

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 2 September 2008**

Case Number: T 0417/06 - 3.2.04

Application Number: 98953147.0

Publication Number: 1030550

IPC: A01K 1/00

Language of the proceedings: EN

Title of invention:

An animal stall and method including a gate sensor means

Patentee:

DeLaval Holding AB

Opponent:

Octrooibureau Van der Lely N.V.

Headword:

Timer/DELAVAL

Relevant legal provisions:

RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):

EPC Art. 56

Keyword:

"Lack of inventive step (main request)"

"Auxiliary request filed at the oral proceedings (not admitted)"

Decisions cited:

-

Catchword:

-



Case Number: T 0417/06 - 3.2.04

DECISION
of the Technical Board of Appeal 3.2.04
of 2 September 2008

Appellant: Octrooibureau Van der Lely N.V.
(Opponent) Weverskade 10
NL-3155 PD Maasland (NL)

Representative: Seerden, Adrianus Maria
Octrooibureau Van der Lely N.V.
Weverskade 110
NL-3147 PA Maassluis (NL)

Respondent: DeLaval Holding AB
(Patent Proprietor) P.O. Box 39
S-147 21 Tumba (SE)

Representative: Gray, Helen Mary
Albihns GmbH
Bayerstrasse 83
D-80335 München (DE)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 6 February 2006
rejecting the opposition filed against European
patent No. 1030550 pursuant to Article 102(2)
EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The opposition filed against the European patent No. 1 030 550 was rejected by the opposition division in its decision dated 6 February 2006.

Independent claims 1 and 16 of the granted patent read as follows:

"1. An animal stall (1) associated with an animal related apparatus (15) for performing an animal related operation, said stall being provided with an entrance gate (7), an exit gate (8) and a gate sensor means (12), said gate sensor means being associated with a control means, and with at least said entrance gate for checking the position of said gate, **characterised in that** a first timer means is adapted to measure a period of time from a defined starting time, and that in dependence of if said sensor means has not detected that said gate is closed within said period of time, driving means perform an opening movement of said gate."

"16. A method of performing an animal related operation in an animal stall (1) associated with an animal related apparatus (15), said stall being provided with an entrance gate (7), an exit gate (8) and a gate sensor means (12) associated with a control means for checking the position of at least said entrance gate (7), said control means being associated with said gate,
characterised by

- defining a starting time

- measuring the time lapsed after said starting time by means of a first timer means
- controlling driving means to perform an opening movement of said gate in case a predetermined period of time has lapsed and said gate sensor means has not sensed that said gate is closed.

II. The opponent (hereinafter appellant) lodged an appeal against this decision on 16 March 2006 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 29 May 2006.

III. Oral proceedings before the board were held on 2 September 2008.

During oral proceedings the patent proprietor (hereinafter respondent) filed an auxiliary request based upon amended claims 1 to 23.

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

The respondent requested that the appeal be dismissed (main request) or, auxiliarily, that the decision under appeal be set aside and the patent be maintained in amended form on the basis of claims 1 to 23 filed as an auxiliary request during the oral proceedings.

V. The appellant essentially submitted that the claimed subject-matter of the main request lacked an inventive step starting from US-A-4 618 876 (D2) and combining this closest prior art with GB-A-2 072 884 (D3). The appellant also asked the board to consider whether the

auxiliary request filed during oral proceedings was admissible.

With respect to the main request, the respondent contested the arguments of the appellant. He further submitted that the auxiliary request filed at the outset of the oral proceedings should be admitted on the ground of the unexpected course of the discussion during the oral proceedings.

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 (inventive step)*
 - 2.1 Document D2, which is considered to reflect the closest prior art, discloses an animal stall (30) associated with an animal related apparatus ("weighting scale means" 20) for performing an animal related operation, said stall being provided with an entrance gate (40), an exit gate (80) and a gate sensor means for checking the position of said gate ("microswitches and/or photoelectric eye means"; see column 7, line 65 to column 8, line 1), said gate sensor means being associated with a control means and with said gate

sensor means. According to D2, after an animal has entered the stall the entrance gate is closed.

2.1.1 The animal stall according to claim 1 differs from this closest prior art in that

- a first timer means is adapted to measure a period of time from a defined starting time, and that in dependence of if the sensor associated with the entrance gate has not detected that said gate is closed within said period of time, driving means perform an opening movement of the gate.

The method of performing an animal related operation defined by claim 16 differs from this prior art by the steps of

- defining a starting time, measuring the time lapsed after said starting time by means of a first timer means, and controlling the driving means to perform an opening movement of said gate in case a predetermined period of time has lapsed and said sensor means has not sensed that said gate is closed.

2.1.2 The problem to be solved by the invention as claimed in claims 1 and 16 may be seen in providing an animal stall and a method of performing an animal related operation in the animal stall in which the risk that an animal becomes clamped by the entrance gate of the stall is reduced and in which it is possible to check that the gate is working in a normal way (see paragraph [0009] of the patent specification).

According to the claimed invention, in case the entrance gate has not been closed within a predetermined period of time, it may be assumed that an animal has become clamped by the gate. Accordingly, the first timer is adapted to measure a period of time from a defined starting point and in case the sensor means has not sensed that the gate is closed within the predetermined period of time, the driving means is controlled by the control means to perform an opening movement of the gate. Hereby the animal is let loose again, so that it can either enter or leave the stall (see paragraph [0011] of the patent specification).

- 2.2 Document D3 discloses (see particularly Figure 6) a control apparatus for the driving means of a door 16, the control apparatus being provided with a condition detector means 300, with a main control unit 301 for controlling the driving means in response to a signal produced by the condition detector means 300 and with an auxiliary control unit 302. The condition detector means 300 comprises an upper limit switch 30 for detecting if the door is completely open, a lower limit switch 31 for detecting if the door is closed and an obstruction detecting switch 52 (see particularly column 3, lines 92 to 95). If the lower limit switch 31 detects that the door is closed, the main control unit 301 stops the movement of the driving means 16. Moreover, if the obstruction detecting switch 52 detects an obstruction during the closing movement of the door, the driving means stops the closing movement of the door and performs an opening movement.

According to Figure 12 (see page 6, lines 6 to 41) and Figure 7, the auxiliary control unit 302 comprises a

"timer means", i.e. the monostable multivibrator 304, which is set at a time longer than the expected door closing time and is turned on by the door command signal Y, when this signal falls at its low level, i.e. at the start of a closing movement of the door. Therefore, the timer means measures a period of time from a defined starting time, i.e. the time lapsed after said defined starting time. If a complete closing movement of the door is performed before said period of time has lapsed, the gate sensor means (lower limit switch) 31 will detect that the door is closed and the driving means of the door will be stopped by means of the main control unit. However, in case the closing movement of the door is not completed (i.e. if the driving means of the door are not stopped) within said period of time, the gate sensor means 31 will not detect that the door is closed within said period of time. In dependence of this, the auxiliary control unit 302 will be activated to stop and reverse the driving means such that the driving means will perform an opening movement of the door.

- 2.2.1 Therefore, all the features which distinguish the claimed subject-matter from the closest prior art are disclosed in D3 as a specific teaching in the context of an auxiliary control unit associated with a main control device provided *inter alia* with an obstruction detection switch.
- 2.2.2 According to the passage on page 1, lines 85 to 112 of D3, "time setting means is set at a time length longer to some degree than the maximum door movement time ..." and "if the driving means fail to attain a predetermined condition within the set time, the power

supply is cut off, or the motor is stopped and reversed".

Furthermore, on page 8, lines 86 to 91 it is stated that "according to this invention the load on an obstacle is cancelled **after a predetermined length of time** even in the case where the main control device runs out of order" (emphasis added).

Thus, the skilled reader of D3 will immediately understand that this specific teaching may solve the problem of avoiding that a load is applied by the door to an obstacle, such as a person or an animal, and accordingly, the similar problem of animals getting stuck by the entrance gate of a stall.

2.3 For these reasons, the skilled person would apply the teaching of D3 to the animal stall and to the method known from D2 and arrive at the claimed subject-matter without exercising any inventive activity.

2.4 With respect to the combination of documents D2 and D3, the respondent essentially argued as follows:

i) The skilled person would not take into consideration D3 because it relates to a remote field, in so far as it concerns a garage door, for which the requirements of safety - in comparison with those concerning the entrance gate of the animal stall according to D2 - are very high.

ii) D3 concerns the problem of ensuring safe operation of a door in the event of a failure concerning the main control unit and solves this problem by

providing an auxiliary control unit in addition to the main control unit. Moreover, it would be difficult for the skilled person to apply to the animal stall of document D2 only those features of D3 which concern the auxiliary control unit (provided with the timer means), because he would consider all the technical features contained in D3 in so far as the auxiliary control unit of D3 is functionally and structurally linked to a main control unit which is provided with an obstruction detector sensor.

- iii) D3 further discloses a control system in which the door sensor (i.e. the lower limit switch) does not functionally interact with the driving means to perform an opening movement. In other words, the driving means of the door perform an opening movement of the door in dependence of whether the door command signal is present but not in dependence of whether the door sensor means has not detected that said door is closed. Therefore, even if the skilled person were to combine D2 and D3, he would not arrive at the claimed invention.

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

- i) Starting from D2, the problem addressed by the present invention relates to the automatic control of the entrance gate of the stall. Document D3 - although the description of the specific examples refers to a door operating apparatus mounted in a garage - relates to "an automatic door operation control apparatus" (see page 1, lines 3 to 8)

which can be used to control other doors or gates. Therefore, the skilled person confronted with the problem addressed by the present invention would take this document into consideration.

- ii) The auxiliary control unit of D3 solves not only the problem of ensuring a safe operation of the door in the event where the main control device runs out of order but also that of avoiding that a load is applied by the door to an obstacle, which may be a person or animal.

In any case, it has to be noted that the patent specification (see paragraph [38]) refers not only to the risk that an animal becomes clamped by the gate but also to the risks that the sensors do not work properly or the control means is out of order.

Furthermore, claims 1 and 16 do not exclude the presence of the timer means in addition to a main control unit. Therefore, even if the skilled person were to apply to the animal stall of D2 all the technical features contained in D3 (i.e. a main control unit with an obstruction detection sensor and an auxiliary control unit with a timer means), he would arrive at something falling within the terms of claim 1 or 16.

- iii) According to claimed invention, an opening movement of the door is performed if the gate sensor has not detected that the gate is closed within a predetermined period of time. In other

words, the opening movement of the door is not linked to a signal but to the absence of a signal from the gate sensor. The same applies to the control system of D3, in which the presence of the door operating signal implies the absence of the signal from the door sensor (lower limit switch).

Furthermore, D3 suggests the use of a timer means setting a period of time longer than the maximum door movement time in order to stop and reverse the closing movement of the door if the door encounters an obstacle. Thus, starting from the animal stall of document D2 in which the gate is provided with a sensor detecting whether the gate is closed, the skilled person confronted with the problem of animals getting stuck by the entrance gate of the stall would apply the timer means of D3 and - without exercising any inventive skill - use the absence of a signal from the gate sensor of D2 as a criterion for performing an opening movement of the door.

- 2.5 For these reasons, the subject-matter of claim 1 as well as that of claim 16 do not involve an inventive step (Article 56 EPC (1973)).

Therefore, the main request is unallowable.

3. *Auxiliary request (admissibility)*

- 3.1 The auxiliary request was filed during the oral proceedings at the end of the discussion of whether the claimed subject-matter of the granted patent, upon

which the respondent had previously based its sole request, involved an inventive step.

In the statement setting out the grounds of appeal, the appellant had based its arguments relating to inventive step essentially upon documents D2 and D3 and had argued that "D3 teaches ... to control a driving means in an automatic door control apparatus to perform an opening movement of the door in case a predetermined period of time has lapsed ... and the driving means fail to attain a predetermined condition", that "the skilled person, starting from D2 ... would be faced with the problem of animals getting stuck in the entrance gate and would really turn to D3, which addresses the general problem of accidents with automatic doors" and that "it would be obvious to choose the closing of the gate in D2 as the 'predetermined condition' to be attained ...".

During the oral proceedings the issue of inventive step was discussed only by referring to documents D2 and D3. Therefore, there was no change in the facts and evidence submitted which might justify the filing of an auxiliary request during oral proceedings.

- 3.2 Quite apart from the substance of the argument based on "the unexpected course of the discussion during the oral proceedings", the patentee could not have reasonably expected that he will with certainty prevail also in the second instance with its main request. Unless an opposition is based on an obviously frivolous line of argumentation, a patent proprietor must normally be prepared for the situation that its main requests will not be upheld, even if this may not

immediately appear probable on the basis of the written proceedings leading up to the oral proceedings. The fact that an opposition is rejected in the first instance is absolutely no guarantee for a patent proprietor that the second instance will uphold this finding. Thus it is clear that the patent proprietor must be prepared for this situation, and he must decide whether or not he is prepared to amend his main request in case of a successful attack by the opponent. However, this decision can not be postponed to a very late stage, and this decision can also not be made dependent of the course of the oral proceedings. The patent proprietor himself must be able to identify and define that restricted subject-matter which may still be of interest to him in case the subject-matter of his main request should fail. It is understandably very tempting to delay action until an informed guess can be made as to how the board will decide as regards a main request. However, such tactical postponement of the filing of requests cannot be admitted. It would be clearly inequitable towards the other party, and also contrary to the underlying principle of Article 13(3) RPBA, namely that the complete case of the parties must be set out by the time oral proceedings are appointed, and *a fortiori* by the time the oral proceedings are held. The purpose of oral proceedings is the exercise of the right of a party to present its case orally, and not a procedural possibility for testing the opinion of the board in order to prepare further requests.

- 3.3 The parties were also reminded of the above principle. In the communication dated 17 April 2008 the board invited the parties wishing to amend their requests to do it at least four weeks before the oral proceedings

and drew the attention of the parties to "Article 13 (1) of the Rules of Procedure of the Boards of Appeal (OJ EPO 2007, 536) governing the amendments to a party's case and the board's discretion in admitting such amendments".

The auxiliary request was based upon four amended independent claims combining claim 1 of the main request with dependent claims 7 or 8 and claim 16 with dependent claims 24 or 25. These amendments could therefore easily have been filed at least four weeks before the oral proceeding. Even in that case, these amendments would have extended the frame of discussion with respect to that determined by the written proceedings. Furthermore, the amended claims, which were not *prima facie* allowable, could have raised issues which were not easy to be dealt with during oral proceedings.

Therefore, admitting the auxiliary request would have been contrary to the principle of procedural fairness, since it would have been difficult for the opponent to deal properly with it.

It is also to be noted that the auxiliary request was submitted - although before the closure of the debate - at a late stage, when the Chairman - at the end of the discussion on the main request - was stating the final requests of the parties in order to declare the debate closed.

3.4 Therefore, the auxiliary request is inadmissible.

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