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**Datasheet for the decision
of 27 July 2010**

Case Number: T 0148/09 - 3.2.04

Application Number: 01850058.7

Publication Number: 1172033

IPC: A01K 1/02

Language of the proceedings: EN

Title of invention:

An apparatus for and a method of managing animals

Patentee:

DeLaval Holding AB

Opponent:

WestfaliaSurge GmbH
Octrooibureau Van der Lely N.V.

Headword:

-

Relevant legal provisions:

EPC Art. 111(1), 123(2)

Relevant legal provisions (EPC 1973):

EPC Art. 100(a)

Keyword:

"Added subject-matter (no)"
"Novelty - main request (yes)"
"Remittal (yes)"

Decisions cited:

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Catchword:

-



Case Number: T 0148/09 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 27 July 2010

Appellant: DeLaval Holding AB
(Patent Proprietor) P.O. Box 39
S-147 21 Tumba (SE)

Representative: Berglund, Stefan
Bjerkéns Patentbyrå KB
Östermalmsgatan 58
S-114 50 Stockholm (SE)

Respondent I: WestfaliaSurge GmbH
(Opponent I) Siemensstr. 25-27
D-59199 Bönen (DE)

Representative: Neumann, Ditmar
KNH Patentanwälte
Kahlhöfer Neumann Rößler Heine
Postfach 10 33 63
D-40024 Düsseldorf (DE)

Respondent II: Octrooibureau Van der Lely N.V.
(Opponent II) Weverskade 110
NL-3147 PA Maassluis (NL)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 November 2008
revoking European patent No. 1172033 pursuant
to Article 101(3)(b) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
T. Bokor

Summary of Facts and Submissions

- I. By its decision dated 11 November 2008 the Opposition Division revoked the European patent 1 172 033. On 8 January 2009 the Appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 11 March 2009.
- II. The patent was opposed on the grounds based on Article 100a) EPC 1973. The Opposition division considered that the subject-matter of claims 1 and 29 as granted was not new with respect to E20: "Die reactie van koeien als de krachtvoerverstrekking in the stal afhankelijk wordt gesteld van die in de AMS-ruimte" C.C. Ketelaar-de Lauwere et al. October 1993; Dienst Landvroukindig Onderzoek, Instituut voor Mechanisatie, Arbeid en Gebouwen, Report 93-18 and its translation into English.
- III. Oral proceedings took place on 27 July 2010 before the Board of Appeal.
- By letter dated 16 July 2010 Respondent II (opponent II) who had been duly summoned informed the Board that he would not attend the oral proceedings. According to Rule 115(2) EPC the proceedings were continued without him.

The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims of the main request filed with the grounds of appeal (the second auxiliary request filed before the Opposition division), or on the basis of one of the auxiliary requests 1 or 2 also filed with the grounds of appeal or in the alternative on the basis of

one of the auxiliary requests 3 or 4 filed with electronic filing of 23 June 2010.

He mainly argued as follows:

Claims 15, 16, 18 and 19 as originally filed provide a basis for apparatus claim 1 of the main request. Method claim 8 of the main request is based on independent method claim 29 and dependent claims 15, 16, 18 and 19 as originally filed. Each feature of claim 8 of the main request has its corresponding feature in claim 1 of the main request. Therefore, the requirements of Article 123(2) EPC are met.

E20 does not disclose an apparatus or a method for enticing an animal to move in a desired direction which leads to a milking station. In this citation there is only one supply station provided outside the milking station.

The Respondents I and II (opponents I and II) mainly submitted that the specific embodiments of the description do not support a method claim as broad as claim 8 of the main request, which therefore does not comply with the requirements of Article 123(2) EPC. Furthermore, claim 1 of the main request does not require more than two supply units. The predetermined destination is not part of the claimed apparatus and thus cannot distinguish it from the prior art. Since in E20 less feed is dispensed in the milking station feeder than in the cowshed feeder, there is an increase of the dispensing intensity with decreasing distance. Therefore, the subject-matter of claims 1 and 8 is not novel with respect to E20.

The Respondents I and II requested that the appeal be dismissed.

IV. Claims 1 and 8 of the main request read as follows:

"1. Apparatus for enticing an animal of a herd to move in a desired direction, which leads to a predetermined destination being a milking station, wherein the apparatus comprises a plurality of supply units (40a-40g) for dispensing edible products, such as feed or water, to the animal, characterized in that the supply units (40a-40g) are arranged at different locations along said direction, each supply unit (40a-40g) being provided with a sensing means for sensing the presence of said animal, and control means for controlling the supply units (40a-40g) in response to said sensing means sensing the presence of the animal to dispense the edible products with varying dispensing intensity to the animal in various supply units (40a-40g), such that the animal is enticed to seek for edible products in said desired direction, said supply units (40a-40g) being arranged at different distances from said destination, said control means being adapted to control the dispensing intensity such that edible products are dispensed in a relatively low dispensing intensity to the animal by supply units (40a-40d) located relatively remote from said destination, in order to entice the animal to seek for edible products dispensed by supply units (40e-40g) closer to said destination, wherein said control means is adapted to control the supply units (40a-40g) such that the dispensing intensity increases with decreasing distance between a supply unit (40a-40g) and said destination."

"8. Method of enticing an animal to move in a desired direction, which leads to a predetermined destination being a milking station, characterized by dispensing edible products, such as feed or water, to the animal in a plurality of supply units (40a-40g) at different locations along said direction;
sensing the presence of the animal at said supply units (40a-40g); and
controlling said supply units (40a-40g) in response to sensed presence of the animal, such that the edible products are dispensed with varying intensity to the animal in various supply units (40a-40g) to entice the animal to seek for edible products in said desired direction,
wherein the dispensing intensity is controlled such that edible products are dispensed in a relatively low dispensing intensity to the animal by supply units (40a-40d) located relatively remote from said destination, in order to entice the animal to seek for edible products dispensed by supply units (40e-40g) closer to said destination, and
wherein the supply units are controlled such that the dispensing intensity increases with decreasing distance between a supply unit (40a-40g) and said destination."

Reasons for the Decision

1. The appeal is admissible.
2. *Added subject-matter*
 - 2.1 Apparatus claim 1 of the main request comprises all the features of the independent claim 15 and dependent

claims 16, 18 and 19 as originally filed. Dependent claim 19 refers back to dependent claim 18, dependent claim 18 to dependent claim 16 and dependent claim 16 to independent claim 15.

Thus claims 16, 18 and 19 as originally filed provide a basis for amended apparatus claim 1, which therefore fulfils the requirements of Article 123(2) EPC.

- 2.2 Method claim 8 of the main request combines the features of independent method claim 29 as originally filed and dependent claims 16, 18 and 19 for an apparatus which refer back to independent apparatus claim 15. Independent claim 29 for a method as originally filed is based on the same features as independent claim 15 as originally filed expressed in terms of method steps. Hence, claim 8 of the main request defines in terms of method steps the features claimed in apparatus claim 1 of the main request.

Accordingly, amended independent claim 8 for a method also meets the requirements of Article 123(2) EPC.

- 2.3 In this respect, it is immaterial that the specific embodiments described in the patent specification are more limited than the now claimed method. What is decisive, is the fact that the amended method claim does not contain added subject-matter.

3. *Novelty - main request*

- 3.1 The aim of the apparatus and method disclosed in E20 is to teach the animals that they can only obtain feed in the supply unit of the cowshed if they have first reported at an automatic milking station (see page 1,

preface). To this effect, a first small amount of feed is dispensed at the supply unit of the milking station whereas the remaining (major) part of the ration can be obtained at the cowshed supply unit, but only if the animal has first reported at the milking station supply unit (page 4, lines 1 to 14 of the third paragraph of section 2.1).

- 3.2 Claims 1 and 8 of the main request require that the predetermined destination should be the milking station. However, in E20 the predetermined destination is not the milking station but the supply unit of the cowshed. If the milking station of E20 were considered to be the predetermined destination, then the dispensing intensity would not increase with decreasing distance between a supply unit and said destination, since as already mentioned more feed is dispensed in the cowshed supply unit than in the milking station supply unit. Moreover, there would be no supply unit dispensing feed on any path leading an animal from the lying area to the milking station, because an animal can only go from the lying area to the milking station either directly or via the cowshed. In this latter case however the animal would get no feed at the cowshed supply unit, because it would not have first reported at the milking station.

Respondent I argued that the milking station is not part of the claimed apparatus and therefore not a limiting feature of it. This reasoning cannot be accepted. The apparatus claim 1 as well as the method claim 8 require that the animal is enticed to move in a desired direction leading to a predetermined destination being a milking station. The aim of E20 is

to teach the animals that no feed will be dispensed in the supply unit of the cowshed if they have not reported at the milking station previously. The apparatus of E20 could therefore not be used for leading animals to a predetermined destination being a milking station without modification.

- 3.3 Moreover, claims 1 and 8 also require that "edible products are dispensed in a relatively low dispensing intensity to the animal by supply units (40a-40d) located relatively remote from said destination, in order to entice the animal to seek for edible products dispensed by supply units (40e-40g) closer to said destination".

Respondent I contended that this requirement does not imply the presence of more than two supply units, because the sole limiting feature concerning the supply units is that the dispensing intensity increases with decreasing distance between a supply unit and said destination.

This point of view cannot be shared. The fact that there are supply units (plural) located relatively remote from said destination as well as supply units (plural) located closer to said destination implies that there must be more than one remote supply units and more than one close supply units. In order that a group of supply units can form a plurality of remote supply units, there must be at least two remote supply units and one closer supply unit in addition.

Conversely, to form a plurality of close supply units there must be at least two close supply units and one additional more remote supply unit. Accordingly, the wording of claims 1 and 8 of the main request implies

at least three supply units, whereas E20 merely describes two supply units.

3.4 Consequently, the subject-matter of claims 1 and 8 of the main request is novel over E20.

4. *Further processing*

The Opposition division decided that the claimed subject-matter lacked novelty and thus left open the issue of inventive step.

Since proceedings before the Boards of Appeal are primarily concerned with the examination of the contested decision, remittal of the case to the Opposition division in accordance with Article 111(1) EPC is normally considered by the Boards in cases where the Opposition division issues a decision solely upon a particular issue and leaves substantive issues undecided.

In the present case none of the parties objected to the remittal of the case.

The Board therefore considers it appropriate to remit the case to the department of first instance for consideration of the undecided issues.

Order

For these reasons it is decided that:

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

The registrar:

The Chairman:

G. Magouliotis

M. Ceyte