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D E C I S I O N
of 17 November 1998

Case Number: T 0774/97 - 3.2.4

Application Number: 92202244.7

Publication Number: 0511722

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:

A milking plant

Patentee:

Maasland N.V.

Opponent:

Alfa Laval Agri AB

Headword:

milking/MAASLAND

Relevant legal provisions:

EPC Art. 101(2), 108, 111, 123
EPC R. 65, 67

Keyword:

"Admissibility of the appeal (yes)"
"Procedural violation (no)"
"Admissibility of the amendments (yes)"
"Remittal for further prosecution"

Decisions cited:

T 0538/89, T 0275/89, T 0271/84

Catchword:

-



Case Number: T 0774/97 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 17 November 1998

Appellant: Maasland N.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 22 May 1997
revoking European patent No. 0 511 722 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
M. Lewenton

Summary of Facts and Submissions

- I. The mention of the grant of the European patent EP-B-0 511 722 was published on 25 January 1995 (Bulletin 95/04). The patent derives from the divisional application No. 92 202 244.7 of the European patent application No. 90 200 422.5, published as EP-A-0 385 539 (parent application).

An opposition based on Articles 100(a) and (c) EPC and requesting the revocation of the patent in its entirety was filed by the respondent (opponent). The objection under Article 100(c) EPC was directed to claims 1, 3 and 4 in so far as each of these claims contains the expression "milk line system" instead of the expression "circular line" referred to in the divisional application as filed. In the notice of opposition, it was stated inter alia that "... in claim 1 and 4 of the granted patent, the circular line (5) has been amended to 'the milk line system'..." (cf. page 4, 4th paragraph).

- II. In a reply dated 12 March 1996 the appellant (proprietor) sought to overcome the Article 100(c) EPC objection by replacing the term "milk line system" in dependent claims 2 to 4 and 6 by the term "circular line (5)" and requested maintenance of the patent in amended form based on "... Claims 1 and 5 in the form as granted and Claims 2 to 4 and 6 in amended form...".

With a further letter dated 12 September 1996 the respondent maintained the objection under

Article 100(c) EPC "...since all the necessary amendments have not been performed" and asserted that in claim 1 (lines 21 to 23) "... the expression 'milk line system' should be read 'circular line' in order not to contravene the requirements of Article 123(2)" (cf. page 1, 1st paragraph). This letter was attached to the EPO Form 2911 (brief communication) dated 25 September 1996 and forwarded by the opposition division to the proprietor with the invitation to **take note** of the respondent's letter.

III. With its decision dispatched on 22 May 1997 the opposition division revoked the patent pursuant to Article 102(1) EPC for failure of Claim 1 as granted to meet the requirements of Article 76(1) EPC (Article 100(c) EPC).

IV. On 1 July 1997 a notice of appeal was lodged against the above identified decision by the appellant and on the same date the appeal fee was received. The statement of grounds of appeal was received on 1 September 1997.

Together with the statement of grounds of appeal the appellant filed a new Claim 1. In a first part of the statement of grounds of appeal (page 1 to page 3, 2nd paragraph) which refers inter alia to the brief communication of the opposition division dated 25 September 1996 (EPO Form 2911) it is argued that a substantial procedural violation had occurred. In a second part (page 3, 3rd paragraph to page 4, 1st paragraph) the new Claim 1 is referred to and it is stated that "This new claim 1 takes away all the

objections raised in the reason for the decision...". The appellant requested with the statement of grounds of appeal that the appeal fee be reimbursed and the case be remitted to the opposition division, "such that the proprietor will have an opportunity to reply to the brief communication of September 25, 1996" (cf. page 3, 2nd paragraph). Subsidiarily, it was requested that the impugned decision be set aside and the patent be maintained on the basis of the new Claim 1 (cf. page 3, 3rd paragraph).

V. With a letter dated 24 February 1998 the respondent raised the issue of the admissibility of the appeal. The respondent stated that the claims in the form as now on file had neither been presented to the opposition division nor indicated or foreseen in the notice of appeal. On the basis of an alleged contradiction between the filing of amended claims and the request for "maintenance in full of the patent" in the notice of appeal, the respondent concluded, firstly, that these amended claims effectively formed the main request of the appellant, secondly, that no proper grounds of appeal had been presented in support of such a request and, thirdly, that the appeal therefore was to be rejected as being inadmissible.

VI. In a communication dated 15 May 1998 the board expressed its provisional opinion. The board held the appeal to be admissible, that no substantial procedural violation had been demonstrated and that the request for a refund of the appeal fee therefore was not justified. The board also stated its intention to remit the case to the first instance for further prosecution on the basis of the amended Claim 1.

VII. With a letter dated 21 October 1998 the respondent requested that the following questions be referred to the Enlarged Board of Appeal:

1. "Can an appeal against a decision to revoke the patent, made by an Opposition Division, i.e. in proceedings inter partes be regarded as substantiated by the mere filing of amended claims not earlier submitted to the Opposition Division, without any argumentation being made within the time period stipulated in Article 108, third sentence, against the decision as such?"
2. If the answer to the question above is yes, is this still the case if the amended claims *prima facie* contravene Article 123(3) or 123(2)?"

VIII. Oral proceedings were held on 17 November 1998.

During the oral proceedings the appellant filed an amended Claim 1 upon which its main request was based. The appellant also submitted a subsidiary request.

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

"A milking plant for milking cows, with a circular line (5) to which the discharge line (9) of a milking machine is connected, a milk tank (6) included in said circular line (5) and a pump (64) for circulating the milk from the milk tank (6) therethrough, characterized in that the milking plant comprises one or more milking

machines for automatically milking cows, each comprising a discharge line (9) connected to said circular line (5) and being provided with a milking robot for automatically connecting teat cups to the teats of a cow and with a milking measuring device (4), and in that the milk tank (6) is constituted by a milk cooling tank and in that the pump (64) is provided for keeping the milk in motion in the circular line preventing milk residues from settling in the circular line."

- IX. As to the admissibility of the appeal, the appellant argued that its appeal was admissible not only because of the submission of an amended Claim 1 taking away the objections raised in the impugned decision but also because in the statement of grounds of appeal extensive argumentation was advanced in support of the allegation of a substantial procedural violation.
- As to the procedural violation, the appellant argued that the brief communication dated 25 September 1996 was misleading since it contained neither an explicit invitation to submit further observations nor a fair indication of the possibility to do so at that stage of the proceedings but only an invitation to **take note** of a letter of the opponent. Consequently, and in fair expectation of a subsequent communication under Article 101(2) EPC signalling the opinion of the opposition division, the appellant filed no such observations. The appellant was therefore not only taken by surprise by the decision of 22 May 1997 to revoke the patent, he was at the same time denied the opportunity stipulated in Article 113(1) EPC to present his comments. Such an infringement of the right to be

heard must be seen as a substantial procedural violation, which as such justifies a refund of the appeal fee under Rule 67 EPC. Moreover, the proprietor argued that the wording of Article 101(2) EPC, "as often as necessary", in relation to an invitation to file observations, is to be interpreted as meaning 'at least once' and that the absence of such an invitation therefore amounts to a procedural violation in the sense of Rule 67 EPC.

- X. Concerning the admissibility of the appeal the respondent essentially argued that in order to be admissible an appeal not only had to challenge the impugned decision, it also had to contain arguments why the decision was wrong. The mere filing of new or 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 deemed inadmissible under Rule 65(1) EPC. In this respect, the respondent also referred to some previous decisions of the boards of appeal.

The respondent also submitted that the amended claims as now filed could and should have been filed at an earlier stage of the proceedings since the appellant had been fully aware of the outstanding deficiencies since the very beginning of the opposition proceedings. That the appellant in these circumstances had chosen to delay the filing of such necessary and evident amendments only until during the appeal proceedings was seen as an abuse of procedure and a further reason to reject the appeal as inadmissible.

The respondent also argued that the primary issue of an appeal must be an issue exhibiting a clear link to the substance of the impugned decision and that any other issue raised in the grounds of appeal is therefore of secondary importance. Since the present patent was revoked for a deficient claim 1 with respect to Article 76 EPC, the admissibility of the appeal as such had to be determined solely on the basis of the submissions of the appellant in this respect, in particular with reference to Article 108, 3rd sentence, EPC.

Referring to the alleged procedural violation the respondent essentially argued that the ground on which the patent had been revoked had been known to the appellant from the beginning of the opposition proceedings.

On the subject of the request of the appellant for remittal of the case to the first instance for further prosecution on the basis of the amended Claim 1 filed during the oral proceedings, the respondent agreed that the case had to be remitted to the first instance if its main and auxiliary request were to be rejected. However, with respect to the amended Claim 1, the respondent expresses the view that the filing of an amended Claim 1 during the oral proceedings amounted to a unallowable late filing.

Concerning the admissibility of the amendments to Claim 1 with regard to Article 123 EPC, the respondent essentially argued as follows:

According to Claim 1 of the patent as granted, the pump 64 is provided for keeping the milk in motion in the milk line system. Since Claim 1 of the patent as granted specifies that the milking plant is provided with "a milk line system comprising a circular line", the term "circular line" has to be construed as defining a part of the "milk line system". Because of the deletion of the wording "a milk line system comprising" from the pre-characterising portion of Claim 1 as granted and of the replacing of the term "milk line system" by the term "circular line", Claim 1 can be interpreted as relating to a pump which does not keep the milk in motion in the remainder of the 'milk line system'. This has the effect of broadening the scope of the claim and constitutes a violation of Article 123(3) EPC.

- XI. The appellant's main request was for the case to be remitted to the first instance for further prosecution on the basis of the amended Claim 1 as filed during the oral proceedings. As a subsidiary request the appellant requested remittal to the first instance on the basis of Claim 1 as filed with the grounds of appeal.

The respondent's main request was for the appeal to be declared inadmissible. The respondent's subsidiary request is for referral to the Enlarged Board of Appeal of the questions referred to in the above section VII.

Reasons for the Decision

1. The admissibility of the appeal and the respondent's

request to refer two questions 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. In the present case compliance with Article 108, third sentence EPC is of particular interest since in the respondent's opinion such compliance is not present, as no written statement properly substantiating the grounds of appeal has been filed.

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".

In the notice of appeal the appellant states that "...maintaining in full of the patent in suit is requested...". This statement clearly meets the formal requirements of Rule 64(b) EPC. With respect to Article 108 EPC, third sentence, the case law of the Boards makes it unequivocally clear that the expression "grounds of appeal" implies the specification of the legal and factual reasons why the decision under appeal should be set aside. While referring to Article 113(1) EPC for the legal basis of its request, the appellant stated furthermore in the statement of the grounds of appeal that a substantial procedural violation has taken place and gives a two-page, detailed factual account in support of this view. The board sees no reason why this reason and the accompanying substantiation thereof should not suffice to satisfy Article 108, third sentence, EPC. Moreover, the decision as to whether an appeal is admissible or not takes into account neither the relevance of the arguments brought forward nor the degree of objectivity of the same. This means that normally also unconvincing or even incorrect arguments will suffice to render an appeal admissible. The merit of such arguments will however be taken into account during the appeal proceedings and thus be reflected in the final decision.

For the above reasons, the appeal is admissible at least in so far as the statement of grounds of appeal refers to the alleged procedural violation. In other words, the first part of the statement of grounds of appeal is sufficient to render the appeal admissible.

In this respect the board finds nowhere in the EPC support for the notion of what could be termed

'partial admissibility' of an appeal; an appeal is either admissible or inadmissible. During the oral proceedings, the respondent expressed agreement with this finding and acknowledged that partial admissibility of an appeal was not provided for under the EPC.

1.1.1 Those arguments of the respondent which relate to the filing of a new Claim 1 are irrelevant in so far as they did **not** relate to the aspect of a possible procedural violation. In other words, the appeal would have been admissible, even if the statement of grounds of appeal had referred only to the alleged procedural violation. For these reasons, also the arguments of the respondent according to which the statement of grounds of appeal has no link to the substance of the impugned decision, cannot be accepted.

1.2 As accounted for above, the appeal cannot be declared inadmissible due to the presence in the statement of the grounds of appeal of both a specific legal reason and argumentation based on facts and related thereto (Article 108 EPC). The specific legal reason is an alleged substantial procedural violation due to the alleged fact that the decision did not satisfy the requirements of Article 113(1) EPC. Since the respondent's request for referral to the Enlarged Board of Appeal addresses a **different** reason, i.e. the filing of amended claims, no decisive connection exists between the two reasons. In consequence, the answering of the questions which were to be presented to the Enlarged Board of Appeal would have no bearing on the board's decision on admissibility in the present case.

The respondent's request for referral to the Enlarged Board of Appeal (Article 112(1)(a) EPC) is therefore rejected.

2. *The alleged procedural violation and the appellant's request for reimbursement of the appeal fee*

2.1 Article 101(2) EPC stipulates that in the examination of the opposition the opposition division shall "as often as necessary" invite the parties to file observations. No basis for the notion that this has to be interpreted as meaning 'at least once' can be found by the board. On the contrary, according to the case law of the Boards the opposition division may - based on the particulars of a given case - even interpret this term to mean that no such invitation, viz. communication, is necessary. Rule 58(3) EPC and the wording thereof that "where necessary, any communication to the proprietor ... pursuant to Article 101 EPC, paragraph 2, shall contain a reasoned statement ...[which where]... appropriate shall cover all the grounds against the maintenance..." **only** applies to the case where a communication **is** issued, and cannot be interpreted to mean that in **any** case such a communication **has** to be issued.

The above has been confirmed in a plurality of decisions of the technical boards of the EPO, see for example T 275/89, OJ EPO 1992, 196, section 3.2 of the reasons, and T 538/89, section 4.2 of the reasons. In both cases it is concluded that the mere absence of at least one communication under Article 101(2) EPC cannot **as such** serve to substantiate an alleged violation of the right to be heard under Article 113 EPC. The latter article merely stipulates that a

decision can only be made on grounds on which the parties have had an opportunity to comment. If the particulars of a case are such that this opportunity is given already without such a communication from the opposition division, then no such communication must be issued.

2.2 In the present case, the ground on which the patent had been revoked had been known to the appellant from the beginning of the opposition proceedings. It is clear from the notice of opposition that an objection under Article 100(c) EPC with regard to the term "milk line system" was directed not only to the dependent Claims 3 and 4 but also to the independent Claim 1 of the patent as granted. Therefore, the basis for the decision to revoke the patent was already in the notice of opposition, and the decision to revoke the patent and the reason therefore thus could not have come as a surprise to the appellant. In other words, the impugned decision was based on a ground on which the appellant had had an opportunity to present its comments (Article 113(1) EPC).

2.2.1 Having regard to the comments in the above section 2.2, the appellant's arguments relating to the fact that the brief communication dated 25 September 1996 did not contain an explicit invitation to submit further observation are not relevant in the present case, since it does not change or influence the above reasoning.

2.3 The board thus finds that no substantial procedural violation has taken place. This also means that the second requirement of Rule 67 EPC has not been met and that a reimbursement of the appeal fee therefore is

not equitable.

Therefore, the appellant's request for the reimbursement of the appeal fee is rejected.

- 2.4 Incidentally, the board notes that even in circumstances where no formal obligation exists to issue an invitation pursuant to Article 101(2) EPC, the opposition division may still inform the parties of its intentions. Such an approach could have made the overall proceedings before the EPO more efficient.

3. *The filing of an amended Claim 1 during the oral proceedings*

The board cannot accept the arguments of the respondent that the filing of Claim 1 according to the main request of the appellant constitutes an unallowable late filing. The amendment to Claim 1 according to the main request of the appellant with respect to Claim 1 filed with the statement of the grounds of appeal is only a minor, clarifying one which does not affect the scope of the claim. Moreover, it was occasioned by a discussion during the oral proceedings.

4. *The interpretation of Claim 1 of the patent as granted and the admissibility of the amendments*

- 4.1 In order to examine whether the amendments to Claim 1 of the main request of the appellant comply (or not) with the requirements of Articles 123(2) and (3) EPC, it is necessary to identify the subject-matter of Claim 1 as granted and the corresponding extent of protection.

Since the amendments to Claim 1 concern the expressions "milk line system" and "circular line" as well as their relationship, the meaning of these expressions has to be established in order to determine how these expressions contribute to define the extent of protection.

4.1.1 Claim 1 as granted specified inter alia the following features which relate to these expressions:

- (a) the milking plant is provided with a **milk line system** comprising a **circular line** (5),
- (b) a pump (64) is included in said **circular line** for circulating the milk from the milk tank (6) therethrough (i.e. through the **circular line**),
- (c) the pump (64) is provided for keeping the milk in motion in the **milk line system** preventing milk residues from settling in the **milk line system**.

The relationship between the "milk line system", the "circular line" and the "pump" is not unambiguously defined in Claim 1 as granted.

4.1.2 In order to determine the meaning of these expressions in the context of Claim 1 and their contribution to the extent of protection (Article 69 EPC), description and drawings shall be used.

These expressions occur firstly in the opening paragraph (column 1, lines 3 to 8) and then in the third paragraph (column 1, lines 18 to 30) of the introductory part of the description of patent as granted. Since these paragraphs recite respectively

the preamble and the characterising portion of Claim 1, they are not helpful in interpreting Claim 1 with respect to the meaning of these expressions.

While the term "circular line" does not occur any longer in the introductory part of the description of the patent as granted, other passages of the introductory part of the description refer to the expression "milk line system":

According to the paragraph in column 1, lines 39 to 44,

"the milk line system extends through at least part of a cow shed" (feature **i**), and

"as the **milk line system** is not provided for cooling purposes and milk already cooled is pumped through the **milk line system**, this **system** has to be insulated ..." (feature **ii**; emphasis added).

In the paragraph in column 1, lines 45 to 57 it is stated that

"...rinsing fluid is circulated through the **milk line system** by means by means of said **pump**" (feature **iii**) and

"as the milk in the **milk line system** only must be kept in motion, the **pump** may operate at two speeds..." (feature **iv**).

In the detailed description of the embodiment represented in the drawings refers, the term "circular line 5" occurs many times. It is clear from this part

of the description that

the pump 64, which can be operated a two different speeds, is incorporated in the **circular line 5** (feature **iv**), see column 7, lines 32 to 34,

the milk is circulated from the milk **cooling** tank through the **circular line 5** in order to keep the milk in motion and to prevent milk residues from being deposited in the circular line 5 and the **circular line** is thermally insulated (feature **ii**), see column 7, lines 34 to 40, and

a rinsing fluid is circulated by the **pump** in the **circular line 5** (feature **iii**), see column 7, lines 44 to 49.

Moreover, in Figures 1 and 2 a circular line provided with the reference number 5 and including a tank provided with the reference number 6 is represented

as extending through part of a cow shed (feature **i**).

Thus, the features **ii** to **iv** and the indication **i** derivable from Figures 1 and 2 correspond unequivocally with the features **i** to **iv** in the introductory part of the description.

- 4.1.3 The term "milk line system" occurs also in a passage of the detailed description (column 6, line 39 to column 7, line 24). However it is clear from this passage that this term is used with a different meaning as in features **i** to **iv** mentioned above.

In particular, the "milk line system" referred to in this passage of the detailed description corresponds to the line system represented in Figure 2 as including the lines 3, 8 and 9. In fact, the wording in column 6, lines 39 to 49 (describing the rinsing of the circuit once the milking operation has been completed) implies that this circuit **only** comprises the lines extending between the teat cup 2 and the three-way valve 60, i.e. lines 3, 8 and 9 of the milking machine, and **not** the circular line 5. The passage in column 6, lines 50 to 54 states that the common milk discharge line 9, which is located downstream of lines 3 and 8, is connected to the circular line 5 by means of a three-way valve 60. In its first position this valve 60 connects line 9 to the circular line 5 and in its second position it connects line 9 to a second rinse line 61. Rinsing of lines 3, 8 and 9 is done with valve 60 occupying its second position and by circulating rinsing fluid through the so-called rinse line system including lines 58, 3, 8, 9 and 61 by means of alternating vacuum and pressure as dictated by switching element 17.

Thus, it is clear that the circular line 5 cannot be included in this rinsing process due to the position of valve 60. The rinsing scheme of the milking machine - as such - is carried out after each milking process.

Moreover, the circular line 5 is rinsed separately by circulating rinsing fluid therethrough by means of pump 64, see column 7, lines 42 to 49. The lines 3, 8 and 9 cannot be included in this rinsing process due to two circumstances. First, no direct connection is possible between the circular line 5 and the second

rinse line 61 since this possibility is not offered by valve 60. Second, even if rinsing fluid in principle could enter 'upstream' through valve 60 and into the common discharge line 9, then further flow in direction of the milk measuring device 4 and line 3 would be impossible due to the presence of a non-return valve 25, see also column 4, lines 15 to 20. The circular line 5 is only cleansed a few times a week.

In other words, the rinsing circuits comprising the lines 3, 8 and 9, on the one hand, and the circular line 5, on the other hand, are separate circuits serving different purposes and subjected to different and separate rinsing procedures. Circulation of milk in the meaning of the present patent does not take place in the lines 3, 8 and 9 and rinsing of these lines is not carried out by means of pump 64.

4.1.3.1 Therefore, the board cannot accept the argument of the respondent according to which in Claim 1 as granted the circular line forms only part of the milk line system and that the pump 64 thus may be able to effect any circulation in any other part of the system than the circular line proper.

4.1.3.2 With regard to the respondent's comments on the 'dead end' piece of line between the valve 60 and the circular line 5, the board finds nowhere in the patent specification support for the notion that this may imply the presence of other parts of the milking plant. In the opinion of the board, the skilled person merely recognises this to be a possible problem zone of the circuit and that this connection piece therefore has to be minimised.

4.1.4 Having regard to the above comments, it must be understood from the description and the drawing of the patent as granted that there is identity between the meanings of the expressions "milk line system" and "circular line" used in Claim 1 of the patent as granted.

4.1.4.1 The respondent pointed out that Claim 1 of the patent as granted specifies in the preamble the feature that

(b) a pump (64) is included in said **circular line** for circulating the milk from the milk tank (6) therethrough (i.e. through the **circular line**),

and in the characterising portion the feature that

(d) the pump [is suitable] for keeping the milk in motion **in the milk line system**.

In this respect the appellant argued that, if the meaning of the terms "circular line" and "milk line system" were to be the same, features (b) and (d) would have the same information content. Since the appellant had introduced feature (d) in the characterising portion of Claim 1 in order to distinguish its subject-matter from the prior art, these terms could not have the same meaning. The board cannot accept this argument of the respondent for the following reasons:

Feature (d) has been isolated from the context of the characterising portion of Claim 1 as granted. In fact, the second part of the characterising portion of

Claim 1 reads as follows:

(c) the pump (64) is provided for keeping the milk in motion in the **milk line system** preventing milk residues from settling in the **milk line system**.

Thus, the information content of feature (c) goes beyond the information content of feature (b), in so far as feature c) also indicates the purpose (i.e. preventing milk residues from settling ...) of the milk circulation in the milk line system (i.e. in the circular line).

4.2 The amendments to Claim 1 as granted concern features (a) and (c) referred to in the above section 4.1.1, which were amended to

(a') the milking plant is provided with a **circular line** (5),

(c') the pump (64) is provided for keeping the milk in motion in the **circular line** preventing milk residues from settling in the **circular line**.

4.2.1 These amendments have a basis (Article 123(2) EPC) in those passages of the description of the divisional application as filed (see page 9, lines 14 to 33) and of the parent application as filed (see EP-A-385 539: column 12, lines 26 to 49) which correspond to the features **ii** to **iv** referred to in the above section 4.1.2.

4.2.2 Having regard to the comments in the above section 4.1.4 these amendments cannot result in an extension of the protection (Article 123(3) EPC).

- 4.2.3 With respect to the allowability of this amendment in the light of Articles 123(2) and (3) EPC, the board also notes that amendments solely serving to remove inconsistencies between the subject-matter of a claim and the accompanying description do not per se infringe said Articles, see e.g. T 271/84, OJ 1987, 405, section 2.
- 4.2.4 Therefore, the board finds that Claim 1 of the main request of the appellant does not contravene Article 123 EPC.
5. The opposition division did not deal with the opposition ground according to Article 100(a) EPC. The board finds it inappropriate to decide this issue and makes use of its power under Article 111(1) EPC to remit the case to the first instance for further prosecution.

Order

For these reasons it is decided that:

1. The request for referral to the Enlarged Board of Appeal is refused.
2. The appeal is admissible.
3. The decision under appeal is set aside.
4. The case is remitted to the first instance for further prosecution on the basis of the main request of the

appellant.

5. The request for reimbursement of the appeal fee is refused.

The Registrar: The Chairman:

N. Maslin

C. Andries