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**Datasheet for the decision
of 29 June 2015**

Case Number: T 1037/11 - 3.2.04
Application Number: 00989032.8
Publication Number: 1154683
IPC: A01J5/017
Language of the proceedings: EN

Title of invention:

A METHOD OF AUTOMATICALLY MILKING ANIMALS AND A MILKING
MACHINE SUITABLE FOR PERFORMING SAME

Patent Proprietor:

Lely Enterprises AG

Opponents:

DeLaval International AB
Intellectual Property & Legal Support
GEA Farm Technologies GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(a), 56, 14(4), 122, 108, 125
EPC R. 6(3), 136(1), 99(1)(a), 100(1), 101(2)
Article 2 (1) of the Decision of the Presidium of the Boards
of Appeal dated November 2007 concerning the transfer of
functions to the Registrars of the Boards of Appeal
Article 8 RrFees
Article 8 Rules relating to Fees

Keyword:

Inventive step - main and auxiliary requests (no)

Decisions cited:

G 0005/88, G 0007/88, G 0008/88, G 0002/97, J 0014/94,
T 0128/87, T 0690/93, T 0161/96, T 0041/09, T 1644/10,
T 0595/11, T 0642/12

Catchword:



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Case Number: T 1037/11 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 29 June 2015

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 7 April 2011
revoking European patent No. 1154683 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	E. Frank
	T. Bokor

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division, dated 18 March 2011 and posted on 7 April 2011 to revoke the European patent No. 1 154 683 pursuant to Article 101(2) EPC.
- II. Two oppositions were filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1), 54, and 56 EPC.

The opposition division held that the patent as granted did not meet the requirements of the EPC, in particular for lack of inventive step of claim 1 as granted. In its decision the division considered the following prior art, amongst others:

D4 = A.H. Ipema et al: "Prospects for automatic milking", pp 244-251, Proceedings of the International Symposium on Prospects for Automatic Milking, Netherlands, 23-25 November 1992, EAAP Publication No. 65, 1992

D9 = WO 99/25176

- III. The appellant proprietor is Lely Enterprises AG, a legal person registered in Switzerland. They filed a notice of appeal in Dutch dated 12 May 2011, with a simultaneously filed English translation. A debit order for the payment of EUR 944 as appeal fee was enclosed with the notice of appeal. The latter stated that the debit order was for a reduced appeal fee under Article 14(4) and Rule 6(3) EPC. The statement of grounds of appeal was submitted on 1 August 2011.

The file number of the appeal and the fact that it has been referred to the present Board was communicated to

the parties with a Communication dated 18 May 2011 (EPO Form 3204) without any further comments. Copies of the grounds of appeal were sent to the respondents (opponent 1 and 2) on 12 August 2011 (EPO Form 3344) by the Registrar of the Board, also without any comments. The respondents commented on the merits of the appeal with letters dated 30 November 2011 and 20 February 2012, respectively.

The Board summoned to oral proceedings with EPO Form 3011 dated 26 March 2015, without communications under Article 15(1) RPBA.

The respondent opponent 1 stated by a letter dated and filed 24 April 2015 that it had become aware of the fact that the notice of appeal had been filed in Dutch and a reduced appeal fee paid, though the appellant-proprietor was a Swiss company and thus not entitled to do so. The respondent stated that the appeal is not valid and that the underpayment of the appeal fee means that the appeal fee was not paid in time. It requested to reject the appeal as inadmissible.

The Board issued two communications pursuant to Article 15(1) RPBA, one addressing the issue of the deemed filing of the appeal, while the other addressed the substantive issues.

The appellant commented on the issue of deemed filing in a letter of 29 May 2015, enclosing a notice of appeal in Italian. It also paid an amount of EUR 372, corresponding to 20% of the appeal fee applicable at the time of payment. The respondent opponents 1 and 2 addressed the issue of deemed filing with letters dated 29 May 2015 and 15 June 2015, respectively. Opponent 2 filed an expert opinion dealing with the issue of

protection of legitimate expectations in *inter partes* proceedings, and additionally submitted following questions for referral to the Enlarged Board of Appeal (original in German, translation by the Board):

1.) *May a party, as a question of principle, rely on the "principle of protection of legitimate expectations" (Vertrauensschutz) under Article 125 EPC in inter partes proceedings?*

1.1) *If the answer to 1.) is in the affirmative, may a party rely on the "principle of protection of legitimate expectations" in case of an omission, where the omission is related to the admissibility of an appeal?*

1.1.1) *If the answer to 1.1) is in the affirmative, does the Board or the responsible agent of the Board have a duty to inform the party of its omission, where it was recognisable that an insufficient court fee or appeal fee were paid?*

1.1.1.1) *If the answer to 1.1.1) is in the affirmative, does it contradict the principle of impartiality of the Board?*

2.) *Must a party, who wishes to rely on the principle of protection of legitimate expectations, demonstrate all due care required by the circumstances?*

IV. Oral proceedings were duly held on 29 June 2015, in the course of which respondent opponent 2 filed the following additional questions for referral to the Enlarged Board of Appeal under Article 112(1) EPC in order to ensure uniform application of the law (original in German, translation by the Board):

1. *May the apparent translation assume the legal position of a notice of appeal where in violation of Article 14(4) it has not been filed in an official language of that Member state, in contradiction to T 41/09?*

2. *If yes, may a 20% less appeal fee payment be considered as the payment of the complete fee in the sense of Article 8, second sentence, in contradiction to T 642/12?*

3. *Are errors as mentioned above in questions 1 and 2 easily recognisable in the sense of G2/97, that do not involve legal difficulties for the Registrar in the sense of Article 6(2) of the Rules of Procedure of the Boards of Appeal?*

V. The appellant requests that the appeal be deemed filed, and that the decision under appeal be set aside and the patent be maintained as granted (main request) or alternatively on the basis of the auxiliary request filed with the grounds of appeal.

The respondents request that the appeal be deemed not filed, or at least be dismissed.

VI. The wording of claim 1 of the main and auxiliary request reads as follows:

Main request (claim 1 as granted)

"A method of automatically milking animals, such as cows, that are allowed to move about freely in an area intended therefor and to visit individually a milking parlour provided with a milking robot and an animal

identification system, in which method an animal is recognized at a visit in the milking parlour and milked when since its previous milking at least a predetermined time has elapsed, characterized in that the animals are classified in groups, an individual predetermined time being allotted to each group."

Auxiliary request

Claim 1 is as in the main request but adds at its end the following text:

"..., the classification of the animals in groups is altered in the course of time, the classification is stored in a computer in which animal data are stored and/or to which animal data can be supplied, which animal data are relevant to the expected milk yield of the animals, certain alterations in the classification on the basis of the animal data are carried out automatically by the computer with the aid of a classification programme, and animals are successively classified in different groups with the aid of the classification programme on the basis of their stage of lactation."

VII. The appellant argued as follows:

Deemed filing of the appeal:

The Office had a duty to check the formalities of the appeal, such as language and appeal fee. The appellant was actually entitled to fee reduction, and merely used the wrong language, instead of Italian. Neither respondents nor third parties had noticed anything wrong the past four years. The *ratio decidendi* of J 14/94 was applicable in the present case. In

particular, the Office itself acted as if everything was in good order. The appellant paid annuities for several years, which the Office accepted. Given the length of the time passed, the well-known principle of statutory limitation was applicable. Furthermore, the appellant could have expected a warning from the Office all the more so as the appeal was filed 36 days before the time limit. Irrespective of whether or not the error was easy to discover, there was a legitimate expectation that the Office checked for it. By not being informed in time of an error, the appellant had also lost the opportunity to request re-establishment of rights. The appellant was not itself obliged to check all their other files, as cases were treated independently. Nor could it be expected that files are permanently re-checked for errors. Further, the circumstances of the present case were similar to those underlying decision T 0595/11 by the present Board, the facts of which appeared to be substantially the same. Therefore, the principle of the protection of legitimate expectations should be applied in favour of the appellant and the appeal should be deemed as filed.

Novelty:

The method of claim 1 as granted differed from D9's disclosure in that, besides a certain milking frequency for each animal of a group, in any case a minimum group level blocking time was required. The underlying problem of this distinguishing feature was how to realize different milking frequencies, i.e. implement different numbers of milkings per day. D4, however, invariably related to finding of an optimum milking frequency to increase the milk yield, cf. D4, page 251, irrespective of different lactation periods as in D9. Moreover, since cows are fetched manually by the

milker, the experiment on page 245 would not be used for a realistic, voluntary milking stall. Therefore, in the light of D9, D4 would not be considered by the skilled person and, thus, claim 1 of the main request involves an inventive step. As to claim 1 of the auxiliary request, D9 did not disclose a group classification of all animals stored in a computer or a classification programme for automatically altering the classification on the basis of animal data. Therefore, claim 1 of the auxiliary request also involved an inventive step over D9 and D4.

VIII. The respondents argued as follows:

Deemed filing of the appeal

Even if assuming that the Office indeed had a duty to check the language and the fee payment, the appellant should still have filed a request for re-establishment of rights under Article 122 EPC. The appellant thus had a duty to show due care, and therefore also had a duty to check possible deficiencies, especially after the discovery of a similar error in the case underlying decision T 642/12. At that time it would have been possible to request re-establishment of rights. It could not be equitable, that the appellant effectively be reinstated in their rights without examining the stringent requirements of Article 122 EPC. The error was not isolated, as demonstrated by the parallel cases. The appellant had not acted in spite of their obligation to show due care. Case law is clear in that the duty of an appellant cannot be offloaded on to the Office, even less on to another party. The error was not easily recognisable, thus could not be expected to be discovered. Case J 14/94 was different in many respects. In the present case the Office took no steps

which could have established the belief that the case was in order. The respondents would not have had any incentive to call attention to the error; on the contrary they could be expected to wait until the expiry of the one-year time limit of reinstatement. The appellant had already had the benefit of the suspensive effect for several years. Recognition of the appeal would affect the respondents adversely, and it would tempt future appellants to wait in a similar situation, instead of coming forward at the earliest opportunity. At the same time this would put an inequitable obligation on respondents instead of the Office to check formal issues. Therefore, the appeal should be deemed not filed under Article 14(4) EPC. A contrary decision would go against a number of earlier decisions. T 595/11 was not yet published and could not be relied on. Referral was justified because of contradicting case law and the existence of several pending cases. Even T 642/12 and T 595/11 by the present Board were contradictory. The applicability of the principle of protection of legitimate expectations was anyway questionable in *inter partes* proceedings. This was a point of law of fundamental importance, further justifying a referral to the Enlarged Board.

Novelty

D4, cf. page 245 concerns automatic milking and, therefore the skilled person starting from D9 would indeed consider its teaching to implement different milking frequencies and respective minimum blocking times for different groups. Therefore, claim 1 of the main request is obvious in the light of D9 and D4. Moreover, the additional features of claim 1 of the auxiliary request are already known or at least obvious from D9, cf. pages 3 and 8. Thus, claim 1 of the

auxiliary request also does not involve an inventive step in view of D9 and D4.

Reasons for the Decision

1. *Filing and admissibility of the appeal*
 - 1.1 The facts of the present case concerning the deemed filing of the appeal are very similar to those underlying case T 595/11, to which opponent 1 and the proprietor were also party and which was decided by the present Board in the same composition on 27 May 2015. However, the notification in writing of the reasons of decision T 595/11 had not yet been issued when the present decision was announced in the oral proceedings on 29 June 2015. The respondents also submit that T 595/11 cannot be considered as binding precedent for the Board.
 - 1.2 The Board agrees that it is in principle not bound by an earlier decision in another case. Nevertheless, the Board finds that for essentially the same reasons as in case T 595/11, the principle of protection of legitimate expectations applies also in the present case in favour of the appellant.
 - 1.3 Pursuant to Article 14(4) EPC, legal persons registered in a Contracting State having an official language other than English, French or German, may file documents which have to be filed within a time limit in an official language of that State (admissible non-EPO language). They shall, however, file a translation in an official language of the European Patent Office ('Office'). If a document is not filed in the prescribed language, or if any required translation is

not filed in due time, the document shall be deemed not to have been filed.

- 1.4 Pursuant to Article 108 EPC, second sentence, the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid. Article 8 RFees, first sentence stipulates that the time limit for payment shall in principle be deemed to have been observed only if the full amount of the fee has been paid in due time. Under Rule 6(3) EPC a reduced appeal fee is payable where a person files an appeal in an admissible non-EPO language under Article 14(4) EPC. In the present case, the time limit for filing the notice of appeal and thereby the time limit for paying the appeal fee expired on 17 June 2011. A reduced appeal fee pursuant to Rule 6(3) EPC was paid on 12 May 2011, and a full appeal fee was paid on 29 May 2015 (see point III above).
- 1.5 It is undisputed that appellants were not entitled to use Dutch in filing documents with the EPO. It is also undisputed that the filing of the notice of appeal in Dutch did not entitle the appellant to benefit from the fee reduction. Rather, appellant argues that the EPO should recognise the appeal as valid, i.e. deemed as filed, both with regard to the used language and the fee payment, through the application of the principle of the protection of legitimate expectations, and that some "statute of limitations" must apply, meaning that certain legal claims can only be brought before a court within specified time limits.
- 1.6 The Board concurs with the appellant that the principle of legitimate expectations, also referred to as the principle of good faith, is applicable in proceedings before the EPO, and also in appeal proceedings (G 2/97

of 12 November 1998, OJ EPO 1999, 123, point 1 of the Reasons).

- 1.7 The Board is not convinced that for example Article 125 EPC or even the established principle of good faith would provide sufficient legal basis for a "statute of limitations". As the appellant also put forward, this requires statutory limitations, i.e. well defined time limits set down by law. Such time limits are missing in the EPC in the present case, as the appellant has acknowledged.
- 1.8 However, it remains to be examined if the appellant had a legitimate expectation that the EPO warn him in good time - that is significantly earlier than was the case - of the deficiency, namely the use of the wrong language and the only partially paid appeal fee.
- 1.9 The Board holds that the Office had a legal duty to examine the appeal for such formal requirements, and to call the attention of the appellant to any deficiencies. This duty is implied by Rule 101 EPC, which explicitly concerns the compliance of the appeal with Article 108, i.e. also implies the examination of payment of the correct appeal fee, among other criteria. At least where an entitlement to fee reduction is claimed, the used language should then also be checked. It is not apparent to the Board that this check of formalities would be so difficult that it could not be expected to be performed or that there would be an expectation that the check would not reveal such a formal error. The Board therefore holds that it is also reasonable that this check is to be performed by the Registrars of the Boards as part of the functions entrusted them under Article 6(2) RPBA in conjunction with Article 2 (1) of the Decision of the

Presidium of the Boards of Appeal dated November 2007 concerning the transfer of functions to the Registrars of the Boards of Appeal (Supplementary publication to OJ EPO 1/2015, page 66), analogously to the entrustment of certain duties to the formalities officers of the first instance departments.

1.10 It is another matter that there is no general legitimate expectation that this examination of the formalities and a possible warning of the appellant should take place **before** the expiry of the applicable time limit, as found by Enlarged Board of Appeal in G2/97, and also followed by the present Board (in a different composition) in case T 642/12 of 11 January 2013, cited by the respondents. Therefore, the present case is not comparable with that underlying T 642/12, where non-entitlement to the appeal fee reduction of the Swiss registered appellant-proprietor filing the notice of appeal in Dutch was noted by the respondent-opponent shortly after expiry of the time limit under Article 108 EPC, and the appellant was still able to file a request for re-establishment of rights. Thus the Board does not see any non-uniform application of the law here, which might justify a referral to the Enlarged Board of Appeal. The question remains, however, if the EPO can be expected to perform this check within a reasonable time frame, and whether this time frame has been observed in the present case.

1.11 The Board considers that even if the EPC and its implementing regulations do not prescribe a precise time limit for performing the formalities check of the appeal, this check must be done within a reasonable time frame. Stating the opposite appears manifestly inequitable and as such unacceptable to the Board.

Respondent opponent 2 argues that Rule 101(2) EPC implies that such an obligation of the Office exists only concerning the deficiencies relating to Rule 99(1)a EPC. This is not accepted. Rule 101(2) EPC only establishes a difference in that the deficiencies relating to Rule 99(1)a EPC are considered as remediable also after the expiry of the time limit for filing the appeal. The Board considers that the examination of the formalities under Rules 101(1) and 101(2) EPC can be presumed to be made at the same time. To the knowledge of the Board, this is indeed the standard practice. Therefore, if it is accepted that an invitation to correct deficiencies under Rule 101(2) EPC is to be expected within a reasonable time (which appears obvious, given that at least the person of the appellant must be known to all parties involved as soon as possible), the same must hold for the finding of deficiencies under Rule 101(1) EPC and its communication to the appellant. It does not appear necessary in the present case to define this time frame within which the formalities of the appeal need to be checked and the party be warned more precisely. This may be a question of days, weeks or even months, depending on the individual circumstances. The Board is confident that whatever this expected time frame might be, it should most certainly be shorter than the almost four years that have passed in the present case between the expiry of the time limit for filing the appeal and the time when the Office first made the appellant aware of a deficiency in this respect.

- 1.12 Having thus established that the Office had a duty to inform the appellant within a reasonable time frame after expiry of the Article 108 EPC time limit but did not do so, it remains to be decided what the consequences should be. The Board considers that an

objective observer relying on the duty of the Office to act within a reasonable time as explained above would have concluded that the appeal had been examined for such formalities as the appeal fee and thus also for the correct language in the notice of appeal. In this manner also the appellant could have reasonably expected that fee and language were no longer an issue which could preclude the examination of the appeal on its merits. Its expectations were also legitimate, given that it had legitimate interests in the positive outcome of the appeal and there is no indication that it were or ought to have been subjectively aware of its own error or the fact that the Office might not have lived up to its duty when dealing with this file.

- 1.13 In the present case, in addition to the time factor, the expectations of an objective observer would not have been altered by the fact that the Board issued a summons to oral proceedings, without mentioning any specific issues to be discussed during the oral proceedings, in itself not an usual procedure. It was to be expected that in the oral proceedings only those issues would be dealt with that were raised by any of the parties or the Board until that point. The Board confirms that it was indeed not aware of the language and fee problem of this file until it received the respondent opponent 1's letter of 24 April 2015 (see point III above). Thus the Board concludes that the legitimate expectations of the appellant (and possibly other parties) that the notice of appeal was in good order and would no longer be objected to, were indeed established, at least in respect of the fee payment and the language requirements. To this extent the Board follows the lines of argument relied on by decision J 14/94 of 15 December 1994 (OJ EPO 1995, 824) cited by the appellant, see No. 7 of the Reasons, last

paragraph. The Board adds that the appellant has also demonstrated good faith on its part in that the missing fraction of the appeal fee was ultimately paid.

- 1.14 Having established that legitimate expectations arose, the Board needs to decide how these should be honoured under the circumstances of the present case, i.e. to what extent such legitimate expectations can be and need be protected. The respondents argue in this context that the Board must remain impartial in *inter partes* proceedings, and this precludes the application of the good faith principle in clear favour of one party over the other. The Board is not convinced by this argument, though it agrees with the respondent that the Office and also the Boards must generally remain impartial. However, this impartiality obligation does not mean that the application of the good faith principle is generally excluded in *inter partes* proceedings.

The leading decisions on this issue, G 5/88, G7/88, G8/88 (consolidated, OJ 1991, 137) and G2/97 (*supra*) were handed down in *inter partes* proceedings. There is no hint in any of these decisions that the Enlarged Board would have considered this fact as a serious obstacle for the Office to act in good faith possibly in the interests of one of the parties only. On the contrary, according to G2/97, reasons 1, the principle applies to "proceedings before the EPO" and is such that "measures taken by the EPO should not violate the reasonable expectations of parties to such proceedings". Rather, the emphasis in G2/97 is on the easily identifiable nature of the error and the possibility to correct it, see Nr. 4.1 of the Reasons. More importantly, the Enlarged Board not only found an intervention of the Office permissible, but under

circumstances even obligatory, in the cited example from T128/87 of a missing cheque for the appeal fee stated to be enclosed, where the "EPO should notify the appellant".

The Board takes note of the decisions T 1644/10 of 26 October 2011 and T 690/93 of 11 October 1994 cited in point 4.2.8.2 of the expert opinion, but does not consider that its present decision would contradict these. T 1644/10 examines if an erroneous Office action could possibly establish legitimate expectations of a party against differing legitimate expectations for the opposing party established by another Office action. It finds that reliance on good faith is problematic also because a re-establishment of rights under Article 122 EPC is not possible for a potential opponent concerning the time limit for filing opposition, as a question of law. This circumstance is fundamentally different from the present case. T 690/93 was handed down in an *ex parte* proceeding and before G 2/97. It only generally mentions the impartiality obligation of the Office, but explicitly permits the weighing up of this obligation against the overall circumstances, see Nr. 3.6 of the Reasons. Neither decisions concerned a factual background comparable with the present case. The further cited decisions concern possible advice of the Board to a party concerning the substantive issues of their case, and already for this reason not considered as comparable to the present case.

The Board adds that the good faith principle is meant to protect the rights of any party from untoward acts of the relevant authority, in this case the EPO, which might otherwise be to that party's disadvantage or detriment. Evidently, and as may be inferred from the

decisions of the Enlarged Board of Appeal cited above, all parties to proceedings before the EPO must be so protected. In opposition and opposition appeal proceedings and vis-a-vis the EPO the principle provides a further safeguard of impartiality in that by its application a party does not unfairly suffer disadvantage or, conversely, an adversary does not derive unfair benefit, from failings that lie within the sphere of responsibilities of the adjudicating authority. In this regard the Board is unable to see how the good faith principle would inherently be at odds with the requirement of impartiality in such proceedings.

- 1.15 The Board further points out that within limits, the Office is not only permitted, but indeed obliged by the Convention itself to make steps which may be considered to be of more help to one party than to others. In this case, the duty implied by Rule 101 EPC treated above in point 1.9 is obviously not different in *inter partes* proceedings. Being a legal duty, compliance with it cannot be qualified as a partial treatment of the parties, even though in the given situation it is for the benefit of typically only one of the parties, and may even be regarded as going against the interests of the other parties, as it may preclude easy success of their case. This demonstrates that pointing out formal, but possibly curable errors in an appeal need not be regarded as partial conduct of a Board of Appeal. Rather, it is in the overall interest of all parties and also of the general public that cases are not disposed of through formal reasons but rather on their merits. For this reason, it has to be accepted that steps taken to make good the non-observance of this duty might also benefit one party only, but not necessarily the others. Therefore, recognising the

legitimate expectations of the appellant in the present case cannot be qualified automatically as an impermissible impartiality of the Board. As explained further below, the Board holds that here at most an equitable, but not perfectly "impartial" solution can be found.

1.16 The Board considers that as far as possible, the consequences of the non-observance of the duty of the Office should not be to the detriment of any party, i.e. it is not merely the legitimate interests of the appellant that must be protected in an inter partes case. To that extent, the Board concurs with the respondents. The problem is that the failure of the Office to check correct fee payment and issue a warning in good time cannot be remedied in the present case without at least one party suffering some disadvantage or detriment. Here the Board can only strive to find what it considers to be an equitable balance of the consequences to either party.

1.17 The respondents argue that the recognition and acceptance of the appeal fee and thereby the deemed filing of the appeal affect them adversely. Whether or not the respondents have been put in an objectively worse position depends on a comparison of their present procedural situation and the situation which could have been expected to arise if the Office had lived up to its duty and noted the fee and language problem in time. It seems realistic to assume that appellants could and would have then filed a request for re-establishment of rights, which might or might not have been successful. It is also conceivable, that if the Office had carried out its duty diligently, it might even have done the check and warned the appellant before the expiry of the time limit, given that the

appeal was filed and the fee was paid more than thirty calendar days before the applicable time limit, so that re-establishment would not have been necessary at all. As explained above in point 1.14, such a timely warning was perhaps not obligatory, but certainly not prohibited, not even when taking account of the impartiality obligation of the Office. At any rate, it is indeed possible that recognising the appeal now after discovery of the error may have put the respondents in the worse position of being prevented from immediately achieving their obvious and legitimate goal, the failure of the appeal. But considered in the broader perspective it is also possible that they might not have gained anything, so that they still would have had to deal with the appeal on its merits and accept its outcome.

- 1.18 The respondents suggest that the Board should deem the appeal as not filed. The Board is of the opinion that such an outcome would also not be equitable. The negligence of the Office has already indisputably put the appellant in a situation that is significantly worse, in that previously available remedies - a request for the re-establishment of rights under Article 122 EPC - are no longer available. If the Board were to now deem the appeal not filed because of the deficiencies, this would undoubtedly and most certainly be to the detriment of the appellant. In this manner, even if made inadvertently, such an effective intervention by the Board into the normal course of the proceedings could be hardly qualified as objectively "impartial". Thus such an outcome must be weighed against the possible, conjectural worsening of the respondents' position, even if accepting that the preconditions for such a situation undisputedly were created by the appellants themselves.

1.19 Against this background, absent any other obvious solution of the issue before it, the Board must choose between a possible and a certain adverse effect, where it also must consider that the possible, but nevertheless conjectural adverse effect is the prevention of an immediate success of the respondent's case (i.e. the revocation becoming final), while the certain adverse effect is the immediate loss of the appeal. Here the question arises whether and how far the Board should take it into consideration that this situation was created by an error of the appellant in the first place, and the respondent is, so to say, completely innocent. The Board finds that this circumstance does not preclude it either from finding in favour of the appellant. The duty of the Office to check the appeal is first and foremost designed to discover such errors. This is a duty not only towards the appellant, but towards all parties and the public, because it is in the common interest of all that such errors are discovered in time. Against this background, there can be no expectation that the adverse consequences of a failure of the Office to discover an error, once made, should be limited to certain parties only. It may appear equitable that the adverse effect should possibly be limited to the party which made the error in the first place. But it is questionable if here the appellant genuinely contributed to the Office's failure, the apparently missing or erroneous check of the appeal. This check had to be done in any case, quite independent of the error made by appellant. Thus it cannot be said that the Office's failure was caused by the appellant, and therefore it cannot be expected that the adverse consequences of this failure should exclusively affect the appellant.

1.20 Weighing up the legitimate interests of both sides and also that of third parties, and considering the overall circumstances of the present case, the Board concludes that the original error might have had serious and inequitable consequences through the Office's failure to discover it. Therefore, it is equitable that the Office's failure is made good and the error is now allowed to be remedied, as far as possible. Seeing that some adverse effect is inevitable, the Board considers that the possibility of a real, but otherwise in itself not necessarily decisive setback (here the non-occurrence of an immediate success) for a party is more preferable than a certain decisive loss of all rights for another party, in particular given the fact that for a long time none of the parties did expect the latter. Put differently, a merely possible injury obviously is less serious than certain death. Therefore in the present case the Board accepts, through the application of the principle of protection of legitimate expectations, that the appeal fee has been timely and fully paid. Similarly, it also accepts that the English translation of the notice of appeal in Dutch was the original notice of appeal (to that extent deviating from the findings of decision T 0041/09 of 14 September 2010). This essentially corresponds to the factual treatment of documents filed in an admissible non-EPO language under Article 14(4) EPC. The Board considers that in this manner overall, least harm is done to all parties and in the end the appeal can be decided on its merits.

1.21 The appellant filed simultaneously with the payment of the missing part of the appeal fee a notice of appeal in Italian, dated 12 May 2011. The appellant did not put any special emphasis on the importance of this document. The Board takes it that the document was

filed in an attempt to demonstrate that the appellant indeed would have been capable of filing Italian language documents, so that the fee payment could have been regarded as sufficient *ab initio*.

However, once the Board has decided that the appellant could rely on the protection of its legitimate expectations, it has also decided implicitly that some provisions of the EPC will not be applied (otherwise there would be no need to rely on legitimate expectations). Thus the Board might in theory have accepted in the specific circumstances of this case Dutch as an admissible language for a Swiss company, akin to the creation of a legal fiction to this effect. Alternatively, it might have established the (obviously far more strained) fiction that the later filed Italian notice of appeal was filed in time (and further that the earlier filed English translation of the Dutch notice of appeal was a translation of the later filed Italian version). Both legal fictions would have meant that the appellant would not have had to pay any further fees. However, the Board considers that the principle of the protection of legitimate expectations, being an exceptional and extraordinary measure, should be used sparingly and only to the extent that a serious loss of rights is prevented where this would be manifestly inequitable. Having to pay more appeal fee than theoretically might have been necessary may be considered as a loss of rights, given the potential entitlement of the appellant to fee reduction. Yet, in the opinion of the Board the entitlement to fee reduction is not a legitimate interest that is so serious so as to deserve protection through the principle of protection of legitimate expectations. Given that the appellant objectively did not comply with the acts necessary for achieving the fee reduction

sought, it was not entitled to a fee reduction, even though it could be argued that an objective observer might have concluded the contrary and thus such an expectation could have been created, as explained above in point 1.12.

1.22 The Board also rejects the further arguments of the respondents against the application of the good faith principle. One such argument is that now a further burden or obligation is put on parties, namely to itself check correct fee payment by the other party. This is rejected. The obligation of the Office to check the appeal fee remains, and it is to be expected that the Office lives up to its obligation for all cases in the future. The "burden" on a respondent is true only to the extent that any party should always be vigilant in order not to miss unexpected benefits or advantages. However, this is not a burden, let alone an obligation, but merely a possibility for a party. This possibility - and to this extent the burden or obligation - was not created by this decision, but existed also before, as demonstrated by the cited case T 642/12, where the present Board acted on an indication from the respondent. A genuine new obligation of the respondent would come into existence only if any examination and objection by the Board concerning an appeal fee in the future would be conditional on an explicit objection coming from the respondent. Otherwise the present decision does not create any binding precedent on any Board to always apply the principle of good faith in comparable circumstances in the same manner as the present Board did.

1.23 The respondents also argued that the appellants did not show due care, and that accepting their appeal would mean that they are now treated more favourably as

compared to a potential reinstatement proceeding under Article 122 EPC, and that this could not be equitable. The Board points out that this might be so, but the better treatment is merely conjectural, given that it would have been possible to warn the appellant in time and therefore proceedings under Article 122 might not have been required at all. Furthermore, the Board does not see any legal basis for commencing a proceeding under Article 122 EPC beyond the one-year time limit of Rule 136(1) EPC, first sentence. It also appears manifestly inequitable to take these circumstances into consideration when examining the entitlement to the protection of legitimate expectations, given that this would require appellants to gather the facts and to provide an explanation of the events after four years. Respondent opponent 2 points to decision T 161/96 of 3 November 1997, but the Board fails to see how this decision could support the respondent's case, as it does not even remotely discuss whether observation of due care need to be examined before a good faith argument is considered as admissible. The respondents further argue that hereafter parties in a similar situation would not come forward at the earliest opportunity, but would seek to conceal the error for a long time. The Board accepts that such a danger exists, but considers this danger to be negligible and for the time being theoretical, absent any known cases. Against this theoretical danger, there is the very real possibility that appellants might lose their appeal through the failure of the Office, as explained above. Finally the Board notes that the Office should be able to prevent such a behaviour of parties simply by a thorough and timely examination of the appeals under Rule 101 EPC.

1.24 The Board also rejects the argument that the very application of the good faith principle would require appellants to demonstrate due care, apart from the considerations in point 1.23 above. Here it is contended that the appellant did not check their files after having been confronted with a similar error in case T 642/12. The Board concurs with respondents to the extent that a party wishing to rely on the argument of good faith must generally demonstrate that it was acting in good faith as well. However, it is questionable if acting in good faith is the equivalent of acting with all due care in the sense of this latter as developed in the case law in relation to Article 122 EPC. While the Board accepts that there may be a large overlap between the two, they are different. An entitlement of a person seeking to achieve or retain some rights under the good faith principle to a large extent depends on the acts of another person, typically the acts of the Office, while the expected observation of all due care is a measure of the objective acts of the party seeking the rights to be re-established. Falling short of all due care is not necessarily a proof of bad faith, e.g. it may also be caused by ignorance. Accordingly, the Board holds that here it only needs to be examined if the appellant has acted in good faith throughout the proceedings. There are no indications to the contrary. In particular, in the judgement of the Board, the obligation to act in good faith does not extend to the general obligation that a party should systematically review its patent portfolio whenever an error is discovered in one of its files. Whether or not it falls short of an obligation to observe all due care need not be examined here.

1.25 Referral of questions to the Enlarged Board of Appeal

Finally, the Board rejects the requested referrals to the Enlarged Board of Appeal. The Board does not see any divergence in the case law, nor do the raised issues appear to be of fundamental importance, but rather concern specific details closely related to the present case. Furthermore, such cases are expected to be rare, hence the overall effect of the present decision on future case law is expected to be low. The Board was further able to answer the questions posed in the letter of 15 June 2015 of respondent opponent 2 (see point X.). As explained above (see points 1.14 to 1.15), the Board considers that the good faith principle is in principle applicable in inter partes proceedings. Nothing is apparent to the Board that would preclude its application as a *question of principle* in cases involving an omission in relation to an appeal. The Board also decided that at least certain formal deficiencies must be brought to the attention of a party within a reasonable time frame. As explained above, good faith and the observation of due care are possibly related, but not strictly equivalent or directly connected requirements. The questions submitted during the oral proceedings (see point XI.) need not be referred to the Enlarged Board of Appeal, as the Board is not aware of a non-uniform application of the law. The cases cited by the respondents are not fully comparable to the present case. Neither T 0041/09 nor T 0642/12 did deal with a situation where the Office has failed to identify errors within a reasonable time frame. Question 3 also appears irrelevant, as G 2/97 also did not deal with the issue before the present Board, but explicitly with the obligation to warn a party still before the applicable time limit. Otherwise Questions 1. and 3. were answered by the present decision, while Question 2. did not require a direct answer for deciding the present case.

1.26 The Board is satisfied that further criteria of a valid and admissible appeal are fulfilled. The Board concludes that the appeal is deemed to have been filed and admissible.

2. *Inventive step - main request*

2.1 It is common ground that the method of controlling automatic milking in Document D9 (cf. abstract) forms the closest prior art. D9 describes that it is possible to set a predetermined number of milkings per day for at least one animal at at least one stage of the lactation period, with different numbers of milkings for different lactation stages, cf. D9, page 2, lines 21 to 29. Moreover, D9's control means may be programmed to allow an individual animal to be milked only after a minimum time interval from a previous milking, as is required in the preamble of method claim 1 of the patent, cf. D9, page 4, lines 19 to 24. Hence, it is prevented that the allowed number of milkings per day for a given animal is performed in a row, i.e. in quick succession during a short period of time so that it would not be milked again for a considerable period of time until the next day, which could be very painful for the animal.

2.2 Furthermore, different stages of a typical lactation period may be used for a part of a herd, i.e. for a group of animals, cf. page 7, lines 17 to 19, and figure 5b. A lactation curve indicates the recommended number of milkings per day depending on the lactation time, cf. D9, page 7, lines 9 to 15, and fig. 5a.

2.3 Thus, D9 discloses a control system that can be programmed such that animals are classified in groups

according to stages of a particular lactation curve. Each stage of the lactation curve corresponds to a predetermined number of milkings per day in D9's control system. The parties agree that "number of milkings per day" and "milking frequency" would be regarded as synonymous by the skilled reader. That is, in D9 different groups of animals classified according to different stages of lactation have corresponding predetermined milking frequencies, cf. again page 2, lines 21 to 29 of D9.

- 2.4 As argued by the appellant, the method of claim 1 of the patent differs from D9's disclosure in each group being allotted a predetermined time (since last milking), i.e. the use of a minimum group level blocking time. Though D9 describes group level milking frequency as indicated above and also suggests the use of minimum milking interval, there is no indication that this interval should vary according to group.
- 2.5 D9 by classifying animals according to group criteria and milking in accordance with these group criteria can already be said to provide a method such that specific conditions of the animals can be taken into account, without the method becoming too cumbersome, cf. patent, paragraph 0003. It is common ground that the associated reformulated objective problem underlying claim 1's distinguishing feature vis-à-vis D9 can be seen as how to realize different milking frequencies, i.e. different numbers of milkings per day, cf. also patent, paragraph 0013.
- 2.6 Document D4 describes an experiment to determine the effect of milking frequencies on milk yield from a number of 39 dairy cows which were able to go to a milking parlour voluntarily, cf. D4, page 245, second

last paragraph, and last paragraph, 1st sentence. Though D4 is concerned with simulation under research conditions as advanced by the appellant, the Board shares the respondent's view that D4 is intended specifically to shed light on aspects of automatic milking systems: see introductory portion on page 245 of D4, and the title of the proceedings of the International Symposium in the context of which the paper is presented. Thus, starting from D9, the skilled person would indeed turn toward D4 for a solution to the problem posed.

- 2.7 In D4 three groups of cows were created, which during the experiment were milked at different frequencies of 2, 3 and 4 times daily, each associated with a different minimum interval between milkings of 10, 6 and 4 hours respectively. If a cow reported earlier for milking, she was refused, cf. D4, page 245, last two paragraphs. Thus, D4 teaches that different frequencies can be achieved by different milking intervals.

Therefore, starting from D9 and faced with the problem of implementing different group level milking frequencies, the skilled person would, prompted by D4's teaching apply it to D9 to the effect that, depending on the desired milking frequency per lactation group in D9, a corresponding predetermined minimum time interval is allotted to that group, all the more so as D9 already suggests the use of minimum milking intervals. Consequently, he will arrive in straightforward, obvious manner at the subject-matter of method claim 1 of the patent.

- 2.8 Therefore the subject-matter of method claim 1 as granted according to the main request does not involve

an inventive step, contrary to the requirements of Articles 100(a) and 56 EPC.

3. *Inventive step - auxiliary request*

3.1 Claim 1 of the auxiliary request is further characterized by the features of claims 2, 5, 8 and 9 of the patent as granted. However, the automatic alteration of the classification over time and on the basis of animal data and storing the classification in a computer in which animal data relevant to the expected milk yield are stored is already known from D9, cf. cf. page 3, lines 25 to 26, and page 8, lines 10 to 11 (automatic alteration of classification); page 7, lines 27 to 29, and page 8, lines 4 to 15 (storage of classification with yield data). Moreover, successive classification on the basis of lactation stage - in so far as not already inherent in the use of the lactation curve of figure 5a - follows from page 8, lines 10 to 15.

3.2 As the added features fail to further differentiate the claimed subject-matter from D9, method claim 1 of the auxiliary request also lacks an inventive step in the light of D9 and D4, for the same reasons as for the main request, contrary to Article 56 EPC.

4. Without prejudice to the question of novelty for claim 1 in either version, in the light of the above, none of the appellant's requests can be considered allowable by the Board. The Board therefore confirms the appealed decision's finding.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated