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D E C I S I O N
of 22 November 2005

Case Number: T 0135/04 - 3.2.04

Application Number: 95201720.0

Publication Number: 0689762

IPC: A01K 1/12

Language of the proceedings: EN

Title of invention:
An implement for automatically milking animals

Patentee:
Maasland N.V.

Opponent:
Prolion B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 99, 100(a)
EPC R. 71(2)

Keyword:
"New document filed with the statement of grounds of appeal - (admitted)"
"Inventive step (yes)"

Decisions cited:
T 0113/96

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0135/04 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 22 November 2005

Appellant: (Opponent)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 26 November 2003 rejecting the opposition filed against European patent No. 0689762 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 26 November 2003 the Opposition Division rejected the opposition. On 27 January 2004 the Appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 5 April 2004.

II. The opposition was filed on the grounds based on Article 100(a) EPC (lack of inventive step).

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

D1: US-A-3 937 297

D2: EP-A-0 091 892

D7: AT-B-271 078

IV. Claim 1 as granted reads as follows:

"1. A construction including an implement for milking animals (8), using one or more milking robots (15), and a movable floor, characterized in that, dependent on the capacity of the milking robots (15), the speed at which the floor moves is automatically variable or the motion can be halted, as the case may be, while furthermore the milking robot (15) is placed next to the movable floor and is capable of being moved reciprocatingly along a part of the movable floor."

V. Oral proceedings before the Board took place on 22 November 2005.
Although duly summoned, the Appellant (opponent) did not appear. Indeed, the Appellant informed the Board by a letter dated 7 October 2005 that he will not attend the oral proceedings. According to the provisions of Rule 71(2) EPC the proceedings were continued without him.

In his written submission the Appellant requested that the decision under appeal be set aside and that the patent be revoked.

He mainly argued as follows: D7 concerns a milking installation with a movable floor, whose purpose is to improve the automatic milking of the animals. In D7 cows enter on the movable floor and a milker attaches the teat cups to the animals. The speed of the movable floor is automatically variable and can be stopped dependent on the time required by the milker for attaching the teat cups to individual animals. A skilled person seeking to improve the installation described in D7 will look for ways how to ease the workload of the milker. D1 discloses an embodiment in which the milker is seated next to the movable floor and can be moved reciprocatingly along a part of it. Further technical developments will lead the skilled person to replace the milker by a milking robot as described in D2. For these reasons the subject-matter of claim 1 does not involve an inventive step.

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

Late filed document D7 is not highly relevant and should be disregarded. D7 describes a rotary milking parlour with a plurality of milking places. The rotary parlour has an entrance and an exit area and opposite to the entrance area an area where the milker is located during connection of the teat cups to the animal. In this area there is arranged a detection device provided with photoelectric cells which detect when the operator remains between the photoelectric cells. As a reaction of such detection the speed at which the floor moves is slowed down. Thus the regulating means only respond when the milker moves in-between the photoelectric cells. The implement according to D7 is not suitable for robotic milking. D1 shows a rotary milking parlour provided with a movable milking chair on which the milker can ride along the milking parlour. The combination of D7 with D1 does not result in the claimed subject-matter of claim 1. In D2, the sole embodiment which illustrates a rotary milking parlour is disclosed in combination with a stationary milking robot. Therefore, a skilled person would not combine D7 with D1 and additionally with D2. Thus, the subject-matter of claim 1 as granted involves an inventive step.

The Respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. *Admissibility of D7:*

2.1 D7 was submitted with the statement setting out the grounds of appeal, that is well after the expiry of the nine-months period under Article 99(1) EPC.

2.2 However, the admissibility of D7 filed for the first time with the statement setting out the grounds of appeal would not hinder the appeal proceedings to be speedily concluded. The Board sees no reason why the consideration of this new material would significantly delay the appeal proceedings.

2.3 Furthermore, D7 is considered by the Appellant only in combination with arguments, facts and evidence already on file (D1 and D2). This new document aims at rendering more convincing the existing line of attack which had not succeeded before the Opposition Division.

Therefore, the Board considers that the filing, with the statement setting out the grounds of appeal, of a new document in the framework of the existing case, in order to reinforce the line of attack already made before the first instance, is the normal behaviour of a losing party. Such document is only "completing the picture which was already presented to the first instance (see T 113/96, section 11, second paragraph).

2.4 Finally, the Board notes that the Appellant introduced this document at the earliest possible moment, that is with the statement setting out the grounds of appeal, and that the Respondent had a sufficient opportunity to assess it. In view of the above the Board in exercising

its discretion under Article 114(2) EPC decided to admit this document into the proceedings.

3. *Inventive step:*

3.1 D7 discloses a milking implement comprising a movable floor.

The problem D7 seeks to solve is to provide a system that allows varying periodically the speed at which the floor moves when a cow or the operator entering or leaving the implement risks to get jammed or when the operator leaves his working place (page 1, lines 14 to 29; page 2, lines 37 to 39 and 43 to 46).

This is achieved by providing the access area and the operator's working place with photoelectric cells which detect when any object remains between the photoelectric cells of the access area or when the operator leaves his working place. As a reaction of such detection the speed at which the floor moves is slowed down or the motion of the floor is halted.

3.2 The Appellant considers that the problem to be solved with respect to D7 would be to improve the installation and look for ways how to ease the workload of the operator.

He concludes that a skilled person would obviously provide the installation of D7 with a movable chair as disclosed in D1.

The skilled person would then further improve the installation by replacing the operator by a robot as disclosed in D2.

3.3 This cannot be accepted by the Board. If a skilled person was aware of the existence of milking robots at the priority date of the patent in suit, there is no reason why he would not immediately replace the operator by a robot instead of first providing the operator with a chair and then replacing the operator by a robot.

3.4 Furthermore, the Appellant's reasoning does not correspond to a proper "problem - solution" approach. Since each of the two proposed steps (movable chair, robot) is a potential solution to the posed problem and since the two solutions lead in different directions and are non-compatible, a skilled person would not combine said solutions but either implement the one or the other.

3.5 Moreover, D7 does not teach to vary the speed at which the floor moves or to halt the motion in dependence on the capacity of the operator, but in dependence on the presence of the operator at its working place. None of D1 or D2 discloses or suggests varying the motion of the carousel disclosed therein in dependence on the capacity of the milking system.

3.6 Therefore, even if a skilled person were to combine a construction according to D7 with a movable chair according to D1 and replace the chair by a robot as known from D2, he would not arrive at the subject-matter of claim 1 of the patent in suit.

3.7 In fact, the closest prior art document is D2.

D2 discloses a construction including an implement for milking animals (Figure 2), using a movable floor (10), and a milking robot (8) placed next to the movable floor.

The construction according to claim 1 of the patent in suit differs from that of D2 in that dependent on the capacity of the milking robot, the speed at which the floor moves is automatically variable or the motion can be halted, as the case may be, while furthermore the milking robot is capable of being moved along a part of the movable floor.

The problem to be solved by the patent in suit is to increase the capacity of the construction and especially to avoid that the robot is out of operation during the time that the platform is rotating (see patent specification column 1, lines 14 to 19).

This problem is solved by the characterising features of claim 1.

3.8 During the opposition proceedings the Appellant submitted that the construction claimed was an obvious combination of the teachings of D1 and D2.

D1 discloses inter alia (Figure 6) a rotational type milking parlour (120) where the milker is provided with and controls a mobile milking chair apparatus for moving from one cow to the next (column 1, lines 50 to 55).

3.9 The Board holds that a skilled person would not take into consideration an installation where the teat cups are attached and removed from the animal by an operator (as disclosed in D1), in order to improve the capacity of an installation comprising a computer controlled milking robot for doing it (as disclosed in D2).

However, even if the teaching of D1 were to be seen in providing a moving floor with moving teat cup connecting means (function which in D1 is fulfilled by the "milker"), this teaching would not lead a skilled person to the claimed solution.

As a matter of fact, the claimed solution provides not only for a reciprocatingly movable milking robot, but also for a movable floor, the speed at which the floor moves being automatically variable depending on the capacity of the milking robot. However, this feature is neither disclosed nor suggested by any of the documents cited in the appeal proceedings.

Consequently, a skilled person starting from the construction of D2 even if taking into account the teaching of D1 would not arrive at a construction as claimed in claim 1 of the patent in suit.

3.10 Therefore, the subject-matter of claim 1 as granted involves an inventive step with respect to D1, D2 and D7 seen alone or in combination.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis M. Ceyte