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D E C I S I O N
of 1 March 2006

Case Number: T 0765/04 - 3.2.04

Application Number: 96938556.6

Publication Number: 0805622

IPC: A01J 5/017

Language of the proceedings: EN

Title of invention:

An implement for milking animals

Patentee:

MAASLAND N.V.

Opponent:

DeLaval International AB

Headword:

Open connection/MAASLAND

Relevant legal provisions:

EPC Art. 56, 84, 123

Keyword:

"Inventive step (yes) "

"Clarity (yes) "

Decisions cited:

-

Catchword:

-



Case Number: T 0765/04 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 1 March 2006

Appellant: DeLaval International AB
(Opponent) P.O. Box 39
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Representative: Lerwill, John
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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.
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NL-3147 PA Maassluis (NL)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 8 April 2004
rejecting the opposition filed against European
patent No. 0805622 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
C. Heath

Summary of Facts and Submissions

I. An opposition based upon Article 100(a) EPC was filed against the European patent No. 805 622. The opposition division rejected the opposition by decision dated 8 April 2004.

II. The opponent (hereinafter appellant) lodged an appeal against this decision on 4 June 2004 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 16 August 2004.

The following prior art played a role during the appeal proceedings:

D1: SU-1349735 and English translation thereof

D7: US-A-4 190 020

D6: SU-1351543 with English abstract

D7: SU-1281217 with English abstract

III. By letter dated 3 February 2006 the patent proprietor (hereinafter respondent) filed an amended claim 1.

IV. Oral proceedings before the board were held on 1 March 2006.

During the oral proceedings the patent proprietor filed a further amended claim 1 (hereinafter referred to as the present claim 1), which differs from the previously filed claim 1 in that the expression "in open connection" was amended into "permanently in open connection".

The present claim 1 reads as follows:

1. An implement for milking animals, such as cows, comprising a milking parlour including a milking robot for automatically connecting the teat cups (1) to the teats of an animal to be milked, which implement is additionally provided with milk container means for the milk yielded, and a milk tank for receiving the milk discharged from the milk container means, characterized in that in at least one milk line (2), between the teat cups (1) and the milk container means, there is disposed an auxiliary reservoir (7), in which a fixed quantity of milk, obtained particularly at the start of the milking process, is collected and in which the milk obtained thereafter is mainly guided to the milk container means and in that the auxiliary reservoir (7) is permanently in open connection with the relevant milk line (2) between a teat cup (1) and the milk container means."

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

The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of claim 1 filed during the oral proceedings.

VI. The appellant essentially argued that the present claim 1 did not meet the requirements of Article 84 EPC with respect to clarity.

Reasons for the Decision

1. The appeal is admissible.

2. *Admissibility of the amendments*

2.1 Amended claim 1 essentially represents the combination of the features specified in claims 1 and 5 as granted with the addition of the word "permanently" before the expression "in open connection".

During the oral proceedings the appellant had argued that the subject-matter of claim 1 filed with the letter dated 3 February 2006 could also encompass an implement in which there is no permanently open connection between the auxiliary reservoir and the milk line. The appellant submitted that the documents D6/D7 which disclose foremilk separating devices incorporating valves for closing the initially open connection between the reservoir chamber and the milk line rendered obvious the claimed device.

Thus, the amendment leading to the present claim 1 clearly represents a reaction of the respondent to this objection and is occasioned by the ground of opposition under Article 100(a) EPC (see Rule 57a EPC).

2.1.1 With respect to Article 84 EPC, the appellant asserted that

(a) the word "permanently" limits the scope of claim 1 in so far as this claim no longer includes an auxiliary reservoir which is connected to the milk

line by means of a valve comprising a float as disclosed in document D6,

and argued essentially as follows:

(b) A permanently open connection (i.e. a connection without any valve) between the auxiliary reservoir and the milk line would ensure the separation of the fore-milk to be collected in the auxiliary reservoir from the further milk to be guided to the milk container means only if between the auxiliary reservoir and the milk line there is a connecting element as shown in Figure 2 of the patent (this connecting element being not specified in the present claim 1).

(c) Therefore, the present claim 1 does not contain all essential features which are necessary for solving the technical problem of automatically separating the fore-milk from the further milk and does not meet the requirements of Article 84 EPC.

2.1.2 Having regard to the considerations in section 2.1 and to the appellant's assertion referred to in section 2.1.1(a) above, the amendments lead to a claim defining in a clear manner the matter for which protection is sought.

The technical problem which the European patent concerns is to automatically separate foremilk from the further milk because the foremilk is somewhat infected and/or is of different quality. This is accomplished by the combination of features defined in the characterising part of claim 1.

The feature concerning the connecting element arranged between the milk line and the auxiliary reservoir was claimed in the dependent claims of the application as filed, mainly in dependent claims 6 and 7, and described in the specific embodiment shown in the figures. This connecting element is neither described nor highlighted in the description as being an essential feature of the invention. Claim 1 clearly represents a functional definition of the invention which encompasses this specific embodiment.

The respondent during the oral proceedings indicated a further possibility for carrying out the claimed invention, that is an auxiliary reservoir whose inlet is directly connected to the milk line, i.e. so as to be permanently in open connection with the milk line without there being any connecting element and asserted that there will be in essence no mixing between the foremilk collected in the lower part of the auxiliary reservoir and the further milk flowing through the milk line.

In this respect, the appellant argued that such an arrangement would not properly work because the vacuum in the milk line would lead to a turbulent flow producing a mix of fore-milk and further milk.

However in the Board's judgement the skilled person would be in a position to achieve the desired result on the basis of the information in the patent specification and by using his common general knowledge, eg by shaping the auxiliary reservoir and

its outlet to particular measurements so as to reduce mixing.

Moreover, it is observed that the appellant's argument is based upon the idea that the claimed invention cannot be worked through the whole of the field claimed, i.e. that the disclosure is insufficient to enable the skilled person to carry out the "invention" over that field. In other words, the appellant's argument relates to an objection under Article 100(b) EPC which was not raised in the notice of opposition.

2.1.3 Therefore, the amended claim 1 meets requirements of Article 84 EPC.

2.2 The appellant did not raise any objection under Article 123 EPC.

The amendments leading to claim 1 can be derived from claim 5 of the application as filed (WO-A-97/18701), read in conjunction with the drawings (see particularly Figure 1 and 2) and the description of the patent (see particularly page 2, lines 18 to 23) and do not extend the protection.

Dependent claims 2 to 10 correspond to claims 2 to 4 and 6 to 11 as granted. The amendment to the description represents its adaptation to the amended claims.

The board is satisfied that the requirements of Article 123(2) and (3) EPC are not contravened.

3. *Novelty and inventive step*

3.1 The appellant did not maintain its objection to the present claim 1 with respect to lack of novelty.

As is apparent from the reasons set out below, the subject-matter of claim 1 is novel (Article 54(2) EPC).

3.2 The closest prior art is disclosed in document EP-A-682 862 (D3). This document, which discloses an implement according to the pre-characterising portion of the present claim 1, does not refer to the problem of separating the fore-milk from the yielded milk, and differs from this prior art by the features of the characterising portion of the claim, which essentially refer to "an auxiliary reservoir (7) in which a fixed quantity of milk can be collected" and which "is in permanently open connection with the milk line (2) between a teat cup (1) and the milk container means".

The problem to be solved is to ensure that the fore-milk is automatically separated from the further milk. (See column 1, lines 10 to 13 of the patent specification).

According to the claimed teaching an auxiliary reservoir is **permanently in open connection** with the milk line, i.e. not only when (at the start of the milking process) the milk flows into the auxiliary reservoir but also after a fixed quantity of milk (containing the fore-milk) has been collected in the auxiliary reservoir. Due to such a permanently open connection, the milk obtained after collection of the fixed quantity of milk is mainly guided to the milk

container means and "does not practically mix with the fore-milk present in the lower part of the auxiliary reservoir" (see column 3, line 53 to column 4, line 2 of the patent specification).

The permanently open connection between the auxiliary reservoir and the milk not only solves the problem above but also provides a simple solution in so far as an intermediate valve can be avoided.

The problem solved by the claimed teaching is referred in the prior art (see i.a. documents D1, D4, D6 or D7) and is generally solved by collecting a fixed quantity of fore-milk in a chamber (i.e. in an auxiliary reservoir) which is connected with the milk line (from the teat cups) via a valve element which closes the connection when a predetermined quantity of milk has been collected.

However, none of the available prior art documents discloses the use of an auxiliary reservoir which is **in permanently open connection** with the milk line. This was not disputed by the appellant.

Thus, the skilled person would not find in the prior art any suggestion leading him in an obvious way to the claimed subject-matter.

Therefore, the subject-matter of claim 1 involves the inventive step required by Article 56 EPC.

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 on the basis of claims 1 to 6, claim 7 (first part) as filed in the oral proceedings, claim 7 (second part) and claims 8 to 10 as filed with letter dated 3 February 2006, and an amended description as follows:
 - columns 3 to 6 of the patent specification,

 - columns 1 to 2 as filed with letter dated 3 February 2006,

 - and Figures 1 to 3 of the patent specification.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte