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**Datasheet for the decision
of 30 June 2011**

Case Number: T 1634/09 - 3.2.04

Application Number: 00201926.3

Publication Number: 1029447

IPC: A01J 5/017

Language of the proceedings: EN

Title of invention:

A construction for automatically milking animals

Patentee:

Lely Enterprises AG

Opponent:

DeLaval Holding AB

Headword:

Collecting member/LELY

Relevant legal provisions:

EPC Art. 56

Relevant legal provisions (EPC 1973):

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Keyword:

"Lack of inventive step (main request)"

"Late filed auxiliary request (not admitted)"

Decisions cited:

T 0239/85, T 0005/10

Catchword:

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Case Number: T 1634/09 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 30 June 2011

Appellant: DeLaval Holding AB
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Representative: -

Respondent: Lely Enterprises AG
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 16 June 2009
rejecting the opposition filed against European
patent No. 1029447 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 division, by its decision dispatched on 16 June 2009, rejected the opposition filed against the European patent No. 1 029 447.
- II. The opposition division found that the subject-matter of granted claim 1 involved an inventive step *inter alia* having regard to EP-A-432 148 (D4) in combination with US-A-2 779 309 (D2).

Granted claim 1 reads as follows:

"A construction for milking animals, such as cows, with an entrance door (3) and an exit door (4), which are located at the same longitudinal side of the construction, and with a milking robot (8) for automatically milking animals, whilst the milking robot is arranged capable of being moved at or near the other longitudinal side of the construction, while furthermore at the leading side of the construction there is arranged a movable feed trough (32) which is connected to an automatic feed supply implement, characterized in that a movable collecting member (36) for the excrements of an animal present in the construction is arranged at the trailing side of the construction, while the collecting member (96) is placed just above the floor (41) of the construction and the bottom (38) of the collecting member (36) extends rearwardly and obliquely downwardly."

- III. The opponent (hereinafter appellant) lodged an appeal against this decision on 7 August 2009 and simultaneously paid the appeal fee. A statement setting

- out the grounds of appeal was received on 21 October 2009.
- IV. Oral proceedings before the board were held on 30 June 2011.
- V. The appellant requested that
- the decision under appeal be set aside and the patent be revoked,
 - the auxiliary requests filed on 26 May 2011 not be admitted,
 - the fresh ground for opposition under Article 100 (c) EPC be admitted into the appeal proceedings and, if admitted, the case not be remitted to the department of first instance.
- VI. The respondent (patent proprietor) requested that the appeal be dismissed (main request), or auxiliarily, the decision under appeal be set aside and the patent be maintained in amended form on the basis of claims 1 to 6 filed under the title of second auxiliary request with letter dated 26 May 2011 (auxiliary request). The previous first auxiliary request was withdrawn during the oral proceedings before the board. The respondent further requested that the fresh ground for opposition under Article 100 (c) EPC not be admitted and, if admitted, the case be remitted to the department of first instance.

Claim 1 of the auxiliary request reads as follows:

"A construction for milking animals, such as cows, with an entrance door (3) and an exit door (4), which are

located at the same longitudinal side of the construction, and with a milking robot (8) for automatically milking animals, whilst the milking robot is arranged capable of being moved at or near the other longitudinal side of the construction, while furthermore at the leading side of the construction there is arranged a movable feed trough (32) which is connected to an automatic feed supply implement, characterized in that a movable collecting member (36) for the excrements of an animal present in the construction is arranged at the trailing side of the construction, while the collecting member (96) is placed just above the floor (41) of the construction and the bottom (38) of the collecting member (36), extends rearwardly and obliquely downwardly, and in that the floor (41) thereof includes one or more slats of such a design as to form a continuous floor (42), as well as one or more slats of such a design to form a grid floor (43).

VII. The appellant essentially submitted that the subject-matter of claim 1 according to the main request did not involve an inventive step over D4 in combination with D2. He also submitted that the auxiliary request of the respondent should be rejected as late filed because no reasons for filing said auxiliary request at this late stage were given by the respondent in his letter dated 26 May 2011.

The respondent contested the appellant's arguments relating to the main request. He also submitted that the auxiliary request had been filed in reply to the board's communication annexed to the summons for oral proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. *Main request (inventive step)*

2.1 It is not disputed that D4 discloses a milking construction having all the features specified in the pre-characterizing portion of granted claim 1. In this closest prior art, the stall is provided with a grid floor under which are arranged bins that are V-shaped in section for collecting manure. The manure is carried away via worm wheels to manure discharges connected to a tank.

The subject-matter of granted claim 1 differs from D4 by the features specified in the characterizing portion, i.e. the provision of a movable collecting member for the excrements of an animal arranged at the trailing side of the construction, the collecting member being placed just above the floor of the construction, its bottom extending rearwardly and obliquely downwardly.

2.2 These distinguishing features provide the advantage that the legs or other rear portion of the animal are kept clean to an improved extent, while keeping the access to the milking stall unobstructed. The technical problem to be solved may thus be seen in improving the hygiene of the animal in a construction for automatically milking animals, while keeping the access to the milking stall unobstructed.

2.3 The claimed solution is suggested by D2 (see particularly Figures 1 and 2) which discloses a movable dung collecting member (64; 66) arranged at the trailing side of the stall (10; 12), the collecting member being also placed just above the floor of the stall and its bottom extending rearwardly and obliquely downwardly.

D2 also addresses the problem of "prevent[ing] excretion from cows from being deposited on the stable floor whereby the individual stalls may be maintained in good sanitary conditions, and **the cows kept reasonably clean**" (see column 1, lines 18 to 22; emphasis added). The movable collectors are advantageous in that they are not obstructive and yet they are effective in directing manure away from an animal into collection means.

The skilled person confronted with the problem of improving the hygiene of an animal in a construction for automatically milking animals of the kind disclosed in D4 would consider D2 since it addresses an analogous problem and apply the teaching of this citation to the construction according to D4. In this way he would arrive at the claimed subject-matter without exercising any inventive skill.

2.4 In this respect, the respondent essentially submitted the following arguments:

- a) The construction according to D4 provides a satisfactory solution to the problem of keeping clean the animal legs in so far as it comprises a grid floor under which are arranged V-shaped bins

for collecting manure. Therefore, starting from D4 the skilled person would have no reason whatsoever to look at further documents for solving a problem already solved in D4.

- b) The construction of D2 is completely different from, and incompatible with the claimed solution, i.e. a milking robot system in which animals can enter and leave the milking stall freely and by themselves via doors.

The board does not find these arguments convincing for the following reasons:

- a') In the closest prior art D4, the dung hitting the stall floor may splash onto, and soil the legs or other parts of the animal. In order to overcome this drawback, there is provided according to the claimed solution a dung collecting member angled obliquely and arranged near and above the floor level. Furthermore, in order to reduce the obstruction the collecting member is provided movable. Accordingly, the objective technical problem to be solved would be to improve the hygiene of the animal in a milking construction of the type disclosed in D4, while keeping the access to the milking stall unobstructed.
- b') It is true that D2 does not relate to a robot milking system in which animals can enter and leave the milking stall freely. However, there is no hindrance for providing the robot milking system of D4 with the movable dung collecting member disclosed in D2, since such a collecting member can

also be used in a robot milking system allowing a free cow-traffic. D2 teaches the provision of a movable dung collecting member for maintaining the cows reasonably clean, the collecting member "being adapted to be moved into position to effectively intercept excrement for direct delivery" to a conveyor (column 1, lines 18 to 26). Thus, the skilled person seeking to solve the above technical problem would have a strong motivation to use the movable dung collecting member of D2 in the robot milking system of D4.

Indeed, the construction of D2 comprises further structural elements for carrying away excrements, in particular a conveyor trough extending across the rear of the stalls and being movable together with the dung collecting members so as to allow the cows to enter the stalls. However, it must be assumed that the skilled person can distinguish the features that are essential to the solution of the problem and those that are not (see T 239/85, point 12). In the present case the skilled person would recognize that only the dung collecting members and not the conveyor trough would solve the problem of improving the hygiene of the animal in a robot system, since they are used for intercepting dung and for avoiding its splashing onto the legs or other parts of the animal.

Therefore, the subject-matter of claim 1 lacks an inventive step over the combination of D4 with D2 (Article 56 EPC).

3. *Auxiliary request (admissibility)*

3.1 According to the jurisprudence of the boards of appeal (see *Case Law of the Boards of Appeal of the EPO*, 6th Edition, VII.E.16.1.1, page 888), new requests containing amended claims may be admitted only exceptionally.

3.2 Since the auxiliary request was filed after oral proceedings have been arranged, it constitutes an amendment to the party's case in the sense of Article 13 (1) of the Rules of Procedure of the Boards of Appeal (RPBA).

According to an approach frequently adopted by the boards (see e.g. T 0005/10), such a request may be admitted and considered at the board's discretion

- i) if sound reasons exist for filing this request so far into the proceedings (this may be the case when amendments are occasioned by developments during the proceedings),
- ii) if the auxiliary request does not extend the scope of discussion as determined by the grounds of appeal and the respondent's reply (in this respect, it is noted that under Article 12 (2) RPBA the grounds of appeal and the reply must contain a party's complete case),
- iii) if the auxiliary request is clearly or obviously allowable (this means that it must be immediately apparent to the board, with little investigative effort on its part, that the amendments made

successfully address the issue raised without giving rise to new ones).

3.3 In the present case, none of the above conditions i) to iii) is met:

3.3.1 Firstly, in the communication annexed to the summons, the board has drawn the attention of the parties to the issues to be discussed that essentially correspond to those dealt with in the grounds of appeal and the respondent's reply. Thus, the filing of the auxiliary request cannot be considered as having been prompted by the board's communication.

In this respect, the respondent submitted that the auxiliary request was filed because he had recently observed that an higher level of inventive step requirement had been set in view of the "Raising the Bar" initiative at the EPO.

However, the "Raising the Bar" initiative does not aim at raising the level of inventive step but concerns in essence improving quality in the search and examination procedures and new time limits for filing divisional applications (see *Patent Information News*, EPO Newsletter, 1/2010, March 2010, pages 1 and 2, in [http://documents.epo.org/projects/babylon/eponet.nsf/0/24adb62bebddd3a8ec12576ea003c1b68/\\$FILE/Patentinfo_News_1001_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/24adb62bebddd3a8ec12576ea003c1b68/$FILE/Patentinfo_News_1001_en.pdf)).

3.3.2 Secondly, claim 1 of the auxiliary request differs from granted claim 1 by additional features concerning the structure of the stall floor that have no relationship to the features of granted claim 1 which concern the

position and the structure of the dung collecting member and that of the feed trough. Moreover, these additional features were discussed neither in the grounds of appeal nor in the respondent's reply so that these amendments go beyond the scope of discussion as determined by the grounds of appeal and the reply.

3.3.3 Finally, the respondent in his letter of 26 March 2011 essentially submitted that the additional features were neither shown nor suggested by any of the cited documents and that the advantages of these features were discussed in column 1, lines 35 to 40 of the patent specification.

It is observed that the closest prior art D4 shows a floor formed by gratings and continuous floor parts in between the gratings. Indeed, it can be derived from Figure 1, in conjunction with column 3, lines 24 to 29 of D4 that the floor includes a plurality of slats of such a design as to form a continuous floor portion whilst between the slats a grid floor is arranged. Moreover, the passage of the patent specification referred to by the respondent does not appear to define advantages which are clearly related to these additional features.

The board concludes that prima facie the inventive step issue has not been successfully addressed in the amended version of claim 1 according to the auxiliary request.

3.4 Therefore, the board uses its discretion under Article 13 (1) RPBA not to admit this late filed request.

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:

A. Counillon

M. Ceyte