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D E C I S I O N
of 7 March 2006

Case Number: T 0136/04 - 3.2.04

Application Number: 97203807.9

Publication Number: 0836802

IPC: A01J 5/017

Language of the proceedings: EN

Title of invention:

A method of and an implement for milking animals automatically

Patentee:

MAASLAND N.V.

Opponent:

DeLaval International AB

Headword:

Dead time/MAASLAND

Relevant legal provisions:

EPC Art. 100(b), 111(1)

Keyword:

"Sufficiency of disclosure - main request (no), auxiliary request (yes) "

"Remittal for consideration of the undecided issues"

Decisions cited:

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Catchword:

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Case Number: T 0136/04 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 7 March 2006

Appellant:
(Proprietor of the patent)

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Representative:

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Respondent:
(Opponent)

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Representative:

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 16 December 2003
revoking European patent No. 0836802 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
T. Bokor

Summary of Facts and Submissions

- I. An opposition - based upon Articles 100(a) (with respect to Articles 52(4), 54(2) and 56 EPC), (b) and (c) EPC - was filed against the European patent No. 0 836 802. The opposition division revoked the patent by decision dated 16 December 2003.

The opposition division held that the invention defined by dependent claim 12 was not sufficiently disclosed in the patent so as to be carried out by a person skilled in the art (Article 100(b) EPC). The opposition division also found that the invention defined by claim 1 was sufficiently disclosed.

Claim 1 reads as follows:

- "1. A method of milking animals, especially cows, automatically, with a milking plant including a computer and making use of teat cups, characterized in that, at randomly selectable times, the monitor display of the computer and/or a printer is capable of indicating the animals of which the dead time between the instant when one of the teat cups has been connected to a teat the instant when the flow of milk from this teat has started, has exceeded the respective predetermined value as well as the extent hereof."

Dependent claim 12 reads as follows:

"12. A method as claimed in any one of claims 6 to 11, characterized in that by means of the computer an indication of heat or illness of the animal is obtained from the dead time."

- II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 27 January 2004 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 13 April 2004.
- III. Oral proceedings before the board were held on 7 March 2006.
- IV. As a main request, the appellant requested that the decision under appeal be set aside and the patent be maintained as granted. Auxiliarily, the appellant requested that the patent be maintained on the basis of the claims 1 to 18 filed with letter dated 8 February 2006 (which correspond to claims 1 to 11 and 16 to 22 as granted).

The respondent requested that the appeal be dismissed.

- V. The appellant essentially argued that both claim 1 and claim 12 as granted define inventions which are sufficiently described to be carried out by a person skilled in the art.

The respondent contested the appellant's arguments.

Reasons for the Decision

1. The appeal is admissible.
2. *Claim 1 as granted (main and auxiliary requests)*
 - 2.1 Claim 1 defines the "dead time" as the time interval between "the instant when one of the teat cups has been connected to a teat of an animal and the instant when the flow of milk from this teat has started".

As stated by the appellant himself, the "dead time" referred to in the patent specification generally refers to the start of the flow of milk and, thus, relates to the start not only of the flow of the milk present in the teat cistern (foremilk) but also of the flow of the milk present in the alveoli which is released by the milk ejection reflex (alveolar milk).

Claim 1 contains the characterising feature that a computer display or a printer is capable of indicating the animals for which the dead time has exceeded a predetermined value as well as the extent thereof. Thus, the problem underlying the invention defined by claim 1 may be seen in providing some general information about the physical condition of an animal. This is supported by the description, *inter alia* in column 2, paragraph 5, which indicates that there are situations associated with the physical condition of the animal which cause relatively large differences in dead time.

The patent describes a milking plant provided with a vacuum-sensitive sensor 26 for establishing "whether a sufficient vacuum prevails in the milk line and in the

teat cup" (see column 4, lines 54 to 57), whose output signal S4 is indicative of the instant at which the teat cup is connected, and a flow-sensitive sensor 24 capable of indicating the start of the milk flow (see column 4, lines 45 to 50).

Therefore, a skilled person would be able - on the basis of the information contained in the patent - to establish the dead time and to compare it with any "predetermined value". He would also apply the teaching given in the description that large differences in dead time are capable of providing general information about the condition of an animal.

- 2.2 In this respect, the respondent essentially argued that the dead time referred to in claim 1 is not a simple time interval between connecting a teat cup and detecting milk flow but a parameter capable of providing information of whether an animal is ill or oestrous.

The board cannot accept this argument because, as has been already stated, the desired result to be achieved by the claimed teaching is merely to provide some general information about the physical condition of an animal.

- 2.3 Therefore, the patent discloses the invention claimed in claim 1 in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC).

3. *Claim 12 as granted (main request)*

3.1 According to Claim 12, which refers to claim 1 via claim 6 (in which the dead time is defined as being determinable by means of the computer), "by means of the computer an indication of heat or illness is obtained from the dead time".

Thus, the problem underlying the invention defined by claim 12 may be seen in providing an indication of heat or illness.

In the description of the patent, it is stated that "when an animal is oestrous or ill, the dead time will generally be longer than **usual**" and that "if the predetermined value of the dead time has been exceeded **by a certain percentage**, the farmer has accordingly obtained an indication signal of the animal's heat or illness (see column 2, lines 31 to 34; emphasis added).

However, the patent specification neither indicates any usual value for the "dead time" nor contains any information necessary to determine the "certain percentage", i.e. to establish when a variation in the dead time has to be considered as an indication of heat or of illness of an animal.

3.1.1 The appellant referred to a passage of the patent specification (column 1, lines 21 to 26) and argued that this passage mentions deviation values for two animals, namely 8% for cow 38 and 13% for cow 15. However, it is not specified that these deviation values would give an indication of heat or illness of the respective animal.

3.1.2 The appellant also argued that the skilled person would find by trial and error the deviation values which are indicative of illness or heat.

However, as has been explained, the information given in column 2, lines 30 to 35 that the dead time will "generally" be longer than usual for an ill or oestrous animal or that when the dead time is exceeded "by a certain percentage" this indicates the animal's heat or illness does not provide the skilled person with sufficient information in order to achieve successfully the desired result, namely that deviations in the dead time can be used as an indication of heat or illness, since on the basis of the information in the patent that there may be some unspecified link between the dead time and the heat or illness of a cow the skilled person can only test each and every one of the cows in a herd to determine whether for each cow heat or illness can be indicated by an increase in the dead time and also what percentage of increase in the dead time and also what percentage of increase may reliably be used to determine that a cow is oestrous or ill. Such an operation which implies very extensive experiments clearly lies well beyond the bounds of normal trial and error and instead rather resembles the mounting of a substantial research programme.

Furthermore, it can reasonably be expected that the "certain percentage" for an ill animal is different from that of the same animal when it is oestrous. However, the patent does not distinguish between heat and illness.

3.2 Therefore, the patent does not disclose the invention claimed in claim 12 in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC).

3.3 Thus, the ground for opposition mentioned in Article 100(b) EPC prejudices the maintenance of the patent on the basis of the main request of the appellant, in so far as this request contains claim 12 as granted.

4. *Procedural matter*

Having regard to the considerations in section 2 above, the ground for opposition mentioned in Article 100(b) EPC does not prejudice the maintenance of the patent on the basis of the auxiliary request of the appellant, in so far as the set of claims of this request does not contain claim 12 as granted.

However, the grounds for opposition according to Article 100(c) and Article 100(a) EPC have not been considered by the opposition division. In such circumstances the case is normally remitted back to the first instance for consideration of the undecided issues.

Accordingly the Board, in exercising its discretion under Article 111(1) EPC, considers it appropriate to remit the case to the first instance, for a decision on the remaining issues concerning the auxiliary request.

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 for further prosecution on the basis of the auxiliary request.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte