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**Datasheet for the decision
of 18 December 2008**

Case Number: T 0220/07 - 3.2.04

Application Number: 97914653.7

Publication Number: 0830055

IPC: A01K 1/12

Language of the proceedings: EN

Title of invention:

A construction including an implement for milking animals

Patentee:

MAASLAND N.V.

Opponent:

DeLaval International AB

Headword:

-

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

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

Keyword:

"Sufficiency of disclosure (yes)"
"Remittal (yes)"

Decisions cited:

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Catchword:

-



Case Number: T 0220/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 18 December 2008

Appellant:
(Patent Proprietor)

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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 22 December 2006
revoking European patent No. 0830055 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
C. Heath

Summary of Facts and Submissions

- I. By its decision dated 22 December 2006 the Opposition Division revoked the patent. On 26 January 2007 the Appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 27 April 2007.
- II. The patent was opposed on the grounds based on Article 100(a), (b) and (c) EPC 1973. The Opposition Division was of the opinion that the invention claimed in claims 1 and 2 did not satisfy the requirements of sufficiency of disclosure of Article 100(b) EPC 1973.
- III. Oral proceedings took place on 18 December 2008 before the Board of Appeal.

The Appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the main request filed with the grounds of appeal or on the basis of auxiliary request 2 as filed during the oral proceedings before the Board. The first auxiliary request was withdrawn during the oral proceedings.

He mainly argued as follows:

The first and the penultimate paragraphs of the description according to the main request have been amended to overcome the objection of insufficiency of disclosure. In addition the first paragraph gives now a better understanding of what is meant by "residence time". The description according to the second auxiliary request corresponds to the description of the patent as

granted, except that all the passages relating to the embodiment according to claim 2 have been deleted. The invention defined in claim 1 is disclosed in such a way that it enables a skilled person using his common general knowledge to carry it out.

As evidence for the common general knowledge in that specific field the Appellant filed the handbook "Handboek Melkwinning" Praktijkonderzoek Rindvee Schapen en Paarden (PR), August 1996, pages 42 and 43.

The Respondent (opponent) contested the arguments of the Appellant. He mainly submitted that the first paragraph of the description has been amended to either reflect information already present in the originally filed application, or to give a special meaning to the expression "residence time". In the first case this amendment is to be rejected under Rule 80 EPC, in the second case it would introduce new information not directly and unambiguously derivable from the originally filed application and thus would not meet the requirements of Article 123(2) EPC.

A skilled person would have to determine an estimated milking time for a given cow on the sole basis of historical data regarding the estimated milk yield and the milk speed as taught by the patent specification. Furthermore, it is unclear how to adjust the speed of the movable floor when a plurality of cows are present on the floor at the same time and how to proceed when one cow leaves the floor and is replaced by another one. Thus the patent specification does not contain sufficient information for carrying out the invention as defined in claim 1.

The Respondent requested that the appeal be dismissed.

V. Claims 1 and 2 as granted read as follows:

"1. A construction including an implement for milking animals, such as cows, said implement comprising a movable floor including one or more milk boxes (4) and the implement is provided with at least one automatically operative adjusting mechanism for adjusting the speed of the movable floor on the basis of the estimated milking time of the cows on the movable floor, characterized in that the adjusting mechanism cooperates with a computer (14) comprising a memory in which historical data regarding the estimated milk yield are stored, and in that the computer (14) defines, on the basis of these data and the milk speed determined by a milk speed meter during milking, the estimated milking time, and in that there are one or more milking robots (22)."

"2. A construction including an implement for milking animals, such as cows, said implement comprising a movable floor including one or more milk boxes (4) and the implement is provided with at least one automatically operative adjusting mechanism for adjusting the speed of the movable floor characterized in that the adjusting mechanism cooperates with the memory of a computer in which historical data regarding the estimated residence time are stored for adjusting the speed of the movable floor on the basis of the estimated residence time on the movable floor, and in that there are one or more milking robots (22)."

Auxiliary request 2 comprises:

Claims:

1 filed during the oral proceedings (as granted) 2 to 19 filed during the oral proceedings

Description:

pages 1, 2, 7, 8 filed during the oral proceedings,
column 2, line 12 to column 4, line 22 of the patent specification

Drawings:

figures 1 and 2 of the patent specification

Reasons for the Decision

1. The appeal is admissible.
2. *Main request - amendments:*
 - 2.1 First paragraph of the description:

The first paragraph of the description has been amended by adding features which in the original description have been disclosed with respect to the prior art construction.

The Appellant argued that these features correspond to the construction as disclosed in the prior art portion of claims 1 and 2 and thus do not infringe Article 123(2) EPC. He further added that these features would contribute to a better understanding of what is meant by the expression "residence time" used in claim 2.

However, if the added features are solely intended to express in other words what is already indicated in the prior art portion of claims 1 and 2, this amendment is not occasioned by grounds of opposition specified in Article 100 EPC 1973 and is thus not admissible under Rule 80 EPC.

If on the contrary, this amendment is intended to give a specific meaning to the expression "residence time" which is not directly and unambiguously derivable from the originally filed application, then this amendment is not allowable under Article 123(2) EPC.

2.2 Penultimate paragraph of the description:

This modification reintroduces the wording of the original application and thus is not objectionable under 123(2) EPC.

However, claim 1 as granted requires "adjusting mechanism for adjusting the speed of the movable floor on the basis of the estimated milking time of the cows on the movable floor".

The reintroduced text says that it is also possible that the computer "... determines the estimated milking time ... on the basis of the longest estimated milking time of an animal in the carrousel..."

Thus claim 1 refers to the estimated milking time of **the cows** (plural), whereas the reintroduced text teaches to use the longest estimated milking time of **an animal** (singular) on the carrousel.

Therefore, this text contradicts claim 1 and renders the disclosure as a whole unclear in violation of Article 84 EPC 1973.

The Appellant argued that "of the cows" in claim 1 should be interpreted as meaning "of one of the cows" which would be in line with the amended description.

However, the wording in claim 1 "milking time of the cows on the movable floor" is clearly unambiguous and means what it says, namely the milking time of the cows (plural) and not "the milking time of one of the cows". Obviously if the patent drafter wanted to claim "the milking time of one of the cows" he would have done so.

2.3 For all these reasons the main request is not admissible.

3. *Auxiliary request 2:*

3.1 Admissibility:

The description of the auxiliary request 2 has been amended by deleting from the description as granted the passages relating to claim 2. The Board is satisfied that these amendments fulfil the requirements of Article 123 EPC. This point has not been challenged by the Respondent.

The Respondent argued that all arguments presented by the Appellant in the grounds of appeal were based on the amended description. Reintroducing now the description of the patent as granted would represent a substantial change in the argumentation of the Appellant. The Respondent should not be taken by surprise by this new unforeseen argumentation and therefore the auxiliary request 2 should not be admitted into the proceedings.

The Board is unable to follow the Respondent on this point, since the Appellant had already submitted in the opposition proceedings that the patent specification, that is the description as granted meets the requirement of sufficiency of disclosure under Article 100b) EPC 1973.

The claims of auxiliary request 2 differ from the granted claims by the mere deletion of claim 2. It goes without saying that the deletion of granted claim 2 does not raise issues which the Board or the other party cannot reasonably be expected to deal with during the oral proceedings.

Accordingly, the Board decided to admit auxiliary request 2 into the proceedings.

3.2 Sufficiency of disclosure:

Claim 1 is directed to a construction comprising a movable floor, one or more milking boxes with one or more milking robots and a mechanism for adjusting the speed of the movable floor on the basis of the estimated milking time. This adjusting mechanism cooperates with a computer comprising a memory in which historical data regarding the estimated milk yield are stored and the computer defines on the basis of this data and the milk speed determined by a milk speed meter during milking the estimated milking time.

The description of the patent describes a carousel with four milking boxes, four milking robots, a cow identification system, a computer which controls entrance door and exit and further details of fencing, cleaning and foremilking devices.

Information with respect to the subject-matter of claim 1 is available in paragraph [0004] of the patent specification, where it is stated that "Due to the fact that each time the actual milk speed is determined, it will be possible to define the estimated milking time rather accurately and to adjust same if required".

In view of the information given by the patent, the skilled person who wants to provide a construction according to claim 1 will furthermore have to use common general knowledge. It is not disputed that the skilled person knows how to construct a mechanism to adjust the speed of the movable floor. He will further be able to provide a computer which stores historical data regarding the estimated milk yield.

The Respondent argued that historical data regarding the estimated milk yield and a milk speed meter are not sufficient to determine an estimated milking time.

It is however common practice that in computer controlled automatic milking implements using milking robots, historical data concerning each animal such as the milk yield during a number of previous milking operations and the time elapsed since the last milking are stored. These historical data concern the estimated milk yield for the next milking operation. In order to have access to the movable floor an animal has to be identified and the access gate has to be opened. The time at which a given animal has access to the movable floor can thus be registered by the computer, as the starting point of the milking operation. Based on the estimated milk yield and previous milk speed an

estimated milking time and a corresponding initial speed of the movable floor can be determined. As soon as the milk starts to flow, the milk speed meter signals the starting point of the milking time. The milk flow is not constant but varies according to a known curve (see Handbook Fig. 2.12). It is thus possible when reaching a specific easily identifiable point of the curve to assess the deviation of the actual flow rate with respect to the curve. An estimated remaining milking time can thus be determined taking into account the estimated milk yield, on this basis the estimated milking time can be re-calculated and the floor speed can be re-adjusted.

The Respondent submitted that the patent in suit does not indicate at which point in time the milk speed has to be measured. It is however clear, that this has to be done at a point of the milk flow curve which can be easily identified such as for example the maximum flow rate or one of the steps in the curve which follow the maximum.

The Respondent further submitted that the estimated milking time obtained by the claimed construction would be inaccurate. It is observed that the milking time is "estimated", that is "roughly evaluated". It is also clear that accuracy may be increased with the number of re-adjustments and it lies within the normal capability of a skilled person to increase the number of measurements of the milk speed in order to adequately determine the remaining estimated milking time.

The Respondent also argued that there may be more than one cow on the carousel and that the patent

specification does not indicate how to handle this situation.

However, claim 1 specifies that the speed of the movable floor is adjusted on the basis of the estimated milking time of the cows on the movable floor. Since each cow may have its own estimated milking time and since the speed is to be adjusted on the basis of all cows on the movable floor, a skilled person would normally consider using the average estimated milking time of the cows on the floor.

The Respondent further submitted the case where of one cow leaving the floor is replaced by another one. This does not appear to be a problem either. As stated above, since the speed of the movable floor results from the average estimated milking time, the value for the cow leaving the floor is replaced by that of the cow which enters and a new speed is calculated.

The Board notes that there are several possibilities for a skilled person to carry out the invention defined in claim 1 on the basis of its common general knowledge. However, sufficiency of disclosure does not imply that a skilled person when taking into account the whole disclosure ends up with some specific precisely defined embodiments. To fulfil the requirement of sufficiency of disclosure it is solely necessary that the skilled person is able to fill the gaps in the disclosure with the aid of its common general knowledge and without inventive skill.

Accordingly, the invention defined in claim 1 is disclosed in manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

4. *Remittal:*

Since proceedings before the Boards of Appeal are primarily concerned with the examination of the contested decision, remittal of the case to the department of first instance in accordance with Article 111(1) EPC 1973 is normally considered by the Boards in cases where the department of first instance leaves substantive issues, in particular inventive step undecided.

The Board therefore considers it appropriate to make use of its discretionary power under Article 111(1) EPC 1973 and to remit the case for consideration of the undecided issues on the basis of auxiliary request 2.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution on the basis of auxiliary request 2 filed during the oral proceedings.

The registrar:

The Chairman:

G. Magouliotis

M. Ceyte