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**D E C I S I O N**  
**of 19 February 2003**

**Case Number:** T 0556/02 - 3.2.4

**Application Number:** 96201558.2

**Publication Number:** 0749682

**IPC:** A01J 7/04

**Language of the proceedings:** EN

**Title of invention:**

A method of automatically cleaning or otherwise treating the udder or at least the teats of animals

**Patentee:**

MAASLAND N.V.

**Opponent:**

DeLaval International AB

**Headword:**

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**Relevant legal provisions:**

EPC Art. 54(3) and (4), 69(1), 100(a) and (b), 111(1), 112

**Keyword:**

"Novelty (yes)"

"Referral to the Enlarged Board of Appeal (no)"

**Decisions cited:**

T 0454/89, T 1129/97, T 0860/93, T 0016/87, T 0416/87,  
T 0860/93, T 0023/86

**Catchword:**

-



**Case Number:** T 0556/02 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 19 February 2003**

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

**Representative:** Corten, Maurice Jean F.M.  
Octrooibureau Van der Lely N.V.  
Weverskade 10  
NL-3155 PD Maasland (NL)

**Respondent:** DeLaval International AB  
(Opponent) PO Box 39  
S-147 21 Tumba (SE)

**Representative:** Harrison, Michael Charles  
Albihns GmbH  
Grasserstrasse 10  
D-80339 München (DE)

**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 7 May 2002 revoking  
European patent No. 0 749 682 pursuant to  
Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** C. A. J. Andries  
**Members:** C. D. A. Scheibling  
M. Tardo-Dino

## Summary of Facts and Submissions

- I. By its decision dated 7 May 2002 the Opposition Division revoked the patent. On 23 May 2002 the appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 13 September 2002.
- II. The patent was opposed on the grounds based on Articles 100(a) and (b) EPC. The Opposition Division revoked the patent for lack of novelty with respect to D1: EP-A-0 716 043 cited according to the provisions of Articles 54(3) and (4) EPC.
- III. Oral proceedings took place on 19 February 2003.
- IV. The appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained as granted.

The respondent (opponent) requested that the appeal be dismissed and the patent revoked. It further requested that the two questions submitted with its letter dated 12 February 2003 be referred to the Enlarged Board of Appeal.

- V. Independent claim 1 as granted reads as follows:

"1. A method of automatically cleaning or otherwise treating the udder or at least the teats of animals and automatically milking animals that are allowed to walk around freely in an accommodation, such as a stable or cowshed or a meadow, and to go individually to a specific place where, after identification of the

animals, there can be started a cleaning program to be executed by a computer for cleaning the udder or at least the teats of the animals or otherwise treating same, as well as a milking program to be executed by the computer for connecting teat cups to the teats of the animals and milking same characterised in that the cleaning program and the milking program can be started independently of each other, whereby the cleaning program is started when a defined period of time has elapsed since the previous cleaning or other treatment of the udder or at least the teats of an animal".

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Interpretation of the independent claim 1*

Claim 1 of the patent in suit comprises the following expression "the cleaning program is started when a defined period of time has elapsed".

The Board considers that in the present case, the expression "when" does not imply that said cleaning program should be started at the moment the defined period of time has elapsed but that it defines the method step of starting the cleaning program when an animal presents itself at the cleaning station for the first time after the defined period of time has elapsed. The respondent agreed during opposition proceedings that there is support in the patent specification for such an interpretation.

3. *Ground for opposition based on Article 100(b) EPC*

Since said ground for opposition was based on an interpretation of the word "when" in the sense of "at a fixed time" and since the Board ruled out said interpretation and has confirmed that in the given context "when a defined period of time has elapsed" has to be understood as meaning "after a defined period of time has elapsed" the ground for opposition based on Article 100(b) EPC is no longer founded and thus, does not prejudice the maintenance of the patent in suit.

4. *Novelty with respect to D1 (Articles 54(3)(4) EPC)*

4.1 The Board considers that the feature of claim 1 of the patent in suit according to which "the cleaning program is started when a defined period of time has elapsed since the previous cleaning or other treatment of the udder or at least the teats of an animal" and which is clearly drafted as a method step, is not disclosed in D1.

4.2 The respondent argued that claim 6 as granted which reads "... that the milking program is started immediately after finishing the cleaning program and that the said period of time is calculated as soon as the milking program has ended", as well as the passage of the description of the patent in suit column 1, lines 44 to 48 which reads "the milking program can be started immediately after finishing a cleaning program and the said period of time can be calculated and thus be defined as soon as the milking program has ended" form a basis for the assertion that in the patent in suit in case a cleaning program is followed by a milking program, the next cleaning program will be started when a defined period of time has elapsed since the previous milking program (and not since the

previous cleaning program).

Moreover, in the respondent's opinion, in a method of automatically milking animals, milking can only take place when (after) a defined period of time has elapsed since the previous milking. Therefore, D1 implicitly discloses that the milking program is started when a defined period of time has elapsed since the previous milking program. However, since in D1 cleaning is consecutive to milking, D1 implicitly discloses that the cleaning program is started when a defined period of time has elapsed since the previous milking program.

Therefore, both D1 and claim 1 of the patent in suit imply the same method step according to the respondent.

4.3 The respondent further argued that, since in D1 cleaning is consecutive to milking and owing to the fact that every operation is computer controlled and thus, controlled by the system clock, there will always elapse a constant period of time between the moment the system records the end of the milking operation and triggers the start of the subsequent cleaning operation.

4.4 The Board however cannot share these arguments. As indicated by the appellant, claim 6 and the cited passage of the description of the patent in suit do not relate to the "starting point" of the said period of time but to the calculation of the extend of the said period of time.

This is furthermore confirmed by the dependent claims 3 to 5 and especially by claim 5 which states "... the said period of time is determined by various of the

aforementioned categories of data concerning the physical state of the animal and/or the quality of the milk...".

Thus, it is clear that even if cleaning and milking are performed consecutively, the next cleaning program is started when a defined period of time has elapsed since the previous cleaning program (and not since the previous milking program), but that the duration in time of the defined period of time can be recalculated dependent on the data recorded during milking, as soon as the milking program has ended. Claim 6 therefore cannot be used to assess that the "defined period of time", used in claim 1, is related to the milking program, instead of to the cleaning program as clearly indicated in claim 1.

4.5 Thus, even if D1 does implicitly disclose that the cleaning program is started when a defined period of time has elapsed since the previous **milking** program, D1 still does not disclose the feature of claim 1 of the patent in suit according to which the defined period of time starts with the end of the previous **cleaning** program. Indeed, in D1 there is no direct time measurement performed with respect to the previous cleaning program. Such a method step is however different from a time measurement performed with respect to the milking program. Although time measurements as such may be always the same, the moment in time these measurements start are different. This difference, for example reflects in different software used to perform the specific method step.

4.6 As a matter of fact, in D1 cleaning takes place after milking and only when the computer has decided that the

animal has to be treated (column 9, lines 6 to 12), this is done as a result of the measurements effected on the animal by mastitis or temperature sensors (column 2, lines 51 to 54) and/or the intervening of an operating person (column 2, lines 43 to 46).

Thus, according to D1 the cleaning program is started by the computer when it is decided that the animal has to be treated, each time the milking procedure has ended and this over a predetermined period of time (see column 2, lines 47 to 50). Thus, the treatment is clearly carried out in relation to a milking operation and not in relation to the period of time elapsed since the previous cleaning or treatment of the animal.

- 4.7 Finally, in the description of the patent in suit, it is stated, column 1, lines 8 to 12: "said period of time may be considerably shorter than the interval between consecutive milking runs ... an animal is more frequently cleaned or otherwise treated than being milked" wherein "said period" is the period of time elapsed since the previous cleaning. It is also stated column 1, lines 39 to 43: "When an animal has been cleaned once or twice or has been treated otherwise without having been milked, said animal, upon presenting itself again at the aforementioned place, will be milked immediately after having been cleaned". It is furthermore stated column 1, lines 51 to 55: "Therefore, the said defined period of time will be longer for the latter category of animals than for those with whom cleaning or otherwise treating the udder or at least the teats has to take place more frequently and has to be separated from the milking proper".



In the remaining description, criteria are defined which make it possible to decide whether or not an animal will consecutively be cleaned and milked.

- 4.8 Therefore, the Board considers that it is clear from the description that the aim or teaching of the patent in suit is to propose a method of automatically cleaning or otherwise treating the udder of animals and automatically milking animals which makes it possible to have an animal more frequently cleaned or otherwise treated than being milked and that this teaching is not disclosed in D1.

In view of the above it is not reasonable to state that the patent in suit discloses that the next cleaning program will be started when a defined period of time has elapsed since the previous milking program, implying thereby that the aim or teaching of the patent in suit, namely more frequent cleaning (with respect to milking) cannot be reached, since according to that interpretation, a cleaning program is always linked to a milking program. Also, in this respect claim 6 of the patent in suit cannot support the respondent's arguments. Indeed, claim 6 does not imply that there is always a milking program started immediately after finishing the cleaning program. In view of claim 1 (i.e. the independent starting) as well as the description (columns 2 and 3: criteria for deciding whether or not an animal will consecutively be cleaned and milked) it becomes clear that claim 6 applies once it has been decided to consecutively clean and milk the animal involved.

- 4.9 Consequently, the subject-matter of claim 1 of the patent in suit is novel with respect to D1.

5. *Referral of two questions to the Enlarged Board of Appeal*

5.1 The respondent requested that the following two questions be referred to the Enlarged Board of Appeal "If a method claim includes a method step defined as one that "can" be performed, is this method step technically limiting on the scope of protection defined by the claim?" and

"Where a feature of a granted claim is not specifically defined in the description, is it permissible under Article 69(1) EPC to interpret this feature such that it is limited to a specific embodiment disclosed in the description and drawings when assessing novelty and inventive step?".

5.2.1 As to the first question the Board notes that it is a pure question of fact and that the Board did not need to interpret the word "can" and the sentence involved when assessing novelty of the subject-matter of claim 1 of the patent in suit with respect to D1.

5.2.2 The second question raises a non relevant problem, namely a problem linked to circumstances which were not proper in this case since the Board, in order to assess novelty over the only document at stake, namely D1 (Articles 54(3) and (4) EPC) had only to read the claim as a person skilled in the art would do, applying the general principle set out in the case law (see section 5.3, below). In doing so it did not need to interpret but took the wording of claim 1 as it stood. It was the respondent which brought in the proceedings an interpretation which is doubtful ("elapsed since the previous milking" instead of the clear wording "elapsed

since the previous cleaning").

5.2.3 The Board therefore sees no reason to refer to the Enlarged Board of Appeal the two questions brought forward by the respondent, since these questions were of no importance for taking the present decision and could not even have influenced it.

5.3 Concerning the discussions related to Article 69 EPC, the Board wants to make clear that it solely uses the general principle of law applied throughout the EPO that a document has to be interpreted as a whole (see for instance T 23/86: section 2; OJ EPO 1987, 316; T 860/93: section 5; OJ EPO 1995, 047).

In the present case the patent in suit as a whole discloses an unequivocally clear teaching as already indicated above (section 4.8), namely that the animals be more frequently cleaned or otherwise treated than being milked.

Any interpretation of the wording of the claims in the patent in suit resulting in something contrary to this teaching, although it is clear from the patent as a whole that that wording should lead to that teaching, cannot be accepted. Otherwise the patent in suit is split into different parts, which are completely separated from each other. On the one hand the description and the drawings, on the other hand the claims as such. However, description, drawings and claims are according to the EPC linked together, although having each its own function.

If some decisions of the Boards of Appeal underline that Article 69 EPC is concerned with the extent of

protection conferred by the patent (Part II, chapter III of the EPC) whenever that extent has to be determined, for example for third parties or for the determination of infringement (see for instance T 454/89: section 4.1 (viii)), and not with the definition of the subject-matter of the claims (see T 1129/97: section 2.1.3; OJ EPO 2001, 273), Article 69 EPC itself is at least a specific application of the general principle mentioned above, namely that the claims of a patent, being a part of a document as a whole, need to be construed in their context (T 860/93) and, in this respect, there are many examples in the case law referring to this article when interpreting the subject-matter of the claims (see T 16/87: section 6; OJ EPO 1992, 212; T 416/87: section 5; OJ EPO 1990, 415). Furthermore, it can be observed that the interpretation of the extent of protection is no more than an aspect of the interpretation of the words of the claims, i.e. a necessary step for a Board to decide in particular on novelty. In this respect there is no reason why the positive requirement of Article 69 EPC that the description and the drawings shall be used to interpret the claims should not apply at this stage (see the above mentioned decisions T 860/93 and T 416/87). In fact, it appears that the general idea underlying the case law and the limits of the use of Article 69 EPC for interpreting the claims is that a feature which is essential for this invention must both be found in the independent claims and be disclosed in the description and that this article cannot be used solely to solve a contradiction in a claim.

Moreover, it has to be noted that the claims of a patent application represent generalisations of specific embodiments of an invention as disclosed in

the description of the patent application and that therefore, they cannot be considered as being isolated from the context of the description and drawings from which they derived.

It follows from the general principle that claims need to be construed in their context that even an unequivocally clear expression in the wording of a claim which normally defines a specific meaning can have however a different meaning than the normal one if a definition for this expression is given in the description. That implies that irrespective of the clarity of an expression or a word present in a claim, that expression or that word has to be read and understood in the framework of the whole patent. There is no reason in a granted patent to isolate a claim and to consider it as such without taking into account the teaching of the patent and/or the definition given in the description. It should furthermore be emphasized that the originally disclosed teaching of a patent application is fixed when the application was filed and is not or cannot be changed by the cited state of the art or by a problem to be solved defined with respect to a closest prior art. Indeed if another "objective" problem has to be defined with respect to a new closest prior art, the originally disclosed teaching remains. It should also be emphasized that there is a clear distinction between a teaching of the patent and the specific embodiments bringing this teaching into a practical form.

6. *Remittal*

Thus, owing to the fact that novelty with respect to D1 is given and that the Opposition Division did not

comment on the ground for opposition based on Article 100(a) EPC with respect to novelty of claim 1 of the patent in suit in view of D2 (EP-A-0 091 892), D4 (EP-A-0 551 957) and D6 (EP-A-0 277 396) and with respect to inventive step, the case is remitted to the first instance, according to the provisions of Article 111(1) EPC, for further prosecution.

## **Order**

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

1. The request for referral of two questions of law to the Enlarged Board of Appeal is refused.
2. The decision under appeal is set aside.
3. The case is remitted to the first instance for further prosecution.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries