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**Datasheet for the decision
of 9 June 2010**

Case Number: T 1866/07 - 3.2.04

Application Number: 02076433.8

Publication Number: 1224857

IPC: A01J 5/017

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:

Liquid and concentrate/MAASLAND

Relevant legal provisions:

EPC Art. 76(1), 100(c)
EPC R. 43(4)

Relevant legal provisions (EPC 1973):

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Keyword:

"Intermediate generalisation (not allowed)"
"Essentiality test: deletion of essential features (not allowed)"

Decisions cited:

T 0331/87, T 0514/88

Catchword:

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Case Number: T 1866/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 9 June 2010

Appellant:
(Patent Proprietor)

MAASLAND N.V.
Weverskade 110
NL-3147 PA Maassluis (NL)

Representative:

Corten, Maurice Jean F.M.
Octrooibureau Van der Lely N.V.
Weverskade 110
NL-3147 PA Maassluis (NL)

Respondent:
(Opponent)

DeLaval International AB
P.O. Box 39
SE-147 21 Tumba (SE)

Representative:

Gray, Helen Mary
Albihns.Zacco GmbH
Bayerstrasse 83
D-80335 München (DE)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 10 September 2007
revoking European patent No. 1224857 pursuant
to Article 102(1) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. The opposition division, by its decision dispatched on 10 September 2007, revoked the European patent No. 1 224 857 filed as divisional application of the parent application EP-A-724 382, published as WO-A-96/05723.
- II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 8 November 2008 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 17 January 2008.
- III. Oral proceedings before the board were held on 9 June 2010.
- IV. The appellant requested that the decision under appeal be set aside and the patent be maintained either as granted (main request) or on the basis of one of the four auxiliary requests filed with the grounds of appeal.
- The respondent (opponent) requested that the appeal be dismissed.
- V. Granted claim 1 reads as follows:

"1. A construction including an implement for milking animals (3), such as cows, equipped with a milking robot, **characterized in that** the implement comprises a drinking bowl (19), in which, depending on an animal (3), a quantity of liquid, such as water and/or milk,

can be supplied, and **in that** the liquid is supplied together with concentrate."

Claim 1 of the first auxiliary request differs from granted claim 1 by the additional feature "the construction comprises one or a plurality of feeding troughs, in which fodder is automatically supplied to the animals to be milked" (hereinafter feature (i)).

Claim 1 of the second auxiliary request differs from granted claim 1 by the additional feature "the construction comprises a computer for controlling the supply of liquid to the drinking bowl, said computer being programmed to supply liquid, such as water and/or milk, depending on the animal" (hereinafter feature (ii)).

Claim 1 of the third auxiliary request differs from granted claim 1 the by feature (ii) and by the further feature "the construction comprises an animal identification system" (hereinafter feature (iii)).

Claim 1 of the fourth auxiliary request differs from granted claim 1 by features (i), (ii) and (iii).

VI. The appellant essentially submitted that the claimed subject-matter does not extend beyond the content of the parent application as filed, having regard to claims 31 and 32, to a paragraph bridging pages 5 (line 35) and 6 (line 4) and to a further paragraph on page 10 (lines 10 to 21) of the parent application as filed.

Reasons for the Decision

1. The appeal is admissible.
2. *Articles 100(c) and 76(1) EPC (main request)*
 - 2.1 Granted claim 1 is directed to a construction including an implement for milking animals provided with the following features:
 - (a) the implement is equipped with a milking robot,
 - (b) the implement comprises a drinking bowl, in which, depending on an animal, a quantity of food can be supplied,
 - (c) the liquid is supplied together with concentrate.
 - 2.2 The parent application as filed contains two independent claims 1 and 2:
 - claim 1 is directed to a construction including an implement for milking animals provided with feature (a) and a further feature according to which "the construction comprises a metering device (21) for dispensing fodder, such as concentrate, as well as a computer, with the aid of which a feeding period can be determined, the arrangement being such that a quantity of fodder still to be dispensed to the animal is distributed uniformly or at least substantially uniformly over the feeding period" (hereinafter this feature will be referred to as feature (d)),

- claim 2 is directed to a construction including an implement for milking animals provided with feature (a) and a further feature according to which "the implement comprises a feeding trough (15) as well as one or more measuring devices (18) for measuring the weight and/or the quantity of fodder in said feeding trough (15)" (hereinafter this feature will be referred to as feature (e)).

2.3 Granted claim 1 claims the combination of the features (a), (b) and (c), that is the addition of the feature (c) to the construction dealt with in the statement bridging pages 5 and 6 of the parent application as filed, which reads as follows:

"The invention ... further relates to a construction including an implement for milking animals, such as cows, equipped with a milking robot, characterized in that the implement comprises a drinking bowl, in which, depending on the animal, a quantity of liquid, such as water and/or milk, can be supplied" (see particularly page 5, line 38 to page 6, line 4).

2.4 The appellant argued that claims 31 and 32 of the parent application as filed provided a basis for the addition of feature (c) to the construction dealt with in the above quoted passage.

The board does not find this argument convincing for the following reasons:

- Feature (c) is specified in dependent claim 32 which refers to dependent claim 31 claiming feature (b). Dependent claim 31, which contains at

the beginning a reference to any of the preceding claims, includes per definition all the features of the other claims to which it refers, that is in particular all the features of either claim 1 or claim 2 (see Rule 43(4) EPC).

- The combination of the features (a) and (d) in claim 1 of the parent application as filed solves the problem of providing an implement in which it is "possible to control the quantity of fodder to be distributed to an animal" (page 1, third paragraph of the parent application as filed). The claimed invention has the advantages that "until the end of the milking period a cow can always eat concentrate at leisure which stimulates the milk production" and that "[in] addition it can be ascertained whether the animal's health has deteriorated". Thus in the parent application as filed, the existing technical problem is solved and the above advantages are achieved by combining feature (a) with (d). It follows that claim 31 in its dependence on claims 31 and 1 provided a basis for a construction combining the features (a), (b), (c) and (d) but not for a construction containing the features (a), (b) and (c). Thus, contrary to the appellant's submissions, a construction combining the features (a), (b) and (c) is not directly and unambiguously derivable from the originally filed claims of the parent application as filed and thus represents an unallowable amendment under Article 100(c) or 76(1) EPC.

- For the same reasons, claim 32 of the parent application as filed in its dependence on claims 31 and 2 provides a basis for a construction combining the features (a), (b), (c) and (e) but not for a construction combining the features (a), (b) and (c) which represents an unallowable intermediate generalisation under Article 100(c) or 76(1) EPC.

2.5 The appellant also submitted that the paragraph on page 10, lines 10 to 21 of the parent application as filed represents a basis for a claim directed to a construction in which concentrate is supplied together with liquid, in such a way that concentrate is not supplied in dependence on the animal, in so far as this paragraph makes it clear that the features of claim 31 and 32 may be isolated from the context of claim 1 or 2.

The board does not find these arguments convincing because this paragraph, which refers to the possibility of supplying liquid and/or concentrated fodder during the milking period in order to adapt the feeding and/or drinking period to the duration of the milking operations, begins with the words "[i]n addition" and contains a reference to "Figure 1" and thus has to be read in the context of that part of the description which relates to the drawings and describes in detail a construction comprising inter alia with features (d) and (e). Therefore, this paragraph does not provide a basis for a construction not comprising either feature (d) or feature (e).

2.6 The appellant also referred to T 514/88, OJ EPO 1992, 579 and argued that the content of an application in respect of Articles 76(1) and 123(2) EPC means the total information content of the disclosure and that, in the present case, there is no contradiction between the amended claims and the totality of the original disclosure.

The board does not find this argument convincing for the following reasons:

The parent application as filed discloses a construction combining features (a) and (b) as well as a construction combining features (a), (b), (c) and (d) or (e). However, the parent application as filed - read in its totality - neither claims nor discloses as a separate invention, a construction provided with features (a), (b) and (c) without feature (d) or (e).

2.7 Decision T 514/88 refers to T 331/87, OJ EPO 1991, 22 in which a test for essentiality was suggested, according to which an amendment that removes a feature is only allowable if the skilled person would directly and unambiguously recognize that

- the feature was not presented as essential in the disclosure,
- the feature is not indispensable for the function of the invention in the light of the technical problem it serves to solve, and
- the removal requires no real modification of other features to compensate for the change.

In the present case, as has been explained, claim 32 of the parent application, in its dependence on claims 31 and 1, combines the features (a), (b), (c) and (d) and, in its dependence on claims 31 and 2, the features (a), (b), (c) and (e).

Granted claim 1 combines the features (a), (b) and (c) and thus has been amended so as to remove feature (d) or feature (e) contained in the originally filed claim 31 in its dependence on claims 31 and 1 or 2.

The first and second conditions of the test for essentiality would clearly not be met because features (d) and (e) in combination with feature (a) were presented as essential features in the parent application as filed (see page 1, last paragraph and page 2, second paragraph) and are necessary for the function of the invention in the light of the technical problem stated in the parent application as filed. Accordingly, the deletion of feature (d) or (e) from the originally filed claim 32 in its dependence on claims 31 and 1 or 2, would also contravene the requirements of Article 100(c) or 76(1) EPC.

2.8 Therefore, the ground for opposition mentioned in Article 100(c) EPC prejudices the maintenance of the patent on the basis of granted claim 1.

3. *Articles 100(c) and 76(1) EPC (auxiliary requests)*

3.1 Independent claims 1 according to auxiliary requests 1 to 4 also contain the additional feature that "the liquid is supplied together with concentrate" without

including all the features specified in either claim 1 or in claim 2 of the parent application as filed.

- 3.2 The appellant submitted that the independent claims of the first and the fourth auxiliary request - in so far as they contain the additional feature that "the construction comprises one or a plurality of feeding troughs, in which fodder is automatically supplied to the animals to be milked" (feature (i)) imply all the features of claim 2.

The board does not find this argument convincing because independent claims 1 of both the first and the fourth auxiliary requests refer to a feeding trough without referring to "one or more measuring device for measuring the weight and/or the quantity of fodder in said feeding trough", as specified in claim 2 of the parent application as filed. These claims cannot be considered as implicitly including this missing feature, since it is technically possible to automatically supply fodder to a feeding trough without measuring its weight or quantity.

- 3.3 Therefore, the above considerations (section 2) apply mutatis mutandis to claim 1 of the auxiliary requests 1 to 4.
4. Since none of the appellant's requests is allowable, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte