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**D E C I S I O N**  
**of 13 September 2005**

**Case Number:** T 0191/04 - 3.2.04

**Application Number:** 94202258.3

**Publication Number:** 0638231

**IPC:** A01J 7/00

**Language of the proceedings:** EN

**Title of invention:**

A construction for automatically milking animals

**Patentee:**

MAASLAND N.V.

**Opponent:**

DeLaval International AB

**Headword:**

Milking box/MAASLAND

**Relevant legal provisions:**

EPC Art. 100(c)

**Keyword:**

"Intermediate generalisation (not disclosed)"

**Decisions cited:**

G 0009/92

**Catchword:**

-



Case Number: T 0191/04 - 3.2.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.04  
of 13 September 2005

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

**Representative:** Corten, Maurice Jean F.M.  
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**Respondent:** DeLaval International AB  
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**Representative:** Gray, Helen Mary  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
14 January 2004 concerning maintenance of  
European patent No. 0638231 in amended form.

**Composition of the Board:**

**Chairman:** M. Ceyte  
**Members:** P. Petti  
T. Bokor

## Summary of Facts and Submissions

- I. An opposition based on Articles 100(a), (b) and (c) EPC was filed against the European patent EP-B-0 638 231. In its interlocutory decision dispatched on 14 January 2004, the opposition division found that the patent in an amended version based upon the independent claim 1 filed during the oral proceedings on 21 October 2003 met the requirements of the Convention.

The opposition division also found that the claimed feature "a milking box (2) with a milking robot (19)" was not disclosed in the application as filed and thus claim 1 as granted did not meet the requirements of Article 100(c) EPC.

- II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 10 February 2004 and simultaneously paid the appeal fee.

With the statement setting out the grounds of appeal received on 24 May 2004, the appellant filed two sets of new claims 1 to 14 and 1 to 12 respectively, upon which a main request and a first auxiliary request were based.

Claim 1 of the main request reads as follows:

- "1. A construction or a similar arrangement for automatically milking animals, such as cows, comprising a milking box (2) with a milking robot (19), an animal identification sensor which is installed near the milking robot (19), is connected to a computer system and, in combination

with a transponder to be worn by each of the animals, forms an animal identification system, with which it is possible to update in the computer system which animal is present in the milking box (2), the computer system comprising a file in which it is recorded when an animal has been milked for the last time, when an animal has calved last, when the lactation period of an animal has started, how much milk it yields in each milking turn, and in which it is automatically recorded how many times said animal can be milked in each 24 hours' period and with what interval, wherein said animal is milked one or more times more frequently per 24 hours period than the average number of times the other animals of the herd to which the animal which has recently calved belongs, are milked, and that stimulation means controlled by the computer system are present for summoning the animal after the time interval between consecutive milking turns determined and recorded by the computer system has elapsed, to go the milking robot (19)."

Claim 1 of the first auxiliary request reads as follows:

- "1. A construction or a similar arrangement for automatically milking animals, such as cows, comprising a milking box (2) with a milking robot (19), the construction preferably including two boxes (1, 2) which are contiguous to each other via their ends, the first (1) of these boxes being arranged for selecting and/or supplying animals with concentrate and the second (2) being arranged

as said milking box, each box (1, 2) including an animal identification sensor which is connected to a computer system and, in combination with a transponder to be worn by each of the animals forms an animal identification system, with which it is possible to update in the computer system which animal is present in the milking box (2), the computer system comprising a file in which it is recorded when an animal has been milked for the last time, when an animal has calved last, when the lactation period of an animal has started, how much milk it yields in each milking turn, and in which it is automatically recorded how many times said animal can be milked in each 24 hours' period and with what interval, wherein said animal is milked one or more times more frequently per 24 hours' period than the average number of times the other animals of the herd to which the animal which has recently calved belongs, are milked, and that stimulation means controlled by the computer system are present for summoning the animal after the time interval between consecutive milking turns determined and recorded by the computer system has elapsed, to go the milking robot (19)."

- III. Oral proceedings before the board were held on 13 September 2005.
  
- IV. The appellant requested that the decision under appeal be set aside and that the patent be maintained, on the basis of amended claims 1 to 14 filed as main request by letter of 24 May 2004 or auxiliarily on the basis of amended claims 1 to 12 filed as first auxiliary request by letter of 24 May 2004 or as amended in accordance

with the interlocutory decision of the opposition division (second auxiliary request).

The opponent (hereinafter respondent) requested that the appeal be dismissed.

- V. The appellant essentially argued that the feature according to which the construction comprises "a milking box (2) with a milking robot (19)" is directly and unambiguously derivable from the application as filed.

The respondent contested the arguments of the appellant.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *The main request*
  - 2.1 Claim 1 of the main request contains the feature according to which the construction comprises "a milking box with a milking robot" (hereinafter feature A).
  - 2.2 The application as filed does not mention feature A.

The independent claims 1, 3 and 5 of the application as filed are directed to a construction comprising a milking robot without referring to any milking box.

The expression "milking box" is used in the dependent claim 8 as well as in the independent claim 9 of the application as filed. Both claims define a construction including "two boxes (1, 2) which are contiguous to each other via their ends, the first of these box being arranged for selecting and/or supplying animals with concentrate and the second [box] (2) being arranged as milking box".

The parts of the description which describe an embodiment of the invention with reference to the drawings and the drawing themselves are consistently directed to a construction comprising two contiguous boxes, one of them being arranged as a milking box.

Thus, feature A represents an "intermediate generalisation", i.e. it defines a subject-matter which is less general than the feature "a construction comprising a milking robot" (which is specified in claims 1, 3 or 5 of the application as filed) but more general than the feature "a construction including two boxes ... the second [box] (2) being arranged as milking box" (which is referred to in claims 8 and 9, described in the description and shown in the drawings of the application as filed).

This intermediate generalisation is not disclosed in an explicit way in the application as filed. Furthermore, it is not even disclosed by way of implication because the application as filed does not contain any hint for the skilled reader that the milking robot could be associated with a milking box without having a further box which is contiguous to the milking box.

2.3 In these respects, the appellant essentially argued as follows:

(i) According to column 7, lines 31 to 33 of the application as filed, the milking box is the place in which the animals are present during milking. Therefore, the reference to a milking robot in claims 1, 3 or 5 of the application as filed implicitly defines a milking box as being the place at which the milking robot is located.

(ii) According to column 2, lines 9 to 13 of the application as filed, "the construction **preferably** includes two boxes whose ends are contiguous to each other via their ends, from which the first box is arranged for selecting and/or supplying concentrate to the animals and the second box is arranged as a milking box" (emphasis added). Therefore, this passage makes it clear that the two boxes are not essential to the invention.

Moreover, the appellant alleged that at the priority date of the application it was common general knowledge to accommodate a milking robot in a milking box and argued that the skilled reader of the application as filed would immediately understand that a milking robot presupposes the presence of a milking box.

2.4 The board cannot accept these arguments for the following reasons:



- (i) The passage referred to by the appellant recites as follows:

**"In the foregoing description** the place in which the animals are present during milking is designated as a milking box" (see column 7, lines 31 to 33 of the application as filed; emphasis added).

This passage refers to "the foregoing description" according to which the milking box is a structural entity, see for instance the description of Figures 1 and 2 which concerns a structural entity (2) provided with frame portions (4, 5, 6 and 7) and a rail (37) along which the carrier element (25) of a milking robot (19) is movable.

Thus, the expression "milking box" in this passage does not define just the place at which the milking robot is located but refers to a structural entity (2) provided with a milking robot and associated with a further contiguous box (1).

The expression "preferably" referred to in section 2.3.(ii) makes it clear that the provision of two contiguous boxes is not essential to the invention as claimed in each of independent claims 1, 3 and 5 in so far as this feature defines the subject-matter of dependent claim 8. Moreover, the passage in question stating that the construction preferably includes two boxes does not suggest the possibility of having a

milking box with a milking robot without there being a further box contiguous to the milking box.

The appellant did not file any evidence in support of his allegation that at the priority date of the patent in suit it was common general knowledge to arrange a milking robot in a milking box. Moreover, the respondent not only contested this allegation but also submitted evidence (US-A-4 941 433) which demonstrates that at the priority date of the patent in suit it was known to use milking robots without a milking box.

2.5 For these reasons, feature A is not directly and unambiguously derivable from the application as filed, so that the ground for opposition mentioned in Article 100(c) EPC prejudices the maintenance of the patent on the basis of claim 1 of the main request.

3. *First auxiliary request*

3.1 Claim 1 of this request specifies the feature of "the construction preferably including two boxes which are contiguous to each other via their ends, the first of these boxes being arranged for selecting and/or supplying animals with concentrate and the second being arranged as said milking box" (hereinafter feature B).

However, due to word "preferably" feature B has to be considered as being facultative. The mere presence of feature B in claim 1 - due to the word "preferably" - does not change the meaning of feature A.

Therefore, since claim 1 of the first auxiliary request also contains the above mentioned feature A, the

considerations in section 2 above also apply for this request.

- 3.2 The appellant's argument according to which feature B can be directly and unambiguously derived from a sentence in the description of the application as filed (column 2, lines 9 to 13) which refers to a construction which "preferably includes two boxes ..." is irrelevant, because it only proves that feature B **by itself** does not contravene Article 123(2) EPC, but does not alter the legal assessment of feature A.

Therefore, the ground for opposition according to Article 100(c) EPC also prejudices the maintenance of a patent on the basis of claim 1 of the first auxiliary request.

4. *Second auxiliary request*

Having regard to G 9/92, EPO OJ 1994, 875 (see Order, point 1), neither the board nor the respondent (i.e. the non-appealing opponent) may challenge the maintenance of the patent as amended in accordance with the interlocutory decision of the opposition division.

**Order**

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

The appeal is dismissed

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte