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Datasheet for the decision of 21 February 2008

Case Number: T 1120/05 - 3.2.04

Application Number: 95942361.7

Publication Number: 0801524

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Language of the proceedings: EN

Title of invention:
An arrangement for and a method of managing a herd of freely walking animals

Patentee:
DeLaval Holding AB

Opponent:
Octrooibureau Van der Lely N.V.

Headword:
Separation/DELAVAL

Relevant legal provisions:
EPC Art. 123(2)

Relevant legal provisions (EPC 1973):
EPC Art. 56, 84

Keyword:
"Undisclosed negative feature - main request"
"Inventive step (no) - first auxiliary request"
"Lack of clarity - second auxiliary request"

Decisions cited:
G 0001/03, T 0169/83, T 0278/88, T 0906/97, T 0170/87, T 0410/91, T 0832/04

Catchword:
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Case Number: T 1120/05 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 21 February 2008

Appellant: (Opponent)
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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 28 June 2005 concerning maintenance of European patent No. 0801524 in amended form.

Composition of the Board:

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

Summary of Facts and Submissions

I. In its interlocutory decision posted 28 June 2005 the opposition division found that the European patent No. 0 801 524 in the amended version based upon claims 1 and 19 filed with letter of 11 June 2004 met the requirements of the European Patent Convention.

II. The opponent (hereinafter appellant) lodged an appeal against this decision on 26 August 2004 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 13 October 2005.

III. Oral proceedings before the board were held on 21 February 2008.

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

V. The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of claims 1 and 19 filed as main request or claims 1 and 19 filed as first auxiliary requests, both filed with letter dated 4 January 2008, or on the basis of claims 1 and 19 filed as second auxiliary request during oral proceedings on 21 February 2008.

Claim 1 of the main request read as follows:

"1. An arrangement for managing a herd of freely walking animals, comprising an area (1, 21, 22) for receiving the animals, a milking station (2) located in said area and having an exit (6), means (7) for

automatic milking of an animal in the milking station, and a separation device (3) located in said area for separating an animal from the herd, wherein
the exit (6) of the milking station (2) leads to the receiving area (1),
the milking station (2) is adapted in such a way that the animal leaving the milking station has to enter the receiving area (1, 21, 22),
the separation device (3) is accessible by an animal from the receiving area (1, 21, 22),
the separation device (3) comprises enclosure means (12) defining a separation zone (11) and at least one entrance device (13) forming an animal passage (15) leading from the receiving area (1, 21, 22) to the separation zone (11), but not to the milking station (2), and adapted to open and close said passage, and
the entrance device comprises a stall (13), the interior of which comprises said animal passage (15), wherein the stall (13) has a front gate device (16) which in an open state permits passage between the stall (13) and the separation zone (11) and in a closed state prevents passage between the stall (13) and the separation zone (11).

Claim 1 of the first auxiliary request read as follows:

"1. An arrangement for managing a herd of freely walking animals, comprising an area (1, 21, 22) for receiving the animals, a milking station (2) located in said area and having an exit (6), means (7) for automatic milking of an animal in the milking station, and a separation device (3) located in said area for separating an animal from the herd, wherein

the exit (6) of the milking station (2) leads to the receiving area (1),
the milking station (2) is adapted in such a way that the animal leaving the milking station has to enter the receiving area (1, 21, 22),
the separation device (3) is accessible by an animal from the receiving area (1, 21, 22),
the separation device (3) comprises enclosure means (12) defining a separation zone (11) and at least one entrance device (13) forming an animal passage (15) leading from the receiving area (1, 21, 22) to the separation zone (11) and adapted to open and close said passage, and
the entrance device comprises a stall (13), the interior of which comprises said animal passage (15), wherein the stall (13) has a front gate device (16) which in an open state permits passage between the stall (13) and the separation zone (11) and in a closed state prevents passage between the stall (13) and the separation zone (11), and wherein the stall (13) comprises a feeding device (18) for feeding an animal being present in the stall (13)."

Claim 1 of the second auxiliary request read as follows:

"1. An arrangement for managing a herd of freely walking animals, comprising an area (1, 21, 22) for receiving the animals, a milking station (2) located in said area and having an exit (6), means (7) for automatic milking of an animal in the milking station, and a separation device (3) located in said area for separating an animal from the herd, wherein

the exit (6) of the milking station (2) leads to the receiving area (1),
the milking station (2) is adapted in such a way that the animal leaving the milking station has to enter the receiving area (1, 21, 22),
the separation device (3) is accessible by an animal from the receiving area (1, 21, 22) in such a way that the animal will not associate any treatment in the separation device with the automatic milking,
the separation device (3) comprises enclosure means (12) defining a separation zone (11) and at least one entrance device (13) forming an animal passage (15) leading from the receiving area (1, 21, 22) to the separation zone (11) and adapted to open and close said passage, and
the entrance device comprises a stall (13), the interior of which comprises said animal passage (15), wherein the stall (13) has a front gate device (16) which in an open state permits passage between the stall (13) and the separation zone (11) and in a closed state prevents passage between the stall (13) and the separation zone (11), and wherein the stall (13) comprises a feeding device (18) for feeding an animal being present in the stall (13)."

VI. The appellant's arguments can be summarized as follows:

i) The terms "but not to the milking station (2)" (in claim 1 of the main request) introduce a negative feature which is not disclosed in the application as filed and does not represent an allowable undisclosed disclaimer in the meaning of G 1/03, OJ EPO, 2004, 413.

ii) The subject-matter of claim 1 of the first auxiliary request lacks an inventive step with respect to document US-A-4 889 074 (D4) and common general knowledge.

iii) The amendments to claim 1 of the second auxiliary request are unclear.

VII. The respondent's arguments can be summarized as follows:

i) The amendment to claim 1 of the main request can be derived from the drawings as well as from the description of the application as filed.

ii) The skilled person starting from document D4 as closest prior art would not arrive in an obvious way at the subject-matter of claim 1 of the first auxiliary request.

iii) The wording "the separation device (3) is accessible by an animal from the receiving area (1, 21, 22) in such a way that the animal will not associate any treatment in the separation device with the automatic milking" (in claim 1 of the second auxiliary) defines a clear functional feature.

Reasons for the Decision

Since the European patent was already granted at the time of the entry into force of the EPC 2000 on 13 December 2007, the transitional provisions according to Article 7 of the Act revising the EPC of 29 November 2000 and the Decisions of the

Administrative Council of 28 June 2001 and of 7 December 2006, Article 2, have been applied. When Articles or Rules of the version of the EPC 1973 are cited, the year is indicated.

1. The appeal is admissible.

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

2.1 The amendment "but not to the milking station (2)" introduces the negative feature that the passage formed by the entrance device of the separation device does not lead from the receiving area to the milking station.

This negative feature is not expressly disclosed in the description and in the claims of the patent application as filed.

2.2 According to the well established jurisprudence of the Boards of Appeal, features may be taken from the drawings if their structure and function are clearly, unmistakably and fully derivable from the drawings (see T 169/83, OJ EPO 1985, 193). It goes without saying that it is not possible to derive a negative or missing feature on its own, i.e. without the context of the other, existing features of the claim. It remains to be decided if a combination of features including the negative feature can be derived or not.

2.2.1 This approach accepts, *arguendo*, that the skilled person is actually capable of finding - and indeed willing to search for - negative features in a drawing, albeit in combination with some other features. In the present case the combined feature "[an animal passage (15)] leading from the receiving area (1,21,22) to the

separation zone (11), but not to the milking station", i.e. a feature which describes a property of the animal passage lends itself to closer scrutiny, because the term "...,but not to..." establishes a direct connection of the disputed negative feature to an other, undisputedly disclosed feature. An equally good candidate would be the combined feature "an animal passage (15)...not [leading] to the milking station". The search for combined features, such as the examples above may even be considered realistic, because there are also other features of this animal passage present in the claim, e.g. that the passage is formed by an entrance device, which latter is adapted to open and close the passage. Therefore, in the present case the board accepts - for the sake of argument only - that the skilled person would look closely at the features related to the animal passage.

2.2.2 In this case, the question arises whether the skilled person would clearly, unmistakeably and fully derive from the drawings that this animal passage has a further feature beside those explicitly stated in the application, i.e. whether the skilled person would positively realise that this animal passage does have some negative features as well. Were the board to accept that this is the case, then, as a matter of logic, the board would have to establish that the skilled person would, inevitably, realise the presence of further negative features, and potentially a large number thereof. Choosing arbitrarily one of these is not permitted, because the skilled person not only has to realise the possible negative features, but because they were derived from the drawings, he must also establish which one of the features is essential to the

invention and which ones are not, see Guidelines, C VI. 3.5.2., see further T 906/97, point 5 of the reasons. The board finds that absent a teaching from the description, the skilled person would be unable establish the essential nature of a single negative feature, seen against a background of a multitude of potentially essential features, even if this selected single negative feature in the drawings could be recognised by the skilled person in the drawings.

2.2.3 It may be mentioned that case law also confirms that negative features cannot be deduced from a schematic drawing only, see T 170/87 (OJ 1989, 441), point 8.3 of the reasons, followed by T 410/91, point 2.1 of the reasons, further see T 278/88, point 3.2.3 of the reasons. This latter decision may appear to contradict, but in fact implictly confirms T 170/87 by declining from a referral to the Enlarged Board, see points 3.3 and 3.4 of the reasons. More generally, in the context of Article 123(2) the original drawings cannot be considered as a reservoir of features from which the applicant or a patent proprietor can draw when amending the claims, see T 832/04, point 2.2 of the reasons.

2.2.4 The above decision T 169/83 requires that "the structure and function" of the negative feature should be clearly, unmistakeably and fully derivable for the skilled person from the drawings. This is not the case here. The represented separation device (3) is provided with an exit device forming an animal passage (15) leading from the separation zone and from here - at least indirectly through the receiving area - to the milking station. In this manner the drawings may also be interpreted as disclosing that the entrance devices

of the separation device (3) define a passage leading from the receiving area to the milking station via the separation device (3), the animal passage (15) and the receiving area. It follows that at least the "structure" of the negative feature in question cannot be deduced, let alone be clearly, unmistakably and fully derived from the drawings.

2.2.5 Furthermore, the drawings relate to a specific embodiment, in which the separation device is arranged in such a way that an animal that has entered one entrance device has only two possibilities, namely either to proceed into the separation zone through a front gate device or to come back to the receiving area through a rear gate, if it should not be separated. Accordingly, for a cow that has entered one entrance device and that should not be separated, the described entrance device forms a passage leading from the receiving area, albeit indirectly, to the milking station, namely via the rear gate of the passage in question and the receiving area. This again demonstrates that the disputed negative feature "the entrance device forms a passage leading from the receiving station to the separation device but not to the milking station" is not directly and unambiguously derivable from this specific embodiment. Therefore, this specific embodiment shown in the drawings cannot serve as a basis for the desired amendment.

2.2.6 The passage of the patent specification referred to by the respondent (page 8, line 34 to page 9, line 3) reads as follows:

"Such a method permits at any time separation of an animal which has left the milking station and is

walking about freely. With such a method there is no risk that the animal should associate the separation with the automatic milking. Preferably the other activity takes place remote from the automatic milking. A great distance between the automatic milking station and the separation is advantageous."

This passage defines the result to be achieved by the invention, that is to avoid that the animal associates the separation with the automatic milking. However, this result does not necessarily imply the above mentioned negative feature.

Furthermore, the fact that there is a great distance between milking station and separation zone does not imply that an entrance of the separation device forms a passage leading from the receiving area to the separation zone "but not to the milking station".

The further passages on page 9, lines 17 to 24 and page 16, lines 12 to 16 referred to by the respondent also define the result to be achieved without disclosing either explicitly or implicitly this negative feature.

2.3 This negative feature therefore adds subject-matter extending beyond the content of the application as filed.

Moreover, the board does not consider this undisclosed negative feature as being an allowable disclaimer in the meaning of decision G 1/03, because the anticipation necessitating the amendment (D4) cannot be considered as accidental.

2.4 Therefore, the main request has to be rejected because claim 1 of this request contravenes the requirements of Article 123 (2) EPC.

3. *First auxiliary request (inventive step)*

3.1 Document D4 discloses (in relation to Figures 3 and 8) an arrangement for managing a herd of freely walking animals, comprising an area for receiving the animals (i.e. the shed), a milking station (49, 50, 51 or 52) located in said area and having an exit (8), means (19) for automatic milking of an animal in the milking station, wherein the exit (8) of the milking station leads to the receiving area. The milking station is adapted in such a way that the animal leaving the milking station (via exit 8) has to enter the receiving area (see particularly Figure 8 as well as column 5, lines 17 to 23). This arrangement also comprises a separating device (formed by the rotary table (67), the ramp (85) and the area for receiving sick cows) for separating an animal from the herd, this separating device being accessible by an animal from the receiving area (via ramp (65)). The separation device comprises enclosure means defining a separation zone (formed by the area for receiving sick cows) and at least one entrance device forming an animal passage leading from the receiving area to the separation zone, the entrance device being adapted to open and close said passage, this entrance device comprising a stall (formed by the rotary table 67 and its fencing), the interior of which comprises said animal passage. The rotary table (67) is provided with a curved fence, which in the position shown in Figure 3 closes access to the ramp (85), and

with an aperture which in a different position of the rotary table ensures access to this ramp. Thus, the curved fence in an open state permits passage between the stall and the separation zone and in a closed state prevents the passage between the stall and the separation zone.

3.1.1 In this respect, the respondent essentially argued as follows:

i) Neither Figure 3 nor Figure 8 of document D4 represent the exit of the milking station as being directly connected to the receiving area such that the animal leaving the milking station via exit (8) has to enter the receiving area. The sentence in column 5, lines 17 to 23 according to which "[the animal] will be milked mechanically, then leaving the milking container 45 via exit opening 8 and return to its place in the shed" means that the animal only has the possibility of entering the shed without being obliged to enter it. Therefore, D4 does not disclose the feature that "the milking station is adapted in such a way that the animal leaving the milking station has to enter the receiving area".

ii) In the arrangement known from D4, the curved fencing of the rotary table (67) does not represent a front gate device as defined in claim 1 of the first auxiliary request.

3.1.2 The board cannot accept these arguments for the following reasons:

i) Figure 3 shows the entrance and the exit of the milking station. At the exit (8) there is provided an exit ramp, while at the entrance there are provided three ramps (65, 85, 86). According to column 4, lines 29 to 56, an animal wishing to be milked goes via ramp (65) to the rotary table from which it can be admitted to the milking station. If the animal is not admitted to the milking station, it is led from the rotary table either to a separation zone via ramp (85) or is returned to the shed via ramp (86). Thus, it is clear that ramps (65) and (86) are directly connected to the shed. In Figure 3, ramps (65) and (86) as well as the ramp at the exit of the milking station are directly connected to an area surrounding the milking station, which area is referred to in the description of Figure 3 as being the shed, i.e. an area for receiving a herd of freely walking animals, from which the animals can directly go to the milking station and to which they can directly return from the milking station.

ii) In claim 1, the "front gate device" defines any device suitable for opening and closing a passage. In the arrangement according to document D4, the curved fencing of the rotary table (67), when it is in a first position, permits passage between the rotary table and the separation zone, while it prevents this passage when it is in a second position. Thus, this curved fencing performs the same functions as the "front gate device" defined in claim 1.

3.2 Therefore, the subject-matter of claim 1 of the first auxiliary request differs from the arrangement according to document D4 only in that the stall comprises "a feeding device (18) for feeding an animal being present in the stall (13)".

3.3 With regard to inventive step, the appellant essentially argued that the problem to be solved is to lure the animals onto the rotary table (67) such that the animals can be led either to the milking station or the separation zone. Since the use of a feeding device to lure animals into a stall is a well known measure, it would be obvious for the skilled person confronted with this problem to arrange a feeding device on the rotary table.

3.4 In this respect, the respondent argued that the skilled person would not install a feeding device on the rotary table of the arrangement according to document D4 essentially for the following reasons:

i) According to the patent specification, the problem to be solved is to permit at any time separation of an animal while avoiding that the animal associates any treatment in the separation device with the automatic milking. This problem is neither solved nor suggested by document D4.

ii) There is no need to arrange a feeding device on the rotary table because the milking station is already provided with feeding devices arranged in the milking boxes.

iii) The skilled person would not arrange a feeding device on the rotary table because there is not enough space and because a feeding device arranged on the rotary table would disturb the animal traffic from the receiving area to the milking station.

3.5 The board cannot accept these arguments for the following reasons:

i) It is true that the problem of permitting the separation of an animal in such a way that the animal will not associate the separation with automatic milking is not necessarily solved by the arrangement according to D4 because the milking station and the separation device have a common access. However, this problem is also not solved by the claimed subject-matter in so far as claim 1 does not exclude arrangements in which milking station and separation device have a common entrance. In the present case the problem submitted by the appellant (see the above section 3.3) is the objective problem to be solved, in so far as it is logically linked to the feature distinguishing the claimed subject-matter from the closest prior art.

ii) The milking station of document D4 (see Figure 3) comprises a plurality of milking boxes (48, 49, 50 and 51), each milking box being provided with a feeding trough (18) for feeding the animal present in the milking box. However, this does not exclude the need of luring to the stall provided at the entrance device of the separation device those

animals which do not wish to be milked. As has been explained, in D4 the entrance device of the separation device also comprises a stall within the meaning of claim 1 (formed by the rotary table and its fence). In the context of the present case it has to be emphasized that it does not matter if the stall of D4 has undesirable characteristics, such that it is not large enough to accommodate a feeding device, because claim 1 does not contain any such limitation. Furthermore, since in D4 the feeding devices associated with the milking boxes are not visible from the receiving areas, the board accepts that - contrary to the respondent's submissions - there could very well exist a need to lure the animals to the separation device first, before allowing them further to the milking boxes, and therefore, the skilled person would at least seriously consider providing the stall (formed by the rotary table and its fence) with a feeding device.

iii) In the arrangement according to D4 the animal traffic from the receiving area to the milking box may be disturbed mainly because milking station and separation device have a common entrance. Thus, the argument that a feeding device arranged on the rotary table would disturb the animal traffic is irrelevant because claim 1 does not claim separate entrances of separation device and milking station, so that the very same problem could also exist with the claimed arrangement.

3.6 Therefore, the skilled person confronted with the problem of luring the animals to the separation device

would arrive at the claimed subject-matter without exercising any inventive skill.

3.7 It follows that the first auxiliary request has to be rejected because the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC (1973)).

4. *Second auxiliary request (Article 84 EPC (1973))*

4.1 Claim 1 of the this request differs from granted claim 1 *inter alia* in that the feature that the separation device is accessible by an animal from the receiving area has been replaced by the feature that

– "the separation device (3) is accessible by an animal from the receiving area (1, 21, 22) **in such a way the animal will not associate any treatment in the separation device with the automatic milking**" (emphasis added).

4.2 The respondent argued that this feature is an allowable functional feature and makes it clear that the milking station and the separation device have separate entrances.

4.3 However, this amendment defines a result to be achieved which does not necessarily represent a technical feature of the claimed arrangement in so far as the achievement of this result may also depend on the animal itself. In other words, the accessibility of the separation device is not defined in terms of functional features of a technical character but in terms of features of a non-technical nature relating to the behaviour or the intention of the animal. Thus, this

amendment would not enable the protection conferred by the patent to be determined with an adequate degree of certainty.

Moreover, this amendment - in so far as it only refers to the accessibility of the separation device without relating to the entrance of the milking station (which entrance is not even mentioned in the claim) - does not imply separate entrances of milking station and separation device. It is namely possible that an animal entering the separation device without having the intention of being milked is separated without associating the separation with the automatic milking even if the milking station and the separation device have a common entrance.

4.4 Therefore, the amended claim 1 does not meet the requirements of Article 84 EPC (1973) in so far as it does not clearly define the matter for which protection is sought.

4.5 It follows that the second auxiliary request has to be rejected since it is based upon an unallowable independent claim.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

G. Magouliotis M. Ceyte