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D E C I S I O N
of 30 June 1999

Case Number: T 0162/97 - 3.2.4

Application Number: 91201927.0

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IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:

An implement for automatically milking an animal

Patentee:

Maasland N.V.

Opponent:

Alfa Laval Agri AB

Headword:

Milking/MAASLAND

Relevant legal provisions:

EPC Art. 108, 112, 56

Keyword:

"Admissibility of the appeal (yes)"
"Inventive step (no)"

Decisions cited:

G 0009/91, T 0729/90, T 0105/87, T 0563/91, T 0220/83,
T 0145/88, T 0169/89, T 0213/85

Catchword:

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Case Number: T 0162/97 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 30 June 1999

Appellant: Maasland N.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 3 December 1996
revoking European patent No. 0 468 588 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
C. Holtz

Summary of Facts and Submissions

- I. An opposition was filed against the European patent No. 468 588.
- II. With its decision dispatched on 3 December 1996 the opposition division revoked the patent pursuant to Article 102(1) EPC.

The opposition division found that the subject-matter of Claim 1 of the patent as granted, upon which the proprietor had based its main request, did not involve an inventive step having regard *inter alia* to document EP-A-360 354 (D1) which was considered as disclosing the closest prior art.

- III. On 29 January 1997 the appellant (proprietor) lodged an appeal against this decision (see the notice of appeal in Dutch and the respective English translation) and simultaneously paid the appeal fee. The notice of appeal contains the following statement: "The maintaining in full of the patent in suit is requested for the reasons as will be set out in the Grounds of Appeal" (see page 1).

A statement setting out the grounds of appeal (hereinafter SGA) was received on 2 April 1997.

With the SGA the appellant filed an amended Claim 1 and based his request upon it.

In the SGA it is stated that the amended Claim 1 defines the sensor "as a mastitis sensor ... or a flow sensor or a milk meter or any other sensor, except a

temperature sensor, which can generate a signal indicative for the occurrence of "blind milking" (see page 1, 2nd paragraph). In the paragraph bridging pages 1 and 2 of the SGA the appellant stated that from document D1 it was known to use a temperature sensor to detect blind milking and that in particular situations problems could occur in summer, as the outside temperature could be as high as the temperature of the milk (see page 2, 2nd paragraph).

- IV. With a letter dated 11 August 1997 the respondent (opponent) filed new documents and argued that the amended Claim 1, "even if limited to one of the alternatives suggested for the sensor to detect "blind milking" (see page 4, 3rd paragraph) lacked an inventive step.

With a letter dated 1 October 1997 the respondent raised the issue of the admissibility of the appeal and essentially argued that the amended Claim 1, which had not been previously presented during the opposition proceedings, did not support the notice of appeal according to which the maintenance in full of the patent was requested.

- V. In a communication annexed to the summons to attend oral proceedings, the board expressed its provisional opinion with respect to the admissibility of the amendments filed by the appellant.

On the subject of the admissibility of the appeal, the board drew the attention of the parties to decisions T 729/90, T 105/87 and T 563/91 (cited in *Case Law of the Boards of Appeal of the European Patent Office*, 3rd

ed. 1998, VII.D.7.5.2 (d), page 488).

VI. Oral proceedings were held on 30 June 1999.

During the oral proceedings the appellant filed three amended independent claims 1 and based upon them its main request as well as two auxiliary requests.

VII. Claim 1 according to the main request of the appellant is worded as follows:

"1. An implement for automatically milking an animal, such as a cow, which implement comprises a milking plant (1) including teat cups (2) and a robot arm by means of which the teat cups are automatically connectable to the teats of the animal's udder as well as a milk measuring device comprising at least one milk meter (3), via which milk measuring device the milk coming from the teat cups (2) can be conveyed into a milk tank (6), while furthermore there is provided a sensor (23, 24), by means of which, after a teat cup (2) has been brought to a teat of the animal's udder and a vacuum has been produced in the teat cup inner space, a signal is generated indicative for the occurrence of "blind milking", i.e. the folding of a teat during automatic connection of a teat cup to said teat, characterized in that the sensor (23, 24) is constituted by a mastitis sensor, which operates on the basis of change in milk conductivity, or a fluid flow sensor or the milk meter or any other sensor, except a temperature sensor, which can generate said signal indicative for the occurrence of "blind milking" and which signal in the case of blind milking effects that the relevant teat cup (2) is automatically decoupled

and, by means of said robot arm, connected again."

Claim 1 according to the first auxiliary request of the appellant is worded as follows:

"1. An implement for automatically milking an animal, such as a cow, which implement comprises a milking plant (1) including teat cups (2) and a robot arm by means of which the teat cups are automatically connectable to the teats of the animal's udder as well as a milk measuring device comprising at least one milk meter (3), via which milk measuring device the milk coming from the teat cups (2) can be conveyed into a milk tank (6), while furthermore there is provided a sensor (23, 24), by means of which, after a teat cup (2) has been brought to a teat of the animal's udder and a vacuum has been produced in the teat cup inner space, a signal is generated indicative for the occurrence of "blind milking", i.e. the folding of a teat during automatic connection of a teat cup to said teat, characterized in that the sensor (23, 24) is constituted by a mastitis sensor, which operates on the basis of change in milk conductivity, or a fluid flow sensor or the milk meter and which signal in the case of blind milking effects that the relevant teat cup (2) is automatically decoupled and, by means of said robot arm, connected again."

Claim 1 according to the second auxiliary request of the appellant is worded as follows:

"1. An implement for automatically milking an animal, such as a cow, which implement comprises a milking plant (1) including teat cups (2) and a robot arm by

means of which the teat cups are automatically connectable to the teats of the animal's udder as well as a milk measuring device comprising at least one milk meter (3), via which milk measuring device the milk coming from the teat cups (2) can be conveyed into a milk tank (6), while furthermore there is provided a sensor (23, 24), by means of which, after a teat cup (2) has been brought to a teat of the animal's udder and a vacuum has been produced in the teat cup inner space, a signal is generated indicative for the occurrence of "blind milking", i.e. the folding of a teat during automatic connection of a teat cup to said teat, characterized in that the sensor (23, 24) is constituted by a mastitis sensor, or a fluid flow sensor or the milk meter, which signal in the case of blind milking effects that the relevant teat cup (2) is automatically decoupled and, by means of said robot arm, connected again."

VIII. On the subject of admissibility of the appeal, the appellant essentially argued that the appeal was admissible because it was clear that the amended Claim 1 took away the objections raised in the decision under appeal.

On the subject of inventive step the appellant essentially argued that the subject-matter of the independent claim of each of its requests represented the solution of a particular problem which problem was not mentioned in the prior art, this solution being based upon the new use of known sensors for solving this particular problem.

The appellant also submitted that Claim 1 according to

the main request did not contravene the requirements of Articles 100(c) and 123 EPC.

IX. Concerning the admissibility of the appeal, the respondent essentially argued that an appeal, in order to be admissible, not only had to challenge the impugned decision, it also had to contain arguments why the decision was wrong. The mere filing of amended claims would not meet this requirement for substantiation, and thus the present appeal could not fulfil Article 108, third sentence, EPC. In consequence the appeal had to be rejected as inadmissible under Rule 65(1) EPC. In this respect, the respondent also based its arguments upon the decisions of the boards of appeal T 220/83 (OJ 1986, 249), T 145/88 (OJ 1991, 251), T 169/89 (unpublished), T 213/85 (OJ 1987, 482) and G 9/91 (OJ 1993, 408). The respondent argued that, if the board were to find support for the admissibility of the appeal in some part of the case law of the boards of appeal, this part of the case law would then contradict the decisions cited. In particular, the respondent argued that the decision T 169/89 contradicted decision T 105/87.

Concerning the admissibility of the amendments the respondent argued that Claim 1 of the main request as well as of the second auxiliary request contravened Articles 100(c) and 123(2) EPC.

On the subject of inventive step the respondent argued as follows:

Document D1 not only taught the use of a temperature sensor for detecting "blind milking" but also suggested

the idea of measuring the milk flow in order to detect this phenomenon. Temperature sensors, mastitis sensors operating on the basis of change in milk conductivity and flow sensors were equivalents in this respect, particularly because they were already used in semi-automatic milking implements in order to generate a signal indicative of a reduction in the milk flow, which signal effected the automatic decoupling of the teat cup or cups. Moreover, the idea of using a signal effecting that each teat cup was automatically decoupled (if the teat is not correctly engaged) and then connected again was known from either document WO-A-85/02973 (D2) or document US-A-4 838 207 (D16). Therefore, it would be obvious for a skilled person to arrive at the subject-matter of the independent claim of each of the requests of the appellant.

- X. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of either the main request or the first auxiliary request or the second auxiliary request, filed in the oral proceedings. Alternatively, the appellant requested that the case be referred back to the first instance for further prosecution.

The respondent requested that the appeal be rejected as inadmissible and, auxiliarily, if the board considers the appeal to be admissible, that a question be referred to the Enlarged Board of Appeal. Alternatively, the respondent requested that the appeal be dismissed.

Reasons for the Decision

1. *The admissibility of the appeal and the respondent's request to refer a question to the Enlarged Board of Appeal*

1.1 According to Rule 65(1) EPC an appeal has, in order not to be rejected as inadmissible, to comply with Articles 106 to 108 and with Rule 1, paragraph 1, and Rule 64(b) EPC. Since the dispute between the parties only concerned the requirements of Rule 64(b) and Article 108, third sentence, EPC the board, after having verified that the other requirements for the admissibility of the appeal are satisfied, will focus its attention on the disputed requirements.

According to Rule 64(b) EPC a notice of appeal shall contain "a statement identifying the decision which is impugned and the extent to which amendment or cancellation of the decision is requested", and according to Article 108, third sentence, EPC "a written statement setting out the grounds of appeal must be filed...".

1.1.1 In the notice of appeal the appellant refers (in the Dutch original version) to the decision under appeal and states that "... maintaining in full of the patent in suit is requested ...". The board therefore finds that the formal requirements of Rule 64(b) EPC are met.

1.1.2 The examination of whether the requirements of Article 108, third sentence, EPC are met has to be made on the basis of the contents of the SGA and of the

decision under appeal.

In the present case, it is clear from the decision under appeal that the subject-matter of Claim 1 of the patent as granted was found to lack inventive step having regard *inter alia* to the prior art disclosed in document D1. It is also clear from the decision under appeal that the milking implement according to document D1 was provided with a temperature sensor generating a signal indicative of the phenomenon called "blind milking" (see section 1, page 2).

On the other hand, it is clear from the SGA that, in the amended Claim 1 filed with the SGA, temperature sensors are disclaimed and that "from document D1 ... it is known to use a temperature sensor" (see above, section III).

Thus, the reader of the SGA - bearing also in mind the content of the decision under appeal - would realize that the appellant argues that the reasoning in the decision under appeal, which was based on the comparative analysis of the granted Claim 1 with respect to the content of document D1, no longer applies, in view of amended Claim 1. In other words, the nature and the extent of the amendments to Claim 1 of the patent as granted (as filed by the appellant with the SGA) make it clear that the reasons in the decision under appeal no longer are relevant. Moreover, the SGA explicitly indicates that there is a causal link between the amended Claim 1 and the reasons given in the decision under appeal. Therefore, the SGA gives a clear indication of the legal and factual reasons why (according to the appellant) the decision under appeal

should be set aside. In other words, the SGA contains a clear presentation of the appellant's case.

It has to be noted that the respondent seems to have been able to understand the appeal properly since it replied straight forwardly to the SGA, cf. the letter dated 11 August 1993 (see above section IV, 1st paragraph).

- 1.2 The most general of the arguments of the respondent was essentially based upon the idea that an appeal in order to challenge the decision under appeal has **always** to deal with the reasons given in this decision. According to the respondent, the mere filing of amended claims cannot make an appeal admissible because this would result in the appeal proceedings being a continuation of the opposition proceedings. In this respect the respondent referred to a sentence in the decision G 9/91 according to which "The purpose of the appeal procedure inter partes is mainly to give the losing party the possibility of challenging the decision of the Opposition Division on its merits" (see section 18). The respondent also argued that any request should have been presented already before the opposition division so that the board may decide only on the merits of the decision of the opposition division.

The board finds that this argument is not relevant for the present case because the amended Claim 1 filed by the appellant with the SGA - as already stated in section 1.1 above - clearly represents an attempt to overcome the reasons given in the decision under appeal. In any case, it has to be noted that if a

patent proprietor were not to be able to file new claims on appeal, this not only would result in forcing him to keep and defend the claims upon which the decision of the first instance is based, even when he realises that these claims are unallowable, but it could also result in a mass of requests being presented before the opposition division, unduly prolonging these proceedings

Furthermore, the board cannot agree with the idea that the patent proprietor, although recognising during the appeal proceedings that its requests could not lead to the maintenance of the patent, would be prevented from amending the claims. Such an approach has no basis in the EPC. On the contrary, Rule 57a EPC allows the patent proprietor to amend its patent under certain circumstances, and Article 111(1), second sentence, EPC indicates that a board may exercise any power within the competence of the department which was responsible for the decision appealed, suggesting thereby that a board may also accept and examine new amended claims.

As far as decision G 9/91 is concerned, it has to be noted that the above mentioned sentence in this decision contains the term "mainly". In other words, it cannot be derived from this sentence that the **only** purpose of the appeal is to challenge the decision under appeal on its merits. This sentence cannot be isolated from its context which relates to the introduction of fresh grounds for opposition into the appeal proceedings. It has also to be considered that section 19 in G 9/91 explicitly refers to amendments of the claims in the course of appeal proceedings.

1.3 The respondent also argued that a request made in the notice of appeal according to Rule 64(b) EPC defines the "frame" or the "scope" of the appeal and that in the statement setting out the grounds of appeal according to Article 108 EPC reasons have to be given which are confined within this "frame" or "scope". Referring to the present case, the respondent asserted that the SGA - in so far as it refers to an amended Claim 1 - did not contain any reasoning relating to the request made by the appellant with the notice of appeal which refers to the patent as granted and argued that therefore the appeal was inadmissible.

The board cannot accept this argument of the respondent for the following reasons:

It has to be noted that Article 113(2) EPC establishes the principle that the patent proprietor himself is free to dictate the text of the patent upon which the instance of the EPO shall decide. In contrast to Article 138(2) EPC according to which in the course of national proceedings, if the grounds for revocation only affect the European patent in part, revocation may be pronounced in the form of a limitation of the patent, in the course of appeal proceedings before the boards of appeal, if the grounds for opposition only affect a part of the patent and **the patent proprietor fails to amend the patent**, the patent is revoked in its entirety. This legal situation underpins the right of the proprietor to change its request and amend the patent in the course of the appeal proceedings (see G 9/91, section 19 and the section 1.2 above).

It has also to be noted that in the practice of the

boards of appeal amendments to the patent may be admitted during the appeal proceedings (in these respects see also Rule 57a EPC and "Guidance for parties to appeal proceedings and their representatives", OJ 1996, 342), even in a late phase of the proceedings. In the present case, the amendments were submitted with the SGA. i.e. in the beginning phase of the appeal proceedings. If the patent proprietor may change his request during a late phase of the proceedings, *a fortiori* the proprietor may do it in the beginning.

Moreover, it has to be considered that Article 108 EPC provides - on the one hand - a relatively short time period for the filing of the notice of appeal with the purpose of making it clear - as soon as possible - whether the effects of the decision of the first instance are suspended or not according to Article 106(1), 2nd sentence, EPC and - on the other hand - a longer time period for the filing of the statement setting out the grounds of appeal with the purpose of giving the appellant sufficient time for analysing the reasons given in the decision under appeal and establishing his strategy to challenge the decision. If the request formulated in the notice of appeal were to bind the appellant to give reasons referring only to this request, this would result in an interpretation of Article 108 EPC which is contrary to its purposes.

1.4 In support of his arguments, the respondent also referred to the decision T 220/83, T 145/88, T 169/89 and T 213/85 (see section IX above).

- (i) Decision T 220/83, however, is not concerned with the significance of amended claims filed with the grounds of appeal and whether such claims can be considered sufficient for the purposes of Article 108 EPC and is therefore not relevant for the present case.

The same conclusion applies as regards decision T 213/85 concerning a case in which the appealing party was the opponent and therefore the issue of amended claims was not relevant for the admissibility of the appeal.

- (ii) In the case of decision T 145/88, by which the appeal was rejected as inadmissible, the patent had been revoked because the subject-matter of Claim 1 of the patent as granted did not involve an inventive step. In the decision under appeal, the opposition division had also held that "the actual features in, *inter alia*, Claims 2 and 3 ... did not contain inventive subject-matter". In this case, the patent proprietor filed with a document headed "Grounds of Appeal" a new set of amended claims and stated that "the new independent Claim 1 was a combination of Claims 1, 2 and 3 of the granted patent" (see section II) without making any submission in support of the allowability of this claim, although in the decision under appeal such a

combination was already considered as being not patentable. In the decision the board therefore found that the statement setting out the grounds of appeal did not contain even the minimum of reasoning in support of the appeal.

Thus, in the case of decision T 145/88, neither did the extent of the amendments make it clear that the reasons in the decision under appeal no longer applied, nor did the document headed "Grounds of Appeal" indicate that there was a causal link between the amended Claim 1 and those reasons. Therefore, this decision is not relevant for the present case either (see the section 1.1.2 above).

- (iii) Decision T 169/89, by which the appeal was rejected as inadmissible, concerned a patent revoked by the opposition division because of insufficiency of disclosure (Article 100(b) EPC). The independent claim 1 of the opposed patent was directed to "mixtures of sulphated polysaccharides having the general structure of polysaccharides which are constituent elements of the heparin... ", wherein the mixtures were analytically characterised by a combination of several parameters. In the decision under appeal, the question of the reproducibility of the claimed mixtures had been raised and reference had been made to the complex nature of heparin (see section III). In this case, the appellant filed with the statement setting out the grounds of appeal a set of amended claims, the first of which was directed to a "procedure

for the preparation of mixtures of sulphated polysaccharides having the general structure of polysaccharides which are constituent elements of the heparin... which involves inducing a reaction of a heparin ester ... ". As only response to the reasons given in the decision under appeal, the appellant stated that "in this process the heparin esters were from commercial heparins of any origin and that consequently the objection relating to the initial products was groundless" (see section IV). This response was not considered by the board as a sufficient statement regarding the objections raised in the decision under appeal.

Decision T 169/89 did not contain a causal link between the amendments (which concerned the claims filed with the statement setting out the grounds of appeal) and the reasons given in the decision under appeal (which concerned the sufficiency of the disclosure of the whole patent), nor did the statement setting out the grounds of appeal give a sufficient indication of the legal and factual reasons why the decision under appeal should have been set aside.

Thus, also the decision T 169/89 is not relevant for the present case in which there is a clear relationship between the filing of amended claims and the nature of the objections raised in the decision under appeal.

Having regard to the above comments, the board

cannot accept the argument of the respondent according to which the situation in case T 169/89 is analogous to that of the present case.

1.5 The respondent also referred to decisions T 729/90, T 105/87 and T 563/91 mentioned in the communication annexed to the summons to attend oral proceedings (see the above section V).

1.5.1 In this respect, the respondent essentially argued that the circumstances which in the case of either T 729/90 or T 563/91 led to the finding of admissibility of the respective appeal were completely different when compared with the present case.

However, insofar as these decisions indicated admissibility where new claims have been filed, this board would observe that if the new claims serve the object of putting the respondent and the board in a position to properly understand the appeal as to its intent and limitation, they suffice as grounds of appeal, even if they would finally be rejected for not being patentable. As the board in decision T 167/97, OJ EPO 1999, 488 said, the strength of an appellant's case is not to be confused with the sufficiency of it for admissibility purposes (see also older case law referred therein).

1.5.2 In the case of decision T 105/87 the patent, which was directed to a cast steel shape, had been revoked by the opposition division because of lack of novelty of its main claim in view of steel compositions existing on the market. The finding of the opposition division was

based upon an apparently broad interpretation of the expression "iron essentially the balance" specified in the independent claim of the patent as granted. In this respect the opposition division had held that this expression also included impurities usually found in steel (see section III). With the statement of grounds the appellant had put forward arguments relating to the expression "iron essentially the balance" but "... in order to overcome the objections raised by the Opposition Division, assuming that the decision under appeal was correct in these respects..." had filed a new independent claim (see section IV). The board found that the appellant had admitted that the decision under appeal was correct for the claim on which the decision was based but had submitted that the reasons given for the decision under appeal no longer applied to the new claim, so that the appellant by limiting the subject-matter of the claim and by submitting reasons for the patentability of the new claim has sufficiently dealt with the ground of the decision under appeal (see section 1).

The respondent argued that the appellant of case T 105/87 had put forward in the statement of ground at least one reason against the decision under appeal (in so far as the appellant had referred to the expression upon whose interpretation the finding of the opposition was based) and argued that in this case the board could have found the appeal admissible because of the presence of this reason.

The board cannot accept this argument because it is clear that the reasoning in decision T 105/87 with respect to the admissibility of the appeal does not

relate to the reason given in the statement of grounds concerning the expression "iron essentially the balance" but to the appellant's submission that the reasons in the impugned decision no longer applied to the new claims.

The respondent also argued that it is not clear from decision T 105/87 to which extent amendment or cancellation of the decision was requested in the notice of appeal, claiming that this decision was in contradiction with the decisions referred to in section 1.3 above, in particular with T 169/89, since in each of these cases the "scope" of the appeal was clearly defined in the respective notice of appeal.

The board cannot accept this argument of the respondent either, since, as already explained in section 1.3 above, it cannot be assumed that the notice of appeal defines a rigid "frame" or "scope", within which all requests, grounds, evidence and arguments have to be confined.

Having also regard to the comments in section 1.4 above, the boards finds that there is no contradiction between the decisions referred to in this section and the decision T 105/87.

Thus, the board does not consider that a question relating to this issue has to be referred to the Enlarged Board of Appeal.

- 1.6 The respondent also argued that the SGA did not sufficiently substantiate why the reasons in the impugned decision no longer applied to the amended

claims. In this context the respondent argued that the appellant in the SGA only indicated a new problem (no difference between milk temperature and ambient temperature in summer) and that this problem was not disclosed in the application as originally filed.

Having regard to comments in the above section 1.1.2, the reasoning in the SGA is not limited to the indication of a problem to be solved. Furthermore, the question of whether the problem indicated in the SGA was originally disclosed (or not) does not concern the examination of whether the appeal is admissible (or not) but rather concerns the examination of whether the appeal can be allowed (or not).

Further, even if this argument can be interpreted to relate to the strength of the appeal and not to the formal sufficiency of the SGA, it must be rejected for the reason already given in section 1.5.1 above.

Therefore, this argument of the respondent is not relevant.

1.7 The board therefore comes to the conclusion that Article 108 EPC is satisfied. Hence, the appeal is admissible. Having regard to the above conclusions the respondent's request for a question be referred to the Enlarged Board of Appeal (Article 112(1)(a) EPC) has to be refused.

2. *The claimed subject-matter and the admissibility of the amendments*

2.1 The independent claim 1 according to each of the

requests of the appellant specifies the features that "there is a sensor (23, 24), by means of which ... a signal is generated indicative for the occurrence of "blind milking"...".

According to Claim 1 of the main request, the sensor (23, 24) is constituted by

- (a) a mastitis sensor, which operates on the basis of change in milk conductivity, or
- (b) a fluid flow sensor, or
- (c) the milk meter, or
- (d) any other sensor, except a temperature sensor.

Thus, Claim 1 of the main request of the appellant defines four different alternatives.

Claim 1 of the first auxiliary request only relates to the above mentioned alternatives (a), (b) and (c). Claim 1 of the second auxiliary request defines the above mentioned alternatives (b) and (c) and a further alternative according to which the sensor is constituted by

- (a') a mastitis sensor.

2.2 As far as alternative (b) is concerned, the independent claims of all the requests of the appellant are identical with regard to their content.

The subject-matter defined by alternative (b) does not

contravene either Article 100(c) or Article 123 EPC.
This was not disputed.

- 2.3 The objections put forward with respect to Articles 100(c) and 123 EPC concerned alternative (d) in Claim 1 of the main request and alternative (a') in Claim 1 of the second auxiliary request.

3. *Novelty*

The subject-matter of Claim 1 is novel (Article 54 EPC) with respect to the cited prior art. Novelty was not disputed.

4. *Closest prior art*

- 4.1 Both parties and the board consider the milking device described in document D1 as being the closest prior art.

- 4.2 Document D1 discloses an implement for automatically milking an animal, which implement comprises a milking plant including teat cups (45 to 48) and a robot arm (6) by means of which the teat cups are automatically connectable to the teats of the animal's udder (see Figures 1 and 2).

Although document D1 does not explicitly refer to either a milk measuring device or a milk tank, it has to be assumed that the implement according to document D1 comprises a milk measuring device comprising at least one milk meter, via which milk measuring device the milk coming from the teat cups can be conveyed into a milk tank. This was acknowledged by the appellant

during the oral proceedings.

Moreover, it is clear from the passage in column 16, lines 12 to 19 of document D1 that a sensor is provided, by means of which, after a teat cup has been brought to a teat of the animal's udder and a vacuum has been produced in the teat cup inner space, a signal is generated indicative for the occurrence of "blind milking", i.e. the folding of a teat during automatic connection of a teat cup to said teat. According to the second sentence of this passage, "the check whether the teat cup is connected correctly [i.e. it is not folded] can be made by means of a temperature measurement; for in the milk flow there is measured a higher temperature than there outside".

Thus, document D1 refers explicitly to the problem of the "blind milking" and gives a solution to this problem. The solution not only indicates explicitly a temperature sensor but also suggests the idea of measuring the milk flow.

5. *Problem and solution*

5.1 Having regard to the conclusions in section 4 above, the subject-matter of independent claim 1 according to each request of the appellant differs from the closest prior art in that

- (i) the sensor is constituted by a **fluid flow sensor**, and
- (ii) the signal generated by the sensor, in case of blind milking, **effects that the relevant teat**

cup is automatically decoupled and connected again.

5.2 Feature (i) defines an alternative solution with respect to a temperature sensor. Feature (ii) complements the teaching of document D1 in respect of the action to be undertaken when "blind milking" is detected.

Thus, the problem to be solved is to find a further solution to the problem of detecting "blind milking" and to improve the milking implement with respect to the automatic application of the teat cups.

6. *Inventive step*

6.1 The skilled person reading document D1 receives the information that, if during the automatic connection of a teat cup the folding of the respective teat of the animal's udder were to occur, no milk would flow from the teat, and that the lack of milk flow would be indicative for the occurrence of "blind milking". Therefore, it would be obvious for the skilled person, to whom milk flow sensors are well known, to arrange in the milking implement known from D1 a fluid flow sensor for directly measuring the flow of milk, instead of the temperature sensor measuring the milk flow in an indirect way. This is according to the board an obvious alternative.

The appellant asserted however that a fluid flow sensor - when compared to a temperature sensor - provides the advantage that the absence of milk flow can be detected even if the ambient temperature around the teat cup is

the same as the body temperature of the animal. In these respects, the appellant argued that the choice of a fluid flow sensor represented the new use of a known sensor for solving a particular problem which problem was not mentioned in the prior art.

It may be that the obvious choice of a fluid flow sensor results in the solution of an additional particular problem; however, it is clear from document D1 that a temperature sensor is suitable for detecting whether (or not) milk is flowing because it measures a temperature difference between the milk temperature and a reference temperature (see D1, column 16, lines 17 to 19: "... higher temperature than there outside"). Therefore, the skilled person reading document D1 will immediately realize that the milk flow cannot be detected if this reference temperature is the same as the body temperature of the animal to be milked. Therefore, the formulation of a problem linked to this issue (i.e. the identification of an additional advantage due to the use of a sensor other than a temperature sensor) does not contribute to give to an inventive character the choice of a fluid flow sensor as an alternative to the temperature sensors.

Moreover, as already indicated above, since document D1 suggests the idea of measuring the flow of milk, it would already have been obvious for the skilled person wishing to find a different solution to the problem of "blind milking" to arrive - on the basis of its general knowledge - at a milking implement of the type disclosed in D1 but having a milk flow sensor instead of a temperature sensor, irrespective of the circumstance that an additional effect is obtained.

Therefore, feature (i) is not inventive.

- 6.2 Feature (ii) has no functional relationship to feature (i), in so far as the action to be undertaken when the sensor generates a signal indicative of "blind milking" does not depend on the type of the sensor. Therefore, this feature can be dealt with separately when inventive step is considered.

The skilled person wishing to increase the level of automation in a milking implement according to the closest prior art, will find some suggestions either in document D2 or in document D16, both relating to automatic milking devices, particularly since document D1 itself suggests that, after having checked the connections and verified whether "all teat cups are connected" (see Figure 11), the "tracking" is started again if not all teats are connected.

According to document D2 "**sensors ... may be provided in order to have check whether the teat is engaged correctly**, may give a warning signal if this is not the case and may **stop the movement** of application of the milking unit to the udder, cause it to **move down again** and **repeat the upwardly engaging movement**" (see page 9, lines 1 to 7; emphasis added).

According to document D16 "... the required additional **sensors** can be present for ... detecting **whether a teat cup has been applied in the correct manner** or has not been applied, so that **the relevant teat cup can be**

returned ... to the starting position for another attempt at application" (see column 14, lines 1 to 6, emphasis added).

Thus, each of documents D2 and D16 teaches the use of a sensor generating a signal which, when a teat is not correctly engaged, effects that the relevant teat cup is automatically decoupled and connected again.

Therefore, it would be obvious for the skilled person to apply this teaching of either document D2 or document D16 to the milking implement according to the closest prior art which is provided with a sensor for detecting whether the folding of the teat occurs during connection of the teat cup.

6.3 It would thus be obvious for the skilled person to arrive at a milking implement falling within the term of Claim 1 (alternative "fluid flow sensor") according to each of the requests of the appellant, so that the subject-matter of these claims does not involve an inventive step (Article 56 EPC).

7. *The appellant's request for the case be remitted to the first instance for further prosecution*

7.1 The request of the appellant was based *inter alia* upon the circumstance that the respondent had filed new documents (D17 to D19) during the appeal proceedings. Since the reasons in the present decision do not relate to these documents, this argument of the appellant is not relevant.

7.2 It has to be noted that in the present case the filing of amendments did not result in raising a case substantially different from that on which the decision under appeal is based and that the respondent did not request the case to be remitted to the first instance. Therefore, the board decided to exercise according to Article 111(1) EPC the power within the competence of the first instance and examine the amendments.

7.3 The board therefore sees no reason for remitting the case to the first instance, so that the request of the appellant has to be rejected.

8. Having regard to the outcome of the appeal review as to inventive step, it is not necessary to review the objections raised regarding Article 100(c) EPC.

Order

For these reasons it is decided that:

1. The request for a question to be referred to the Enlarged Board of Appeal is refused.
2. The appeal is dismissed.

The Registrar:

The Chairman:

N. Maslin

C. Andries