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**Datasheet for the decision
of 24 October 2018**

Case Number: T 0604/14 - 3.2.04

Application Number: 08870114.9

Publication Number: 2219437

IPC: A01K1/00, A01K1/12

Language of the proceedings: EN

Title of invention:
IMPLEMENT FOR KEEPING DAIRY ANIMALS

Patent Proprietor:
Lely Patent N.V.

Opponent:
DeLaval International AB

Headword:

Relevant legal provisions:
EPC Art. 54(2), 56

Keyword:
Novelty - (yes)
Inventive step - (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0604/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 24 October 2018

Appellant: Lely Patent N.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
20 January 2014 concerning maintenance of the
European Patent No. 2219437 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
T. Bokor

Summary of Facts and Submissions

I. The appellant-proprietor lodged an appeal, received on 17 March 2014, against the interlocutory decision of the Opposition Division of the European Patent Office posted on 20 January 2014 concerning maintenance of the European Patent No. 2219437 in amended form, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 27 May 2014.

The appellant-opponent likewise lodged an appeal, received on 28 March 2014, against the interlocutory decision of the Opposition Division, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 30 May 2014.

II. Opposition was filed under Article 100(a) EPC based *inter alia* on lack of novelty (Article 54 EPC) and inventive step (Article 56 EPC).

The Opposition Division held that the patent as amended met the requirements of the Convention, having regard *inter alia* to the following evidence:

- (D1) Midwest Plan Service (MWPS) 72354: "Dairy Barn-200 Free Stalls" (copyright notice: 1974).
- (D2) John P. Chastain "Design of Spaces to Enhance Cow Management and Care", Department of Agricultural and Biological Engineering, Clemson University, 2000.
- (D3) Prof. Robert E. Graves et al. "Design Information for Housing Special Dairy Cows", Pennsylvania State University (Written for presentation at the 2006 ASABE Annual International Meeting, 9 - 12 July 2006).

- (D5) "Housing Design for Cattle - Danish Recommendations", interdisciplinary report, third revised edition (2002 - official English translation).
- (D8) WO 2004/068940 A1
- (D9) Signed declaration of Mr. Mats Johansson (Owner of the Bleckenstad Farm) and accompanying plan layout.
- (D9a) Further declaration of Mr. Mats Johansson and accompanying plan layout.
- (D10) Signed declaration of Mr. Anders Sandberg (veterinarian) and accompanying plan layout of the Bleckenstad Farm.

III. The appellant-opponent filed the following further documents with the statement of grounds:

- (D13) US 6,516,744 B1
- (D14) EP 0 677 243 A2

IV. The appellant-opponent requests that the decision under appeal be set aside, and that the European patent No. 2 219 437 be revoked.

The appellant-proprietor requests that the decision under appeal be set aside and the patent be maintained in an amended form on the basis of any of the claims filed as First to Sixth auxiliary requests with the proprietor's grounds of appeal dated 27 May 2014, the First auxiliary request now as main request, remaining requests renumbered accordingly.

Both parties requested oral proceedings in the written phase of the proceedings.

- V. With communication of 25 July 2018 in preparation for oral proceedings to be held on 24 October 2018 the Board drew attention to the main issues to be discussed during the oral proceedings together with a preliminary opinion of the Board on some of those issues.

With letter of 26 September 2018 the appellant-opponent informed the Board of their non-attendance to the scheduled oral proceedings.

Oral proceedings were duly held before the Board on 24 October 2018 in the absence of the appellant-opponent.

- VI. Claim 1 according to the main request (filed as first auxiliary request with the grounds of appeal dated 27 May 2014) reads as follows:

"Implement (1) for keeping dairy animals, provided with a first and a second production unit (A, B, ...) and a care unit (2) having a plurality of subunits (3, 4, 7), wherein each production unit (A, B, ...) is provided with at least one accommodation area for a production group, which comprises a group of lactating dairy animals, and with a milking robot (6, 13) for milking the production group, and wherein the subunits of the care unit (2) at least comprise a calving unit (4) for separate accommodation of dairy animals in a calving period and a milking implement (6) for milking just calved dairy animals, and an infirmary unit (7) for separate accommodation of sick animals, and wherein the care unit (2) forms a connection between the production units (A, B, ...)."

VII. The appellant-opponent argues as follows:

Prior use Bleckenstad Farm (as described in documents D9/D9a/D10 and in the following also referred to with this notation) is sufficiently proved and thus forms part of the prior art in the sense of Article 54(2) EPC. The subject-matter of claim 1 of the main request lacks novelty over D1 or D9/D10 and also lacks inventive step in the light of D1, D2, D3, D5, D8, D9/D9a/D10, D13, D14 or common general knowledge of the skilled person. Documents D13 and D14 should be admitted.

VIII. The appellant-proprietor argues as follows:

Prior Bleckenstad Farm (D9/D9a/D10) is insufficiently proved. New documents D13 and D14 should not be admitted as they are no more relevant than the documents already on file. The subject-matter of claim 1 according to the main request is new and inventive in the light of the cited evidence.

Reasons for the Decision

1. The appeals are admissible.
2. Background

The invention is concerned with the layout of a dairy farm. The invention is aimed at efficient management of a large dairy farm, see specification paragraph [0004]. The claimed layout has at least two production units, each one accommodating a group of lactating animals and having a milking robot. The layout also comprises a care unit having at least the following subunits: a calving unit with a milking implement for milking just

calved animals and an infirmary for separate accommodation of sick animals. Animals in the care unit require more individualized attention. According to the invention the care unit forms a connection between the production units. Thus, with the claimed layout attention can be concentrated on the care unit, while the production units can be reached quickly from the care unit. Also the distances to be covered by the operating persons and the dairy animals if they need transfer to or from the care unit are short, see patent specification paragraph [0005].

3. Main request - novelty

The appellant-opponent contests the novelty of granted claim 1 in view of D1 or the prior use Bleckenstad Farm, corresponding to the evidence D9/D9a/D10. This conclusion would also hold for amended claim 1 of the present main request.

3.1 It is undisputed that D9/D9a/D10 discloses two production units in the new barn (or VMS barn) and a care unit in the old barn, anticipating the production and care units of the contested claim 1 - see the accompanying plan layouts of D9, D9a or D10. The other prior art, document D1, describes two accommodation units on the left and right sides of the main building (see "floor plan 1/1") and a milking center (see also "milking center 1/2") including a care unit in the sense of the contested patent.

3.2 However, in the Board's view neither prior art - prior use (D9/D9a/D10) or D1 - discloses a care unit that forms a connection between the production units, as in the contested claim. The interpretation of this claimed feature has been under dispute.

- 3.2.1 In the Board's opinion a connection between the production units in the context of the contested patent, that is aimed at avoiding unproductive walks and long cow transfers, is to be understood as a passageway between the production units that joins, i.e. connects, both units. Within this definition, it is undisputed that the passageway can be in the form of a walking path, as contended by the appellant-opponent and supported by the specification description paragraph [0008].
- 3.2.2 The Board is however not convinced by the argument of the appellant-opponent that the feature has a broader scope. They submit that any walking path starting in one of the production units and ending in the other, even if it deviates from the connection between the production units and forms a detour or side trip, meets the claimed limitation. The appellant-opponent reads the patent specification as supporting that broad meaning of the feature. They interpret paragraph [0031] of the patent specification, reciting that the dry animal units "do not necessarily constitute part of the care unit", as inviting the skilled person to consider the dry animal unit 3 of any of the disclosed embodiments as not forming part of the care unit 2. They would thus also interpret the dry animal unit 3 of figure 1 of the patent to be located between production units A and B as not forming part of the care unit. If unit 3 is not part of the care unit, to pass from production unit A to B via calving and infirmary subunits 4,7 - forming a "connection" in their understanding - would in fact constitute a detour deviating from the connecting passageway between production units A and B through the dry animal unit 3. It would necessarily follow that any detour, such as

shown in D1 or the Bleckenstad farm, or plausibly imaginable on the layouts presented in the patent, would meet the claimed feature of forming "a connection between the production units", and as such would be devoid of a distinctive meaning.

However, in the Board's view, the appellant-opponent errs in their interpretation of the patent. It is true that paragraph [0031] recites that the dry animal units 3 do not necessarily constitute part of the care unit 2, but this is meant to refer to an alternative configuration to that shown in figure 1, namely one in which the dry animal unit is not part of the central care unit but provided remotely from it, as is clear from the further lines of paragraph [0031]. It is not meant to suggest a different way of interpreting the embodiment of figure 1 or the claim feature "forms a connection". It is on the other hand unambiguously clear from paragraphs [0029] and [0030] that in the embodiment shown in figure 1 the dry animal units 3 are indeed part of the care unit, and that any trip from production unit A to B or vice versa must normally pass through the care unit. Otherwise there is no suggestion in the patent that "connection" should be understood in anything but this narrow sense, with the care unit 2 (which may or may not include a dry animal units), arranged between the production units A and B to form a connecting passageway between them.

- 3.2.3 The appellant-opponent alternatively submits that in some embodiments not all sub-units of the care unit 2 are located between corresponding production units. For instance, units 3 and 4 (dry animal and calving units) in figure 4 are not located between production units B and F. The farmer would still need to make a detour if he is to visit all subunits of the care unit, and

therefore "connection" should be given the broader reading of also encompassing detours. In the Board's view however the term "connection" requires that the pathway from one production unit to another passes through at least a part of the care unit, but not necessarily through all parts of it. Thus in figure 4, to go from production unit B to F the farmer normally passes through infirmary unit 7 as part of the care unit and thus through the care unit itself.

3.2.4 In conclusion, in the Board's view the claimed feature calls for a passageway that joins or connects the production units, which connection is formed by any part of the care unit.

3.3 In this sense, and without prejudice to the issue of proof, the prior use Farm Bleckenstad as apparent from D9/D9a/D10 does not disclose a care unit that forms a connection between the production units. Both declarations from Mr. Mats Johansson and Mr. Anders Sandberg describe only one path, namely one in which the cows were moved from the old barn housing the care unit to the VMS or new barn, housing both production units, along the eastern wall of the old barn between the two barns and in front of VMS4 (see D9a page 3 last paragraph and D10 point 3). This path therefore connects the new barn (housing the production units) to the care unit (old barn) but it does not connect any of the production units VMS1-VMS4 to another. The normal pathway from one production unit to another simply passes along the top (western) end of the new barn without passing through the old barn/care unit. Therefore the care unit does not form a connection between the production units as required by the contested claim.

3.4 In respect of D1, the Board does not consider that the milking center (see plan Milking Center 1/2), also including a care unit with Maternity Pen and Hospital Area, that is located to the side of the main barn forms a connection between the two accommodation areas (production units) housed in that main barn. Here again, the two "production units" or accommodation areas are directly connected at the center of the main building (see Manure Handling at Center of Building 2/2), with the normal path between the two running straight from one to the other, bypassing the Milking Center. The care unit or Milking Center does not form part of that connection. The operating persons or the cows passing from one production unit to the other would have to make a detour from that connecting passageway to pass through the "Milking Center". In the Board's understanding, as explained above, this path does not form a connection between the production units in the sense of the contested patent.

3.5 The Board thus concludes that the subject-matter of claim 1 is new over the prior use (regardless of the issue of proof), and D1.

4. Main request - inventive step

4.1 Starting from either D1 or the prior use, the claimed different layout with the care unit forming a connection between the production units, allows the herd manager or veterinarian to concentrate their attention on the care unit, while the production units can be reached quickly from the care unit. Thus the distances to be covered by the operating persons as well as by the dairy animals if they need transfer to or from the care unit are short, see patent specification paragraph [0005]. Consequently,

unproductive walks and long transfers are saved and the facility can be more efficiently managed. The corresponding technical problem can thus be formulated as how to enable a less time consuming operation or more efficient time management, see specification paragraph [0004].

4.2 This raises the question whether the skilled person, when confronted with the above problem, would consider modifying the layout of either D1 or of the Bleckenstad Farm so that the care unit forms a connection between the production units as a matter of obviousness. In this regard, the appellant opponent cites teachings of D2, D3, D5, D8 or common general knowledge.

4.2.1 Thus, D2 teaches that treatment areas should be conveniently located adjacent the return lane in a centralized milking center or cow-traffic lane between that milking center and the freestall barn to facilitate sorting or separation of the cows, see page 2, "treatment areas"; page 3, paragraph 2 and figure 3.

D3 teaches to locate the special needs facilities (care unit) close to a centralized milking center so the cows have a short distance to travel to the parlor and back. Also sorting cows is most easily accomplished as they are leaving the milking parlor, see page 3, "Location".

D5, which also relates to centralized milking, teaches that calving should take place in calving pens at a place that the staff passes frequently during the day, see page 65 section 7.1 "Calving", and that they should be easy to access in a place that facilitates optimum supervision.

Document D8 teaches that each production unit 1 can also have individually associated milking robots 51, i.e. milking can be decentralized, in order to increase efficient milking, see e.g. sections 1 and 5 of the barn in fig. 3.

- 4.2.2 However, none of these documents specifically suggests locating the care unit to form a connection between the production units given its proper interpretation. Thus none discloses arranging a care unit such that it forms a passage from one (production) unit to another. Consequently the combination of any of these documents with either D1 or Bleckenstad (if proven) would not result as a matter of obviousness in the subject-matter of claim 1.

In the case of D1 and D2 this is all the more so as in D1 the treatment areas are already, as in D2, located in the centralized milking center adjacent the return lane. The skilled person, following the teachings of D2, would thus not be motivated to modify the layout of D1.

This finding is also further compounded for Bleckenstad in combination with any of D2, D3 or D5 by the fact that they are predicated on inherently different layouts. In the Bleckenstad Farm milking robots are provided decentrally with each production unit, whereas D2, D3 or D5 each have milking centers. It is difficult to reconcile these rather different concepts, so that in the Board's view the skilled person would not as a matter of obviousness combine these teachings.

- 4.2.3 The appellant-opponent also submits, that the skilled person when scaling up the dairy of D1 would, as a matter of common general knowledge out of concerns for

space or applying routine design consideration, place further accommodation areas in the form of a new barn on the opposite side of the care unit from the first accommodation barn. However, the milking center in D1 has only one cow traffic gate, namely adjacent the existing accommodation barn, and also has the corresponding layout to manage cow traffic through that single entrance and exit. The skilled person would thus add accommodation units, as a matter of obviousness, near cow entry and return to the milking center. Thus, the Board is not convinced that common general knowledge teaches the skilled person to modify the layout of D1 to locate the "Maternity Pen" or the "Hospital Area" forming a connection between the accommodation or production units as a matter of obviousness.

4.2.4 The Board thus concludes that the subject-matter of claim 1 according to the main request involves an inventive step in the light of the evidence cited during the opposition proceedings.

5. Documents D13, D14 - admission

According to Art. 12(4) RPBA, the Board has the discretionary power to hold inadmissible evidence which could have been presented in the first instance proceedings, see CLBA IV.C.1.3.14. In this context, there appears to be no plausible reason for filing D13 and D14 only in appeal proceedings. The appellant-opponent submits that these documents would serve to illustrate that milking robots and in particular the layout of D14 were part of the common general knowledge. However, they appear to be no more relevant than the documents already on file, e.g. D8 also describes elongated production units with milking

robots at each unit. Therefore, the Board decided not to admit these documents.

6. For the above reasons the Board holds that the claims as amended according to the main request (filed as first auxiliary request with the grounds of appeal dated 27 May 2014) meet the requirements of the EPC. The Board is also satisfied that the consequential amendments to the description bringing it into line with the amended claims are unobjectionable. Such consequential amendment moreover does not constitute an amendment under Article 13(3) RPBA to the appellant proprietor's case that raises new issues that the appellant opponent cannot be expected to deal without adjournment. Indeed as a necessary step for a final decision it was to be fully expected by the other party. In application of Article 15(3) RPBA the Board therefore sees no reason in the appellant opponent's stated absence from the oral proceedings to delay a final decision in the matter.
7. The Board thus concludes that the patent can be maintained as amended pursuant to Article 101(3) (a) EPC.

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 with the order to maintain the patent as amended in the following version:

Description:

Columns 1-9 as filed in the oral proceedings before the Board,

Claims:

Claims 1-12 of the Main request, filed as First auxiliary request with the grounds of appeal dated 27 May 2014,

Drawings:

Figures 1 to 4 of the published patent specification.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated