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**Datasheet for the decision
of 17 September 2015**

Case Number: T 1748/11 - 3.2.04

Application Number: 01203673.7

Publication Number: 1163842

IPC: A01K1/12, A01J5/017, A01J7/04

Language of the proceedings: EN

Title of invention:
A construction including an implement for milking animals

Patent Proprietor:
MAASLAND N.V.

Opponent:
DeLaval International AB

Headword:

Relevant legal provisions:
EPC Art. 100(a), 56

Keyword:
Inventive step - main and auxiliary requests (no)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1748/11 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 17 September 2015

Appellant: DeLaval International AB
(Opponent) P O Box 39
147 21 TUMBA (SE)

Representative: Gray, Helen Mary
ZACCO GmbH
Bayerstrasse 83
80335 München (DE)

Respondent: MAASLAND N.V.
(Patent Proprietor) Weverskade 110
3147 PA Maassluis (NL)

Representative: Corten, Maurice Jean F.M.
Octrooibureau Van der Lely N.V.
Cornelis van der Lelylaan 1
3147 PB Maassluis (NL)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 June 2011
rejecting the opposition filed against European
patent No. 1163842 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. de Vries
Members: E. Frank
C. Schmidt

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division dated 23 Mai 2011 and posted on 15 June 2011, to reject the opposition against the European patent No. 1 163 842 pursuant to Article 101(2) EPC. The appellant (opponent) filed a notice of appeal on 01 August 2011, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 20 October 2011.
- II. The opposition was filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1) and 56 EPC. The opposition division held that the ground of lack of inventive step did not prejudice maintenance of the patent as granted. In its decision the division considered the following prior art, amongst others:
- D1 = EP 0 091 892 A2
D4 = US 3 835 814 B
D9 = W. Wesselink: "First robot milker out on farms",
Dairy Farmer, April 1992, pp. 60, 62
- III. After a summons to attend oral proceedings, the respondent (proprietor) withdrew its request for oral proceedings with letter of 28 April 2015, and requested a decision according to the state of the file. Subsequently, the scheduled oral proceedings were cancelled by the Board.
- IV. The appellant requests that the decision under appeal be set aside and the patent be revoked or alternatively oral proceedings be held.

The respondent requests that the appeal be dismissed or alternatively the decision under appeal be set aside and the patent be maintained in amended form according to the auxiliary request filed with its reply of 7 May 2012.

V. The wording of claim 1 reads as follows:

Main request (claim 1 as granted)

" A construction including an implement for milking animals, such as cows, said implement comprising a carrousel (1) or a conveyor belt, including at least one milking robot (22) and a number of milk boxes (4) and in that the carrousel (1) or the conveyor belt comprises at least one udder massage device, one udder cleaning device (16) end one concentrate rationing device (21), characterized in that the carrousel (1) or the conveyor belt comprises at least one foremilkng device and In that between two milk boxes (4) there is provided a walking path (7)."

Auxiliary request

Claim 1 is as in the main request but adds at its end the following text:

"..., and in that in the outer wall of the carrousel (1) or the conveyor belt there is provided a door (8) giving access to the walking path (7)."

VI. The appellant argued as follows:

Inventive step

The patent does not provide any details of the foremilk functions. Moreover, the description of the figure 1 and 2 embodiments of the patent consistently refer to a single device, the "cleaning/foremilk device 16". Thus, claim 1 of the patent need not be limited to separate foremilk and cleaning devices. Rather, the skilled reader would understand that a "single device" could be a cleaning or a foremilk device, or a combination of the two performing multiple functions. Therefore, the interpretation of claim 1 should not be limited to a construction containing a separate foremilk device, contrary to the finding in the decision under appeal.

As regards D1, it is inevitable that foremilk will be released at some stage, whether during massage and cleaning or subsequently during milking. Thus, all the features of claim 1, in particular a foremilk device, are at least implicitly disclosed by D1 or at least obvious from D1 alone or in combination with D9, which discloses the cleaning, foremilk, and milking functions being performed by one and the same device, i.e. the teat cups, whereby the foremilk is separated from the bulk milk to obtain a higher quality of milk for human consumption. Finally, even if a walking path were not deemed disclosed in D1, it would nevertheless be obvious to provide access for an operator to the space between milk boxes disclosed in D1 to enable the operator to reach the robot and computer located at the centre of the rotating platform, even if this required the person to climb over or under fencing to access it. However, it is, in fact, necessary to have some kind of barrier, because there is a risk that an animal could try to enter the space. In any event, thus, it would have been obvious for the skilled person seeking to prevent animals from accessing the space between milk

boxes yet enable easy access to personnel, to provide a gate or barrier as disclosed in D4 in the arrangement of D1.

Therefore, claim 1 of the main and auxiliary requests lacks an inventive step.

VII. The respondent argued as follows:

Inventive step

With respect to the provision of separate devices for the udder cleaning and the foremilking in claim 1 of the patent, the arguments given by the opposition division in its decision are in principle agreed to. Thus, the cited prior art cannot lead the skilled person to the claimed separate devices.

It is further noted that D1 also does not disclose the claimed walking path, since the spaces between the milk boxes in figure 2 are not accessible to an operating person. Figure 2 of D1 clearly shows that the milk boxes are interconnected by means of some sort of fencing. Hence, there is no way these spaces can serve as a walking path and there is no disclosure whatsoever pointing in this direction. This means that irrespective of the interpretation of claim 1 regarding the separateness of the udder cleaning device and the foremilking device, the combination of D1 with any of the cited prior art cannot lead to claim 1 of the main request, which therefore involves an inventive step.

Moreover, claim 1 of the auxiliary request is limited by the provision of a door giving access to the walking path. Without a door there is risk of cows waiting at the platform getting hurt, when trying to enter the

walking path. This feature is neither shown nor suggested in any of the cited prior art. D4 merely teaches a swinging gate for operator entry, which does not avoid the aforesaid problems. Therefore also claim 1 of the auxiliary request involves an inventive step.

Reasons for the Decision

1. The appeal is admissible.
2. *Inventive step - main request (patent as granted)*
 - 2.1 The invention according to claim 1 relates to a construction including an implement for milking animals. More particularly, the milking implement inter alia comprises one udder cleaning device, and at least one foremilking device.
 - 2.2 In the impugned decision, see point 2.5, the opposition division held that claim 1 defined a foremilking device that is separate from the cleaning device. This interpretation of claim 1 would also be in line with the specification, cf. patent, paragraphs 0007, 0010, and 0013, claim 7, and figures 1 and 2.
 - 2.3 However, turning to paragraphs 0010 and 0013 which correspond to the preferred figure 1 and 2 embodiments, respectively, the skilled reader will note from these passages that these consistently refer to a single "cleaning/foremilking device 16", cf line 39 of paragraph 0010 and line 13 of paragraph 0013, which indeed is shown as such, denoted by a single reference sign 16, in both figures. This "device" is moved via a single rail, which is either curved (rail 15 of figure 1) or linear (rail 15A of figure 2).

2.4 Moreover, apart from washing the udder, and (implicitly) separating the foremilk from the bulk milk, the patent does not provide any further details about the device's respective cleaning and foremilking functions, as also advanced by the appellant. Thus, even if, as asserted, the somewhat vaguely formulated term "cleaning/foremilking device" in paragraphs 0010 and 0013 should be read as "cleaning and/or foremilking device" (cf. impugned decision, point 2.5), in the Board's judgement, the skilled person could neither deduce from the description, and much less from the drawings, that such a "cleaning and/or foremilking device 16" movable along a single rail as shown in figures 1 or 2 must be, therefore, necessarily constituted by separate devices.

2.5 Hence, the Board shares the appellant's view that neither the wording of claim 1 in itself excludes a combined device that may perform multiple functions, such as cleaning as well as foremilking, nor does the patent specification provide any support for such a limited interpretation of claim 1. Consequently, any devices which are suitably arranged to carry out udder cleaning and foremilking functions, be it separate or in combination, can be understood as one udder cleaning device and (at least) one foremilking device of the carrousel or conveyor belt according to claim 1 of the patent.

2.6 Moreover, claim 1 requires that between two milk boxes there is provided a walking path. Contrary to the finding of the opposition division under point 2.3 of its decision, the Board holds that a "walking path" of claim 1 is not "simply created by the distance between the fencing of two milk boxes", i.e. by the fact that they are spaced. As argued by the respondent, the space

between two milk boxes must be accessible to a person for it to be a walking path. That is, a "walking path" has to be suitably dimensioned to enable a person to walk along it, which in particular requires that the path should be wide enough.

2.7 It is common ground that document D1 forms the closest prior art. It is further undisputed that the figure 2 embodiment of D1 discloses a construction including an implement having a carousel (rotatable platform 10) according to the preamble of claim 1. More particularly, D1 describes milking means 6 which are provided with means for cleaning the teats and means for effecting massage of udder and teats to facilitate milking, cf. D1, page 8, lines 4 to 8, and figure 2. However, D1 nowhere mentions foremilk or foremilk related problems. Thus, the Board in principle follows the impugned finding of the opposition division that D1 does not directly and unambiguously disclose a device suitably adapted to function properly in conjunction with foremilk, merely based on the fact that, when an animal is milked, it would possibly release foremilk at some stage, whether during massage and cleaning or subsequently during milking, as argued by the appellant.

2.8 As to the spaces between the milk boxes shown in figure 2, because these are not drawn to scale, there is no information derivable from D1 as to whether these would be wide enough to serve as a walking path. Moreover, as also advanced by the respondent, on the side of the outer circumference of the rotatable platform 10, the milk boxes are apparently interconnected by means of some sort of fencing. In any case, D1 does not directly and unambiguously disclose that the platform 10 of figure 2 is actually accessible to a person by means of

a suitably adapted "walking path" between two milk boxes, cf. also point 2.6 above.

2.9 Therefore, in the Board's view, the subject-matter of claim 1 differs from D1's figure 2 embodiment in that the carousel comprises at least one foremilking device and in that between two milk boxes there is provided a walking path.

2.10 As argued by the appellant, the problem underlying the technical effect of a foremilking device can be seen as how to obtain a higher quality of milk for human consumption. The provision of a walking path between two milk boxes on the other hand solves the problem of enabling an operating person to enter the carousel, cf. patent, paragraphs 0006 and 0009.

2.11 The Board holds that these two problems are unrelated or not linked by a common technical problem in the light of the entirely different technical effects of a foremilking device on the one hand, and a walking path on the other hand. In other words, the arrangement of at least one foremilking device and the provision of a walking path between two milk boxes according to the characterising portion of claim 1 must be considered as a mere juxtaposition of features, when applying the "problem-solution-approach" in line with the established case law of the boards of appeal.

2.12 "foremilking device"

Document D9 teaches on page 62, left hand column, first two paragraphs, an automated milking method. In particular, after the teatcups are connected, the preparation of the udder starts, and a thin tube flushes warm water to clean the teats for 10 seconds.

When the real milking process begins, the rinsing water and foremilk are taken to a separate tank. Thus, as argued by the appellant, it would be immediately apparent to the skilled person from D9's disclosure that, in order to carry out the automated process, D9's teat cups together with a draining system serve as a "foremilking device", as they must be suitably adapted to take the rinsing water together with the foremilk to the separate tank, whereby the foremilk is separated from the bulk milk and automatically drained off at the beginning of the real milking process. The Board shares the appellant's view that, in so doing, a higher quality of bulk milk is obtained that is not contaminated by foremilk.

Therefore, starting from the figure 2 embodiment of D1 and faced with the problem of obtaining a better milk quality, the skilled person would consider the milking process of D9, and modify the milking means 6 of D1 in that its teat cups are used together with a draining system to drain off the foremilk to a separate tank, thus to arrive at a carousel (platform 10) comprising at least one foremilking device.

2.13 "walking path"

Although D1 gives no clue as to the spaced relationship between two neighbouring milking boxes shown in figure 2 (stalls 1), the skilled person would readily glean from the drawing that an operating person would need to pass over the milking platform 10 regularly, e.g., for reasons of maintenance of the computer 5 or the stationary robot 8, as also argued by the appellant, cf. D1, page 7, lines 21 to 26. Therefore, in order to enable an operating person to enter the platform 10 to maintain centrally arranged parts, it would be a

trivial design measure obvious to the skilled person, a matter of common sense, to foresee enough distance between two neighbouring milking stalls 1, so that the operating person can pass through by means of a walking path. It would likewise be obvious for the skilled person that such a walking path must be per se accessible to the operating person. Thus, if the lines drawn between neighbouring boxes shown in figure 2 are indeed meant to indicate some form of barrier or fence as argued by the respondent, the skilled person would then design it to be removable to allow access.

- 2.14 It follows from the above, that the subject-matter of claim 1 of the main request does not involve an inventive step in the light of D1 and D9 (foremilking device), and D1 and the common general knowledge of the skilled person (walking path).

Therefore, claim 1 of the main request does not involve an inventive step.

3. *Inventive step - auxiliary request*

- 3.1 With respect to claim 1 of the main request (as granted), in claim 1 of the auxiliary request moreover the following feature has been added at its end:

"..., and in that in the outer wall of the carrousel (1) or the conveyor belt there is provided a door (8) giving access to the walking path (7)."

- 3.2 As argued by the respondent, in figure 2 of D1 the lines drawn between neighbouring stalls 1 suggest some form of barrier or fence, which minimizes the risk of an animal trying to enter the space between boxes. In that case it would be obvious for the skilled person to

foresee a removable fence in front of the walking path, see point 2.13 above. The simplest and most straightforward way to realise a removable fence providing access that is known to the skilled person from his common general knowledge is the provision of a gate in the fence, i.e. a door, giving access to the walking path. For the sake of completeness the Board adds that, as also argued by the appellant, doors or gates that provide access to personnel are a common feature of milking carrousel, cf D4, figure 1 at reference sign 37, see also column 3, lines 55 to 61, where the gate provides access to the carrousel why the the animals remain safely contained within the carrousel.

- 3.3 Thus, the Board's finding under point 2.14 equally applies.

4. In the light of the above, neither of the respondent's requests can be considered allowable by the Board. As the patent as granted and as amended according to the auxiliary request fails to meet the requirements of the EPC, it must be revoked pursuant to Articles 101(2) and (3)(b) EPC.

5. After it had had ample opportunity to respond to the latest submission of the appellant dated 14 June 2012, the respondent withdrew its request for oral proceedings with letter of 28 April 2015, and requested a decision according to the state of the file. Since the Board can base its decision on the submissions of the parties to date and no further arguments have been brought forward as to the inventive step of claim 1 of the main and auxiliary requests, the Board is able to decide directly.

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

A. de Vries

Decision electronically authenticated