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**D E C I S I O N**  
**of 11 November 1999**

**Case Number:** T 0494/98 - 3.2.4

**Application Number:** 89107974.1

**Publication Number:** 0332229

**IPC:** A01K 1/12

**Language of the proceedings:** EN

**Title of invention:**

Device for milking animals, such as cows

**Patentee:**

Maasland N.V.

**Opponent:**

Alfa Laval AB

**Headword:**

Milking/MAASLAND

**Relevant legal provisions:**

EPC Art. 69, 76, 100, 108, 111(1), 123

**Keyword:**

"Admissibility of the appeal (yes)"  
"Extension of the scope (no)"  
"Remittal"

**Decisions cited:**

G 0001/93, T 0108/91, T 0673/89, T 0214/91, T 0271/84,  
T 0371/88, T 0729/90, T 0105/87, T 0563/91, T 0145/88

**Catchword:**

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Boards of Appeal

Chambres de recours

Case Number: T 0494/98 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 11 November 1999**

**Appellant:** Maasland N.V.  
(Proprietor of the patent) Weverskade 10  
3155 PD Maasland (NL)

**Representative:** Corten, Maurice Jean F. M.  
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**Respondent:** Alfa Laval AB  
(Opponent) Hans Stahles väg  
147 80 Tumba (SE)

**Representative:** Lerwill, John  
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London, WC1V 7LE (GB)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 18 March 1998  
revoking European patent No. 0 332 229 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** C. A. J. Andries  
**Members:** P. Petti  
R. E. Teschemacher

## Summary of Facts and Submissions

- I. The European patent No. 332 229 (hereinafter referred to as the patent in suit) resulted from European patent application No. 89 107 974.1 filed as a divisional application of the earlier European patent application No. 86 200 064.3 published under the number EP-A-189 954 (hereinafter referred to as the parent application).

An opposition based upon Articles 100(a), (b) and (c) EPC was filed against this patent.

- II. With its decision dispatched on 18 March 1998 (hereinafter referred to as the decision under appeal) 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, as well as that of the independent claims upon which two auxiliary requests were based extended beyond the content of the parent application.

In the decision under appeal, the opposition division held that the feature specified in Claim 1 as granted according to which "near the milking parlour the mobile device is provided with a space for mounting the cleaning unit and for mounting the milking unit" (hereinafter referred to as feature X) was not disclosed in the parent application. The opposition division did not accept the interpretation of the appellant who considered the milking parlour as being

the area, bounded by lateral guide means, where the animal stands during the milking process but interpreted the term "milking parlour", which was also specified in each independent claim according to the auxiliary requests of the appellant, as defining a box including not only the area in which the animal stands during the milking process but also the space within which the milking unit and the cleaning unit are located.

III. On 7 May 1998 the appellant (proprietor) lodged an appeal against this decision and simultaneously paid the appeal fee.

IV. A statement setting out the grounds of appeal (hereinafter referred to as the SGA) was received on 20 July 1998.

The SGA contains a first paragraph having the title "Main request" and relating to Claim 1 as granted and two further paragraphs having the titles "First auxiliary request" and "Second auxiliary request", respectively relating to two amended independent claims filed by the appellant with the SGA.

V. In a communication annexed to the summons to attend oral proceedings, the board expressed its provisional opinion with respect to the admissibility of Claim 1 as granted with respect to Article 100(c) EPC. On the subject of the admissibility of the appeal the board drew the attention of the parties to the 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 11 November 1999.

During the oral proceedings the appellant based its sole request upon an amended independent Claim 1 (hereinafter referred to as the present Claim 1) which is worded as follows:

"1. A device for milking animals, such as cows, comprising a milking parlour (1) with a computer-controlled fodder supply unit and a computer-controlled milking machine having a cleaning unit (28) for the animal's teats and a milking unit for automatically applying teat cups to the teats of an animal and automatically milking the animal, the milking parlour further comprising a separate entrance and exit door (3, 4) which doors are automatically operable by means of computer-controlled members, such as hydraulic or pneumatic cylinders, characterized in that the device is mobile, while near that part of the milking parlour where the animal stands during the milking process and which is laterally bounded by guide means (27) having the object of giving the animal only a limited freedom of movement, the milking parlour is on each side of said part provided with a space for mounting the cleaning unit (28) and for mounting the milking unit (29) respectively, the units (28, 29) being movable to a non-operative position behind the respective guide means (27), the device further comprising storage containers (11, 12 and 10) for storing respectively milk obtained during milking, a cleaning liquid for cleaning the animal's teats and fodder to supply to the animal in the milking parlour."

VII. The appellant submitted that the appeal was admissible

and that the present Claim 1 did not contravene the requirements of Articles 100(c) and 123 EPC. With regard to Article 123(3) EPC the appellant referred to the decision T 108/91 (OJ EPO 1994, 228).

VIII. On the subject of the admissibility of the appeal, the respondent referred to the decision T 145/88 (OJ EPO 1991, 251) and essentially argued as follows:

- (i) Concerning the main request submitted by the appellant with the SGA:

The paragraph of the SGA having the title "Main request" and relating to Claim 1 as granted refers to a passage in the description of the parent application as providing a basis for the interpretation that the milking parlour is the space bounded by the guide means 27. In the decision under appeal it is stated that Claim 1 as granted contravenes Article 76 EPC which concerns the relationship between the subject-matter of the divisional application and the content of the parent application. However, the opposition ground according to Article 100 (c) EPC, on which the decision under appeal is based, refers to the relationship of the subject-matter of the patent to not only the content of the earlier application (i.e. the parent application) but also the content of the application as filed (i.e. the divisional application). Since the above mentioned paragraph of the SGA does not refer to the content of the divisional application as filed, the SGA contains no factual and legal reasons as

to why the decision under appeal - in so far as it concerns Claim 1 as granted - has to be set aside.

- (ii) Concerning the auxiliary requests submitted with the SGA:

In the decision under appeal (page 6, section 9) the opposition division, referring to the second auxiliary request submitted by the appellant in the course of the opposition proceedings, observed that Claim 1 as granted required that the location of the mounting space for the milking and the cleaning units be outside of the milking parlour, whereas this was not the case according to the amended Claim 1 of the second auxiliary request. However, although the amended claims filed with the SGA clearly relate to a milking device in which the mounting space for the milking unit and the cleaning unit is located inside the milking parlour, the SGA fails to explain why the amendments satisfy Article 123(3) EPC. Therefore, the SGA does not indicate either explicitly or implicitly that the reasons given in the decision under appeal no longer apply for the amended claims upon which the auxiliary requests are based.

- (iii) The circumstances which in the case of either T 729/90 or T 105/87 or T 563/91 (see section V above) led to the finding of admissibility of the respective appeal were completely different when compared with the present case whose



circumstances are analogous to those in the case of T 145/88 (supra) which led to the rejection of the appeal as inadmissible.

On the subject of the admissibility of the present Claim 1 with respect to Article 123(3) EPC the respondent referred to the decisions G 1/93, (OJ EPO 1994, 541), T 673/89, T 214/91, T 271/84 and T 371/88 (cited in Case Law of the Boards of Appeal, 3rd edition 1998, III.C3) and essentially argued as follows:

(iv) The term "milking parlour" has to be interpreted as defining - both in Claim 1 as granted and in the present Claim 1 - a box comprising the area in which the animal stands during the milking process and the space or spaces in which the milking unit and the cleaning unit are located. Claim 1 as granted - because of feature X - has to be interpreted as defining a milking device in which the milking unit and the cleaning unit are located **outside** the milking parlour. Since the amendments concerning the present Claim 1 make it clear that the milking unit and the cleaning unit are located **inside** the milking parlour, these amendments are such that they extend the protection conferred to the patent (Article 123(3) EPC).

(v) According to the decision G 1/93, if the independent claim of an European patent contains a "limiting extension" (i.e. a feature restricting the scope of the claim which was not disclosed in the application as filed), the

patent has to be revoked. In this decision three cases are mentioned in which a "limiting extension" does not necessarily imply the revocation of the patent. However, the present case is different from each of these cases. Moreover, the decision T 108/91 as well as the decisions T 673/89, T 214/91, T 271/84 and T 371/88 (supra) are not relevant for the present case.

- (vi) According to the present Claim 1, the milking parlour is provided with two spaces, a first space for mounting the milking unit and a second one for mounting the cleaning unit, whereas according to Claim 1 as granted there is a space for mounting the milking unit and the cleaning unit. This amendment also leads to an extension of the scope of the claim.

With regard to the admissibility of the present Claim 1 with regard to Article 123(2) EPC the respondent referred to the decisions G 1/93, T 673/89, T 214/91, T 271/84 and T 371/88 (supra) and essentially argued as follows:

- (vii) According to the parent application and the divisional application the movement of the milking and cleaning units (behind the respective guide means) is always controlled by the computer. Since the present Claim 1 has been amended by addition of the feature that the units are movable to a non-operative position behind the guide means without specifying that the movement is made under computer control,

this leads to an undue generalisation having no basis in the original disclosure.

IX. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the following documents:

**Claims:** 1 as submitted during the oral proceedings;  
2 to 7 filed with the letter dated 4 September 1997;

**Description:** columns 1 and 2 filed with the letter dated 4 September 1997;  
columns 3 and 4 filed with the letter dated 6 November 1996;  
columns 5 to 7 as granted;

**Drawings:** Figures 1 to 7 as granted.

X. The respondent requested that the appeal be dismissed.

### Reasons for the Decision

1. *The admissibility of the appeal*

With respect to this issue, the dispute between the parties only concerned the requirement of Article 108, third sentence EPC, according to which "a written statement setting out the grounds of appeal must be filed". The board, being satisfied that the other

requirements for the admissibility of the appeal are satisfied, will focus its attention on the disputed requirement.

- 1.1 The examination of whether the requirement of Article 108, third sentence, EPC is met has to be made on the basis of the contents of the SGA and of the decision under appeal.
- 1.1.1 In the present case, it is clear from the decision under appeal that the subject-matter of Claim 1 as granted was found to extend beyond the content of the parent application (see section 1, page 3). The opposition division did not accept the arguments of the appellant according to which the term "milking parlour" had to be interpreted as defining solely the area bounded by the guide means 27. Since in the SGA it is submitted that the passage on page 6, lines 16 to 23 of the description of the parent application clearly provides a support for this interpretation, the SGA gives a short but nevertheless clear indication of the legal and factual reasons why (according to the appellant) the decision under appeal should be set aside.

Since the decision under appeal, in so far as it relates to Claim 1 as granted, only refers to the relationship of the patent in suit to the content of the parent application (according to the second alternative of Article 100(c) EPC: "... or, if the patent was granted on a divisional application ... beyond the content of the earlier application as filed"), there is no need to deal in the SGA with the relationship between the patent and the divisional

application as filed (i.e. to the first alternative of Article 100(c) EPC: "... beyond the content of the application as filed). Therefore, the board cannot accept the argument put forward by the respondent in this respect (see section VIII above, item (i)).

1.1.2 Moreover, the passages of SGA which relate to the auxiliary requests make it clear that the amended claims according to each of these requests are directed to a device in which the area where the animal stands during the milking process is a part of the milking parlour. In other words, the appellant by submitting these new auxiliary requests accepted the argument given in the decision under appeal according to which the milking parlour could not be interpreted as the area limited by the guide means. 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 (in so far as in this decision the interpretation that the milking parlour was solely the area where the animal stands during the milking process had not been accepted) no longer applies for the amended Claim 1. In other words, the nature and the extent of the amendments concerning the auxiliary requests submitted with the SGA make it clear that the reasons in the decision under appeal no longer apply.

The argument put forward by the respondent that the SGA does not deal with the question whether the auxiliary requests extend the protection conferred by Claim 1 (see the above section VIII, item (ii)) is not relevant because the comments in section 9 of the decision under appeal do not present any reason for the revocation of the patent but express only an opinion of the opposition division concerning the admissibility of future amendments with regard to Article 123(3) EPC.

- 1.1.3 As far as the respondent's argument referred in section VIII above, item (iii) is concerned, it has to be noted that in the case of the decision T 145/88 (*supra*), which rejected the appeal as inadmissible, the decision under appeal had revoked the patent 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 this decision the deciding 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, the amendments

did not make it clear that the reasons in the decision under appeal no longer applied while the document headed 'Grounds of Appeal' did not 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 in which the SGA makes it clear that the reasons in the decision under appeal no longer apply for the amended claims submitted with the SGA.

1.1.4 The board therefore comes to the conclusion that even the disputed requirements of admissibility were satisfied.

1.2 Having regard to the above comments, the appeal is admissible.

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

2.1 The present Claim 1 is directed to a device for milking animals such as cows, comprising

(A) a milking parlour (1)

(A1) with a computer-controlled fodder supply unit  
and

(B) a computer-controlled milking machine having

(B1) a cleaning unit (28) for the animal's teats and

(B2) a milking unit for automatically applying teat

cups to the teats of an animal and automatically milking the animal,

- (A2) the milking parlour further comprising a separate entrance and exit door (3, 4),
- (A21) the doors being automatically operable by means of computer-controlled members, such as hydraulic or pneumatic cylinders,
- (C) the device being mobile,
- (A3) the part of the milking parlour where the animal stands during the milking process being laterally bounded by guide means (27);
- (A31) the guide means (27) having the object of giving the animal only a limited freedom of movement;
- (A32) near said part and on each side of said part the milking parlour being provided with a space for mounting the cleaning unit (28) and for mounting milking unit (29) respectively;
- (A33) the cleaning unit and the milking unit being movable to a non-operative position behind the respective guide means;
- (D) the device further comprising storage containers (11, 12 and 10) for storing respectively milk obtained during milking, a cleaning liquid for cleaning the animal's teats and fodder to supply to the animal in the milking parlour.



2.2 Article 123(3) EPC

The present Claim 1 differs from Claim 1 as granted

- (a) in that features A3 and A32 have replaced feature X
- (b) and in that features A31 and A33 have been added.

2.2.1 According to the respondent, the term "milking parlour", which is specified in Claim 1 as granted, has to be interpreted as defining a box including not only the area where the animal stands during the milking process, i.e. the part which is laterally bounded by the guide means, but also the spaces in which the milking unit and the cleaning unit are mounted.

It has to be considered that the wording of Claim 1 as granted - taken alone - is not unequivocally clear with respect to meaning of the term "milking parlour" but the above mentioned interpretation can be arrived at by reading Claim 1 in the light of several passages in the description of the patent as granted. In fact, the description of the patent refers to the milking parlour as an equivalent of the box provided with the reference number 1 (see column 2, lines 24 to 28: "Figure 1 shows a device including a box 1 (milking parlour) ..."; and column 3, line 44: "...milking parlours or boxes") and to the guide means as "rods ... provided with the object of giving the animal only a limited freedom of movement" defining and bounding an area where the animal stands during the milking process and outside which the units 28, 29 may be in a non-operative position (column 3, lines 43 to 56).

However, the decisive issue in these respects is not the interpretation of the term "milking parlour" but the interpretation of feature X with regard to the words "near the milking parlour". These words have to be given a meaningful interpretation in the light of the description and drawings of the patent. When reading Claim 1 as granted in the light of the description (see particularly column 3, lines 48 to 53) and the drawings (see particularly Figure 2) of the patent, it becomes clear that the milking unit and the cleaning unit are mounted inside the box 1 in the spaces adjacent to that part where the animal stands during the milking process. No other position of these units is disclosed in the patent. Whereas it is clear for the person skilled in the art why both units are mounted outside the area where the animal stands during the milking process, there is no technical reason why the units should be mounted at a distance from the cow greater than necessary to allow her free movement.

Moreover, it has to be considered that Figure 2 shows an entity having three adjacent milking parlours or boxes 1 which are separated from each other by partitions 26, this entity having two end walls (see the description of the patent, column 3, lines 43 to 45). This configuration makes the interpretation of the respondent impossible, as far as the central box and the internal partitions of the two external boxes are concerned. Furthermore, it has to be considered that it would not be technically meaningful to arrange the milking and cleaning units outside the area bounded by the (external) side walls of the milking parlours in a device constructed such that it is mobile.

Therefore, the interpretation put forward by the respondent (see section VIII, item (iv) above) according to which Claim 1 as granted is directed to a milking device in which the milking and cleaning unit are mounted outside the whole box is contrary to the teaching of the description and the drawings of the patent as granted. This interpretation appears to be the result of an isolated analysis of Claim 1 as granted, i.e. of an analysis made without using the description and drawings of the patent.

Having regard to the above, the words "near the milking parlour" - taken literally - contain an incorrect technical statement which is, without any doubt, inconsistent with the description and the drawings of the patent which have to be used - according to Article 69(1) EPC - to interpret the claim.

2.2.2 The amendment according to item (a) makes it clear

(a') that the milking parlour comprises a part which is laterally limited by guide means, in which part the animal stands during milking, and that near this part there is an area suitable for mounting the milking unit and the cleaning unit and

(a'') that this area comprises two spaces, near the part bounded by the guide means, each on a side of this part, wherein one of these spaces is suitable for mounting the milking unit while the other one is suitable for mounting the cleaning unit.

Therefore, the amendment according to item (a) removes the above mentioned inconsistency between Claim 1 and the description. In so far as this amendment defines the configuration according to item (a'), it has the same technical meaning as feature X when correctly interpreted by using the description and the drawings of the patent. Therefore, this amendment does not result in extending the protection conferred by the patent.

- 2.2.3 Having regard to the above comments, the respondent's argument referred to in section VIII, item (v) above cannot be accepted. Indeed, feature X cannot be considered as a "limiting extension", i.e. as an **added** undisclosed feature, within the meaning of decision G 1/93.

Moreover, it has to be noted that according to the case law of the boards of appeal (see T 108/91, T 673/89, T 214/91, T 271/84 and T 371/88, in *Case Law of the Boards of Appeal of the European Patent Office*, 3rd ed. 1998, III.C.3, page 223) amendments removing inconsistencies do not contravene Article 123(3) EPC, if the modified wording of the claim has the same meaning as the incorrect granted claim when correctly interpreted in the light of the description and drawings of the patent.

Therefore, the respondent's arguments referred in section VIII, item (v) above are not relevant.

- 2.2.4 The amendment according to item (b) results in limiting the scope of the present Claim 1 with respect to that of Claim 1 as granted.

2.2.5 It has to be noted that the expression in Claim 1 as granted "a space for mounting the cleaning unit (28) and for mounting the milking unit (29)" cannot be interpreted as solely defining only one space in which both milking and cleaning units are mounted. Such a restricted interpretation neither finds a basis in the described embodiment nor is suggested by the remaining portion of the description.

This expression can also define - more specifically - a space consisting of two "sub-spaces", one for mounting the milking unit and the other one for mounting the cleaning unit, such as shown in the disclosed embodiment.

Therefore, contrary to the respondent's argument referred to in section VIII, item (vi) above, this amendment does not extend the protection conferred.

2.2.6 Having regard to the comments above, the amendments leading to the present Claim 1 do not contravene Article 123(3) EPC.

2.3 Article 123(2) EPC

2.3.1 Features A3, A31, A32 and A33 can be unequivocally derived from Figure 2 and from the passage in column 3, lines 43 to 53 of the description of the patent as granted. This passage corresponds to a passage in the description of the divisional application (page 5, lines 26 to 34) and of the parent application (page 15, line 30 to page 16, line 2).

2.3.2 The present Claim 1 is clearly directed to a device

comprising a **computer-controlled** milking machine having a cleaning unit and a milking unit (see features B, B1 and B2). Therefore, it is clear from the context of the claim that the cleaning unit and the milking unit are moved to their non-operative position under computer control. The board cannot accept the respondent's arguments referred in section VII, item (vii) above.

2.3.3 Therefore, the amendments leading to the present Claim 1 do not contravene Article 123(2) EPC.

2.4 Article 100(c) EPC

The board is satisfied that the subject-matter of the present Claim 1 does not extend beyond the content of the parent application as well as of the divisional application.

In these respects, no objections were raised by the respondent.

3. *Remittal*

The decision to revoke the patent in suit was solely based on Article 100(c) EPC. As the opposition division did not decide on the other grounds for opposition, the board makes use of its competence under Article 111(1) EPC to remit the case the first instance for further prosecution on the basis of the present claims (see section IX above). This will not preclude further amendments to these claims as well as to the description as may become necessary.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries