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**Datasheet for the decision  
of 21 April 2009**

**Case Number:** T 1555/06 - 3.2.04

**Application Number:** 97202005.1

**Publication Number:** 0801894

**IPC:** A01K 1/12

**Language of the proceedings:** EN

**Title of invention:**

A construction for automatically milking animals

**Patentee:**

MAASLAND N.V.

**Opponent:**

Westfalia Landtechnik GmbH  
DeLaval International AB

**Headword:**

One-way passageway/MAASLAND

**Relevant legal provisions:**

EPC Art. 123

**Relevant legal provisions (EPC 1973):**

-

**Keyword:**

"Amendments extending beyond the content of the application as filed"

"Prohibition of *reformatio in peius*"

**Decisions cited:**

G 0001/99

**Catchword:**

-



Case Number: T 1555/06 - 3.2.04

**DECISION**  
of the Technical Board of Appeal 3.2.04  
of 21 April 2009

**Appellant:**  
(Opponent)

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**Decision under appeal:**

Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
2 August 2006 concerning maintenance of  
European patent No. 0801894 in amended form.

**Composition of the Board:**

**Chairman:** C. Scheibling  
**Members:** P. Petti  
T. Bokor

## Summary of Facts and Submissions

- I. Two oppositions were filed against the European patent No. 0 801 894. The opposition division by its interlocutory decision dated 2 August 2006 found that the patent in an amended version based upon claim 1 filed with letter of 3 February 2006 met the requirements of the EPC.
- II. On 6 October 2006 opponent II (hereinafter appellant) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 12 December 2006.
- III. By letter dated 20 March 2009 the patent proprietor (hereinafter respondent) filed four sets of claims upon which four auxiliary requests were based.
- IV. Oral proceedings before the board were held on 21 April 2009.  
  
Opponent I, who had been duly summoned, did not attend the oral proceedings. In accordance with Rule 115(2) EPC the oral proceedings were held without him.  
  
During the oral proceedings the respondent filed three further amended claims upon which he based a fifth auxiliary request, which was subsequently withdrawn, as well as a sixth and a seventh auxiliary request.
- V. The appellant requested that the decision under appeal be set aside and the patent be revoked.

VI. The respondent requested that the appeal be dismissed, i.e. the patent be maintained in the amended form held allowable by the opposition division (main request), or alternatively, that the decision under appeal be set aside and the patent be maintained on the basis of any of the first to fourth auxiliary requests filed with the letter dated 20 March 2009, or sixth or seventh auxiliary requests filed during the oral proceedings before the board.

Claim 1 of the main request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a milkbox (6) having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture with a rotational grazing system, wherein the animals are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B), not being the milkbox (6) and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals."

Claim 1 of the first auxiliary request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a cow shed with a milkbox (6) having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture with a

rotational grazing system, wherein the animals are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B), and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals, wherein the cow shed, said pasture, said another pasture and said one-way passageway constitute a one-way walk-through system.

Claim 1 of the second auxiliary request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a cow shed with a milkbox (6) having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture with a rotational grazing system, wherein the animals present in said pasture are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B) and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals, wherein the cow shed, said pasture, said another pasture and said one-way passageway constitute a one-way walk-through system."

Claim 1 of the third auxiliary request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a milkbox (6) having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture with a rotational grazing system, wherein the animals are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B), and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals."

Claim 1 of the fourth auxiliary request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a cow shed with a milkbox (6) having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture with a rotational grazing system, wherein the animals are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B), and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals, wherein the cow shed, said pasture, said another pasture and said one-way passageway constitute a one-way walk-through system, the feeding device being provided for the automatic administration of feed to the animals that have passed the doors of the one-way passageway."

Claim 1 of the sixth auxiliary request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a cow shed belonging to farm buildings with a milkbox (6) provided therein having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture with a rotational grazing system, wherein the animals are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B), and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals, wherein the cow shed, said pasture, said another pasture and said one-way passageway from said pasture to said another pasture constitute a one-way walk-through system."

Claim 1 of the seventh auxiliary request reads as follows:

"1. A construction for automatically milking animals, such as cows, provided with a cow shed belonging to farm buildings with a milkbox (6) provided therein having a milking robot and an area (9, 10) where the animals are allowed to move freely, characterized in that the construction comprises a pasture area with a rotational grazing system, wherein the animals are prevented from entering a particular pasture pair (9', 10') and in another pasture pair comprising a

first and a second pasture are allowed to visit said second pasture through a one-way passageway (B), and in that the passageway (11) is provided in a fence, such as a wire fence, or similar construction and in that the passageway (11) comprises a feeding device (21) for feeding the animals, wherein the cow shed, said first pasture, said second pasture and said one-way passageway from said first pasture to said second pasture constitute a one-way walk-through system."

VII. The appellant essentially submitted that claim 1 according to the main request - due to the presence of the feature "the one-way passageway (B) not being the milkbox" contravened the requirements of Article 123(2) EPC and that the amendments concerning all auxiliary requests contravened the principle of the prohibition of *reformatio in peius* as well as the requirements of Article 123(2) EPC.

VIII. The respondent essentially submitted that the feature "the one-way passageway (B) not being the milkbox" was unambiguously disclosed in the application as filed in so far as the use of the different terms "one-way passageway" and "milkbox" made it clear that the entities defined by these terms were distinct from each other.

He also submitted that the amendments leading to the independent claims of the auxiliary requests were disclosed in the application as filed and limited the scope of these claims with respect to claim 1 as maintained by the opposition division.



## Reasons for the Decision

1. The appeal is admissible.

2. *Main request*

2.1 Claim 1 of this request has been amended with respect to granted claim 1, which is identical with claim 1 of the divisional application (hereinafter DA) as filed (see EP-A-801 894) and with claim 3 of the parent application (hereinafter PA) as filed (see EP-A-622 019), *inter alia* by addition of the feature

(a) "[the one-way passageway] not being the milkbox".

This additional feature limits the scope of the claim with respect to granted claim 1, in so far as it excludes the possibility that the one-way passageway through which the animals "are allowed to visit another pasture" is the milking box ("milkbox").

2.2 In the present case, neither the claims nor the introductory portion of the description of the DA and of PA as filed refer to feature (a).

2.3 In the DA as filed an embodiment concerning a pasture with a rotational grazing system is described in column 3, lines 6 to 29 by referring to Figure 2. This embodiment concerns a construction comprising farm buildings (8) situated in the centre of a pasture area consisting of a plurality of separated pastures pairs (9/10, 9'/10', ...) arranged around the farm buildings, the two pastures of each pasture pair being separated by a fence provided with a one-way passageway (B1,

B2, ...). The animals present in the first pasture (9) of a pasture pair are allowed to go from this pasture (9) to a second adjacent pasture (10) through the one-way passageway (B1) provided in the fence separating the two adjacent pastures (9 and 10), then they can go from the second pasture (10) to the cow shed provided in the farm buildings (8) in which the milking box is located, whereafter they can go from the cowshed to the first pasture (9) again, such that a one-way walk-through system is constituted by the first pasture (9), the passageway (B1), the adjacent pasture (10) and the cow shed in which the milking box is provided. These specific features clearly disclose not only the elements constituting the one-way walk-through system but also the path and the direction of travel of the animals and thus implicitly define the positional relationship of the one-way passageway (B1) with respect to the two pastures (9, 10) as well as to the farm buildings (8) in which the cowshed with the milking box is arranged.

Feature (a) represents an intermediate generalisation of these specific features without there being a basis in the DA as filed for such a generalisation. In other words, due to the presence of feature (a), claim 1 excludes the possible solution of using the milking box as a one-way passageway leading from a pasture (9, 9', ...) to another pasture (10, 10', ...) but without defining the positional relationship of the one-way passageway to the pastures and to the farm buildings in which the milking box is located. Therefore, claim 1 of the main request includes not only the specific solution described in column 3, lines 6 to 29 of the DA

as filed but also other solutions which are non disclosed.

2.4 The respondent essentially submitted the following arguments:

- According to granted claim 1, the one-way passageway and the milking box are separate entities, because in this claim as well as in a sentence of the DA as filed (column 3, lines 11 to 15 corresponding to column 2, lines 52 to 56 of the patent specification) use is made of the different terms "milkbox (6)" and "one-way passageway (B)". Granted claim 1 has to be construed by giving its terms a technical meaning: the interpretation according to which the milking box is used as a passageway allowing the animals to visit another pasture would have no technical meaning.
- Feature (a) can unambiguously be derived from the DA as filed because both embodiments described in this application by referring to Figures 1 and 2 relate to a construction in which the one-way passageway is provided between two pastures, remotely from the milking box.

The board cannot accept these arguments for the following reasons:

- Generally, the use of different terms does not necessarily exclude that the entities identified by the different terms may coincide. In the embodiment according to Figure 2, the pastures are

not only adjacent to each other but also to the farm building including the milk box, such that it is possible that the animals are led from one pasture to the other adjacent pasture via the milking box. Furthermore, a milking box with a milking robot may represent a one-way passageway in so far as it is normally provided with entrance and exit doors opening in an unidirectional way. Thus, the solution of using the milking box as a one-way passageway leading from a pasture to another one is not only theoretically possible but also technically feasible.

- The embodiment according to Figure 1 is not covered by claim 1 since it does not concern a rotational grazing system and thus the part of the description relating to Figure 1 cannot be considered as a basis for claim 1.

The sentence in the DA as filed (column 3, lines 11 to 15) referred to by the respondent relates to the embodiment according to Figure 2. According to this sentence, "[a] one-way walk-through system for the animals is now constituted by two pastures 9 and 10, a one-way passageway B1 from the pasture 9 to pasture 10 and also the cowshed belonging to the farm buildings 8 with the milkbox provided therein". This sentence, however, has to be read in the context of Figure 2 and of the whole paragraph (column 3, lines 6 to 29) describing the embodiment of Figure 2 and cannot be isolated from its context, which relates to an embodiment in which the position of the one-way passageway with respect to the cow shed provided

with the milking box therein is defined in terms of further features which are not specified in claim 1 of the main request.

2.5 Therefore, the amendments leading to claim 1 of the main request contravene the requirements of Article 123(2) EPC and thus the main request has to be rejected.

3. *First to fourth auxiliary requests*

3.1 According to the decision G 1/99 (OJ 2001, 381), a non-appealing patent proprietor - in order to overcome a deficiency due to an amendment introduced in the version of the patent as maintained by the opposition division but which does not comply with the requirements of the EPC - may request a restriction of the maintained version of the patent by introducing one or more originally disclosed features which further limit the scope of the patent. Such a limitation would not put the opponent and sole appellant in a worse situation than if he had not appealed (principle of the prohibition of the *reformatio in peius*). Exception to this principle may be made if such a limitation proves impossible (see Headnote and point 15 of the Reasons).

3.1.1 In the present case, the paragraph in column 3, lines 6 to 29 of the DA as filed in conjunction with Figure 2 relates to a one-way walk-through system which is constituted *inter alia* by the one-way passageway. In particular, this paragraph contains features which define not only the elements constituting the one-way walk-through system (the two pastures of a pasture pair, the cow shed with the milking box and the one-way

passageway) but also the path and the direction of travel of the animals. This paragraph implicitly defines the layout of the elements constituting the one-way walk-through system and the positional relationship of the one-way passageway (B1) with respect to the milking box (see section 2.3 above). Thus, this paragraph of the DA as filed, which corresponds to the paragraph in column 3, lines 31 to 56 of the PA as filed, contains additional features which make it possible to amend claim 1 as maintained by the opposition division so as to further limit the scope of the claim by excluding that the one-way passageway is the milking box.

Therefore, since a further limitation of the claimed subject-matter does not prove impossible, any exception to the principle of prohibition of the *reformatio in peius* as referred to in G 1/99 would not be admissible.

3.1.2 Consequently, it has to be examined whether the amendments leading to the claims of the auxiliary requests further limit the scope of claim 1 as maintained by the opposition division such that the principle of the prohibition of the *reformatio in peius* is not contravened.

3.2 Claim 1 of the first auxiliary request differs from claim 1 as maintained by the opposition division, in that the negative feature (a) and the feature that "the construction is provided with a milkbox" (hereinafter feature (b)) have been replaced, respectively by the following features:

(a') "the cowshed, said pasture, said another pasture and said one-way passageway constitute a one-way walk-through system,

(b') "the construction is provided with a cow shed with a milkbox (6)".

Feature (a') defines the elements of the one-way walk-through system. However, the use of the different terms "one-way passageway" and "cowshed" does not imply that the entity "one-way passageway" is an additional element with respect to the entity "cowshed with a milkbox". Moreover, feature (a') does not refer to the milking box. Furthermore, it does not define the path and the direction of travel of the animals, i.e. the order with which the animals can walk through the elements of one-way walk-through system and thus does not define the positional relationship of the one-way passageway with respect to the pastures and to cowshed with the milking box. Therefore, this feature does not exclude the possibility that the milking box is the "one-way passageway" allowing the animals to visit another pasture, i.e. to go from "said pasture" to said "another pasture".

3.2.1 In this respect the respondent essentially submitted that features (a') and (b') in combination with the feature that the animals "are allowed to visit another pasture through a one-way passageway" implicitly define the path and the direction of travel of the animals and make it clear that the one-way passageway is located between "said pasture" and "said another pasture" and is an additional element separated from the cowshed and the milking box.

The board cannot accept this argument because claim 1 can be interpreted as allowing a path along which the animals present in "said pasture" can reach said "another" pasture via the milking box. Such an interpretation is not inconsistent with the description and the drawings of the patent specification, in so far as Figure 2 represents diagrammatically a plurality of pasture pairs, the two pastures (9, 10; 9', 10', ... ) of each pair being connected to each other not only by means of the elements provided with the reference signs (B1, ...) but also by means of the element provided with the reference 8 which is defined as the farm buildings with the milking box therein.

3.2.2 Therefore, the amendments leading to claim 1 of the first auxiliary request broaden the scope of claim 1 as maintained by the opposition division and thus contravene the principle of the prohibition of the *reformatio in peius*.

3.3 Claim 1 of the second auxiliary request differs from claim 1 as maintained by the opposition division not only in that the above mentioned features (a) and (b) have been replaced by features (a') and (b') but also in that the feature that "the animals are prevented from entering a particular pasture" has been replaced by the feature

(c) "the animals present in said pasture are prevented from entering a particular pasture".

Feature (c) has no functional or structural relationship to either the one-way passageway or the



milking box and, thus, its presence cannot make it clear that the one-way passageway is not the milking box.

Therefore, the amendments leading to claim 1 of the second auxiliary request contravene the principle of the prohibition of the *reformation in peius* for the same reasons given for the first auxiliary request.

- 3.4 Claim 1 of the third auxiliary differs from claim 1 as maintained by the opposition division, in that the negative feature (a) has been deleted.

This amendment clearly broadens the scope of claim 1 as maintained by the opposition division and thus contravene the principle of the prohibition of the *reformation in peius*.

- 3.5 Claim 1 of the fourth auxiliary request contains - in comparison with claim 1 of the first auxiliary request - the additional feature that

(d) "the feeding device is provided for the automatic administration of feed to the animals that have passed the doors of the one-way passageway".

This additional feature - even if it is read in conjunction with features (a') and (b') as well as with the features that the one-way passageway "is provided in a fence" and "comprises a feeding device" - neither makes it clear that the one-way passageway is a entity separate from the milking box nor defines the path and the direction of travel of the animals in the one-way walk-through system as referred to in feature (a').

3.5.1 In this respect, the respondent argued that feature (a') in conjunction with feature (b') and with the features that "the passageway (11) is provided in a fence, such as a wire fence, or similar construction" makes it clear that the "one-way passageway" can be provided in a wire fence. The reference to a wire fence implies that the one-passageway cannot be the milking box in so far as the use of a wire fence in a milking box would not have technical sense.

The board cannot accept this argument for the following reasons:

- Claim 1 does not define the fence in which the passageway is provided as a fence dividing "said pasture" from "said another pasture".
- The "wire fence" referred in claim 1 - due to the terms "such as" - is a facultative feature. Moreover, milking boxes normally comprise an enclosure made by means of fences or railings and according to the patent specification (column 3, lines 16 to 19), "all kind of other fences, railings, palings or similar enclosure" can be used instead of wire fences.

3.5.2 Therefore, the amendments leading to claim 1 of the fourth auxiliary request contravene the principle of the prohibition of the *reformatio in peius* for the same reasons given for the first auxiliary request.

3.6 Consequently, these auxiliary requests have to be rejected.

4. *Sixth and seventh auxiliary requests*

4.1. These auxiliary requests can be seen as a respondent's reaction to different objections raised by the appellant for the first time during the oral proceedings and concerning the allowability of the claims of first to fourth auxiliary requests with respect to Article 84 EPC 1973 and Article 123 EPC and the prohibition of *reformatio in peius*.

4.2. Claim 1 of the sixth auxiliary request differs from claim 1 as maintained by the opposition division in that the above mentioned features (b) and (a) have been replaced, respectively, by features

(b'') "the construction is provided with a cow shed belonging to farm buildings with a milkbox (6) provided therein", and

(a'') "the cow shed, said pasture, said another pasture and said one-way passageway from said pasture to said another pasture constitute a one-way walk-through system".

4.3. Claim 1 of the seventh auxiliary request differs from claim 1 as maintained by the opposition division in that above mentioned features (b) and (a) as well as the features "pasture with a rotational grazing system" and "the animals are prevented from entering a particular pasture (9', 10') and are allowed to visit another pasture through a one-way passageway (B)" have been replaced, respectively, by feature (b'') and the following features (a'''), (e) and (f):

- (a'') "the cow shed, said first pasture, said second pasture and said one-way passageway from said first pasture to said second pasture constitute a one-way walk-through system,
- (e) "pasture area with a rotational grazing system",
- (f) "the animals are prevented from entering a particular pasture pair (9', 10') and in another pasture pair comprising a first and a second pasture are allowed to visit said second pasture through a one-way passageway (B)".

4.4 Features (a'') and (a''') make it clear that the one-way passageway leads from "said pasture" or "said first pasture" to "said another pasture" or "said second pasture". However, neither these features nor features (b'), (e) and (f) unambiguously define the path and the direction of travel of the animals walking through the elements of one-way walk-through system. Thus, also these amendments do not exclude the possibility that the milking box is the "one-way passageway" allowing the animals to go from "said first pasture" (or said pasture") to "said second pasture" (or "said another pasture").

4.5 Therefore, it is immediately clear that the amendments leading to claim 1 of the sixth auxiliary request as well as those leading to claim 1 of the seventh auxiliary request contravene the principle of the prohibition of the *reformatio in peius* for the same

reasons given for the first auxiliary request and thus are inadmissible.

4.6 Consequently, sixth and seventh auxiliary requests have to be rejected.

5. Since there are no allowable requests, the patent has to be revoked.

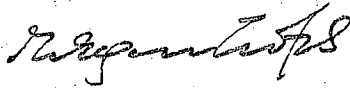
**Order**

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

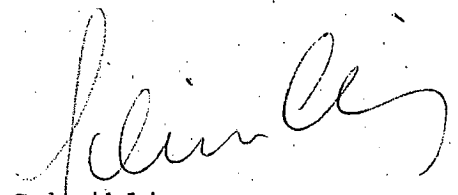
- 1. The decision under appeal is set aside.
- 2. The patent is revoked.

The Registrar:

The Chairman:



G. Magouliotis



C. Scheibling

