', 5"), characterized in that said milking is being controlled by a control systems (25), whereby the gates (17, 19, 22) are opened by the control system in such a way that the animal can walk from the milking stall (5', 5") to the waiting area (2) if the control system determines that the placing of the teatcups on the teats has not been completed successfully."

First auxiliary request:

"1. Device for automatically milking animals comprising inter alia one or more milking stalls (5', 5") each provided with an entrance gate (21) and an exit gate (22), an access gate (6) for selecting milk-ripe animals, a waiting area (2) where the selected as milk-ripe animals are waiting before entering the milking stalls (5', 5") and a feeding and watering area (3), connectible to the exit gate of a milking stall, characterized in that there are provided a control system (25) for controlling the automatic milking of the animal and an exit fence (7) with a switchable gate (19) for connecting a milking stall (5', 5") with the waiting area (2) in such a way that the animal can walk from the milking stall to the waiting area"

"3. Method for automatically milking animals, comprising selecting milk-ripe animals and admitting these animals into a waiting area, admitting the animals from the waiting area (2) into a milking stall (5', 5"), and opening, after milking, gates (17, 19, 22) so that the animal can walk from the milking stall (5', 5"), characterized in that said milking is being controlled by a control system (25), whereby the gates (17, 19, 22) are opened by the control system in such a way that the animal can walk from the milking stall (5', 5") to the waiting area (2) if the control system determines that the placing of the teatcups on the teats has not been completed successfully."

Second auxiliary request:

"1. Device for automatically milking animals comprising inter alia one or more milking stalls (5', 5") each provided with an entrance gate (21) and an exit gate (22), a lying and walking area (1), an access gate (6) for selecting milk-ripe animals, a waiting area (2) where the selected as milk-ripe animals are waiting before entering the milking stalls (5', 5") and a feeding and watering area (3), connectible to the exit gate of a milking stall, characterized in that there are provided a control system (25) for controlling the automatic milking of the animal and an exit fence (7) with a switchable gate (19) for connecting a milking stall (5', 5") with the waiting area (2) in such a way that the animal can walk from the milking stall to the waiting area"

Claim 3 of the second auxiliary request has the same wording as claim 3 of the first auxiliary request.

Fourth auxiliary request:

"1. Device for automatically milking animals comprising inter alia one or more milking stalls (5', 5") each provided with an entrance gate (21) and an exit gate (22), a lying and walking area (1), an access sluice (6) for selecting milk-ripe animals, a waiting area (2) where the selected as milk-ripe animals are waiting before entering the milking stalls (5', 5") and a feeding and watering area (3), connectible to the exit gate of a milking stall, characterized in that there are provided a control system (25) for controlling the automatic milking of the animal and a swing gate (19) for connecting a milking stall (5', 5") with the waiting area (2) in such a way that the animal can walk from the milking stall to the waiting area without passing the access sluice (6)"

"3. Method for automatically milking animals, comprising selecting milk-ripe animals by means of an access sluice (6) and admitting these animals into a waiting area, admitting the animals from the waiting area (2) into a milking stall (5', 5"), and opening, after milking, gates (17, 19, 22) so that the animal can walk from the milking stall (5', 5") to a feeding and watering area, characterized in that said milking is being controlled by a control system (25), whereby the gates (17, 19, 22) are opened by the control system in such a way that the animal can walk from the milking stall (5', 5") to the waiting area (2) without passing the access sluice (6) if the control system determines that the placing of the teatcups on the teats has not been completed successfully."

Reasons for the Decision

1. The appeal is admissible.
2. *Main request, first and second auxiliary requests:*
 - 2.1 Claim 1 of all these requests comprises the term "switchable gate" either as being part of an exit fence or not.

However, the description as filed (see page 3, lines 3 to 9) and the parent application D1 (see page 3, lines 12 to 18) solely refer to a "swing gate 19". However, the term "swing gate" implies that the gate is pivoted at one of its ends, whereas the term "switchable gate" is broader in that it also covers a gate which can be rolled along a rail between two end positions.

Therefore, the term "switchable gate" introduces subject-matter which is not directly and unambiguously derivable either from D1 or from the application as originally filed.

- 2.2 The Respondent argued that, as disclosed in claim 3 of D1, an essential feature of the invention is the separating device also called exit fence, the gate only being a part of it. Therefore, it would be clear for a person skilled in the art that the type of gate, i.e. whether or not it is supported on pivots is irrelevant to the claimed invention.

Nevertheless, the only type of gate disclosed in D1 with respect to the exit fence is a swing gate, and the subject-matter generated by the generalised feature "switchable gate" is not supported either by the parent application or by the originally filed application.

2.3 Consequently, the main request, the first and second auxiliary requests do not meet the requirements of Article 100(c) EPC and thus are not allowable.

3. *Fourth auxiliary request:*

3.1 Amendments with respect to the claims as granted:

3.1.1 Claim 1 according to the fourth auxiliary request differs from claim 1 as granted in that:

- the feature "a lying and walking area (1)" has been added. This feature is disclosed in the description as filed page 2, lines 26 to 30 and in D1 page 2, line 37 to page 5, line 1;
- the feature "an access sluice (6) for selecting milk-ripe animals", and the indication the animals waiting in the waiting area are "the selected as milk-ripe animals" have been added. These features are disclosed in the description as filed page 4, lines 31 to 36 and in D1 page 4, line 38 to page 5, line 3;
- "exit area" has been amended to "feeding and watering area". This modification is based on the description as filed page 2, lines 33 to 35,

page 5, lines 10 to 13 and Figure and in D1 page 3, lines 4 to 6, page 5, lines 14 to 17 and Figure;

- "switchable gate" has been amended to read "swing gate". This feature is disclosed in the description as filed page 3, lines 3 to 5 and in D1 page 3, lines 12 to 14;

- "without passing the access sluice (6)" has been added. This feature is derivable from the description as filed, page 5, lines 18 to 23 and the Figure and in D1 page 5, lines 22 to 27 and the Figure.

3.1.2 Claim 3 according to the fourth auxiliary request differs from claim 3 as granted in that:

- "selecting milk-ripe animals by means of an access sluice (6) and admitting these animals into a waiting area" has been added. These features are disclosed in the description as filed page 4, lines 31 to 36 and in D1 page 4, line 38 to page 5, line 3;

- the features "to a feeding and watering area" and "without passing the access sluice (6)" have been added. These features are disclosed in the description as filed page 5, lines 10 to 13 and 18 to 23 and the Figure and in D1 page 3, line 6, page 5, lines 14 to 17 and lines 22 to 27 and the Figure;

- the alternative condition "or the milking" has been removed.

3.1.3 Consequently, the amendments made are not objectionable under Article 123(2) and (3) EPC.

3.2 Article 100(c) and 84 EPC.

3.2.1 The Appellant objected that the "object of the invention" of the patent in suit is not derivable from the parent application D1. In his view there was no disclosure of the object of the divisional application in isolation from the subject-matter of the parent application.

It is clear that the aim of filing a divisional application is to obtain protection for subject-matter which may not be claimed as such in the parent application, e.g. because it would result in a lack of unity of invention. Thus, the object of the divisional application is in principle not identical with the object of the parent application. However, such object must be directly and unambiguously derivable from the parent application. In this respect the following is to be observed:

The parent application D1 in its claims 3 and 5 relates to a device wherein the exit of the milking stall can be connected to the waiting area and a method wherein when connection of the milking device has failed repeatedly the animal is guided back to the waiting area.

Reference is also made to the description of D1, which states that only cows that are to be milked are guided in the direction A1 (see paragraph bridging pages 4 and

5), that is in the waiting area 2 (see figure); if the connection of the teat cups to the teats has not been successful, the cow is then guided in a direction C3 (page 5, lines 22 to 26) that is into the waiting area 2, whereafter it can re-enter the milking parlour 5.

Therefore, the object of the patent in suit, which according to its paragraph [0004] is to "provide a device in which a cow can be guided back from the milking stall into the waiting area, so that she may enter the milking stall a second time", is clearly supported by the parent application.

- 3.2.2 The Appellant also considered that the provision of an "identification system" was an essential feature of the invention according to the patent in suit.

He argued that without this feature, claim 1 would also cover the case where a herd was divided in groups and where a group of animals would be considered to be milk ripe after a certain period of time has elapsed and thus, urged into the waiting area. Consequently, he concluded that the subject-matter of claim 1 of the divisional application extends beyond the content of the parent application D1.

This point of view cannot be shared by the Board. In claim 1 in suit, there is indicated "an access sluice (6) for selecting milk-ripe animals". This implies that a selection is performed, which means that not necessarily all animals of a group are admitted into the waiting area. Furthermore, this selection is to be performed by the access sluice. This would not be the

case in the example given by the Appellant. In fact, a skilled person would consider that the active selection of milk ripe animals according to claim 1 implies the presence of an identification system, which thus, is implicitly disclosed. Furthermore, according to claim 1, the device is provided with a control system for controlling the automatic milking of the animals. Automatic control of the milking implies that the milking robot is supplied with individual data concerning the animal to be milked and that the milk yield of the animal is recorded. This also implies that the animal has previously been identified by a system.

- 3.2.3 The Appellant also argued that claim 1 does not make clear that the access sluice connects the lying and walking area with the waiting area.

However, this feature is implicit for a skilled person when reading the claim in the light of the description.

- 3.2.4 Thus, the objections raised under Articles 100(c) and 84 EPC do not prejudice the maintenance of the patent as amended in accordance with the fourth auxiliary request.

3.3 Article 100(b) EPC:

- 3.3.1 The Appellant considered that due to the introduction of the feature "an access sluice (6) for selecting milk-ripe animals" into the wording of claim 1, the invention was no longer sufficiently clear and complete for it to be carried out by a skilled person, because it was not indicated as to how an access sluice could select milk ripe animals. He also considered that this

ground for opposition resulted directly from the amendment made, so that in the light of G 9/91 it would not constitute a fresh ground for opposition.

However, it is well established by the case law of the Boards of Appeal that sufficiency of disclosure within the meaning of Article 100(b) EPC must be assessed on the basis of the patent as a whole - including the description and the figures - and not of the claims alone. The patent clearly indicates that the access sluice is provided with an identification system and thus, a skilled person is provided with the information necessary to carry out the invention.

In fact, the objection raised by the Appellant is rather an objection under Article 84 EPC since the Appellant considers that not all features necessary to define the invention are present in claim 1 (see decision T 409/91, OJ 1994, 653, point 3.2 of the reasons).

This objection has already been dealt with in section 3.2.2 above.

3.3.2 Consequently, the ground for opposition based on Article 100(b) EPC does not prejudice the maintenance of the patent in suit as amended in accordance with the fourth auxiliary request.

3.4 Novelty and inventive step:

3.4.1 The Board is satisfied that novelty of the independent claim according to the fourth auxiliary request is

given. This point was no longer disputed by the Appellant.

- 3.4.2 Concerning inventive step the Appellant referred to his written submissions, which read "... the subject-matter of claim 1 ... would lack an inventive step, as the most obvious solution to the skilled person confronted with the problem of unsuccessful milking in the milking stall would be to provide a "return" gate between the milking stall and the waiting area, and to control the gate accordingly. Similarly, claim 3 also lacks an inventive step."

This submission can only be considered to be speculative since no corresponding evidence has been provided. As a matter of fact, none of D2 to D4 gives any hint how to proceed when milking was unsuccessful. On the contrary, in the document cited in the description of the patent in suit, "Back to the Future, Dairy Farmer, May 1986, pages 44 to 47" it is indicated that cows with known problems are diverted into an area for manual milking. Thus, this appears rather to be an indication that it was current practice to milk manually cows having problems. This document also indicates that eager cows are not admitted into the milking stalls, whereas cows having problems in the milking stalls (which kick off the cluster) are collected in a separate area for observation. There is no indication that such cows could be recirculated.

- 3.4.3 Consequently, the Appellant failed to provide a convincing reasoning in support of his objection of lack of inventive step and, as has been explained above, the cited prior art documents do not prejudice the

patentability of the subject-matter of claim 1 according to the fourth auxiliary request.

The same conclusions apply mutatis mutandis to the subject-matter of claim 3.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent in the following version:

Description: columns 1 and 2 as filed during oral proceedings,
columns 3 and 4 of the patent specification.

Claims: 1 to 3 filed as fourth auxiliary request during oral proceedings.

Drawings: Figure of the patent specification.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte