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**Datasheet for the decision
of 10 February 2017**

Case Number: T 0707/12 - 3.2.04

Application Number: 04077700.5

Publication Number: 1523882

IPC: A01K1/12, A01J5/017, A01J7/04

Language of the proceedings: EN

Title of invention:
An assembly for and a method of feeding and milking animals

Patent Proprietor:
Lely Enterprises AG

Opponent:
DeLaval International AB
Intellectual Property & Legal Support

Headword:

Relevant legal provisions:
EPC Art. 14(4), 100(c), 108, 111(1), 123(2)
EPC R. 6(3)
RFees Art. 8

Keyword:

Underpayment of appeal fee
Protection of legitimate expectations (yes)
Deemed filing of the appeal (yes)
Added subject-matter - main request (no)
Remittal to the department of first instance

Decisions cited:

T 0595/11, T 1037/11, T 2554/11

Catchword:



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Case Number: T 0707/12 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 10 February 2017

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 23 January 2012
revoking European patent No. 1523882 pursuant to
Article 101(2) 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, decided in oral proceedings on 14 December 2011 and posted on 23 January 2012 to revoke the European patent No. 1 523 882 pursuant to Article 101(2) EPC. The appellant (proprietor) filed a notice of appeal on 29 March 2012, paying the appeal fee on the same day (for further details in this respect see point III below). The statement of grounds of appeal was submitted on 4 June 2012.

II. The opposition was filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1), 54, and 56, Article 100(b) and Article 100(c) EPC.

The opposition division held that the patent as granted (main request), and the first and second auxiliary requests as filed on 23 December 2010 and during the oral proceedings, respectively, did not meet the requirements of Articles 100(c) and 123(2) EPC for lack of original disclosure.

III. The appellant proprietor is Lely Enterprises AG, a legal person registered in Switzerland. The notice of appeal was filed in Dutch, with a simultaneously filed English translation. A debit order for the payment of EUR 944 as appeal fee was provided in the letter accompanying the notice of appeal.

The file number of the appeal and the fact that it has been referred to the present Board was communicated to the respondent opponent with a Communication dated 5 April 2012 (EPO Form 3204) without any further

comments. A copy of the grounds of appeal was sent to the respondent on 8 June 2012 (EPO Form 3344) by the Registrar of the Board, also without any comments.

The respondent commented on the merits of the appeal with letter dated 4 October 2012 and requested that the appeal be dismissed. With a letter dated and filed 24 April 2015 the respondent stated 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. It stated that the appeal was not valid and that the underpayment of the appeal fee meant that the appeal fee was not paid in time. The respondent requested to reject the appeal as inadmissible.

Following a communication from the Board, the appellant commented on the issue of deemed filing in a letter dated 2 June 2015 and filed 3 June 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.

A second communication pursuant to Article 15(1) RPBA was issued on 2 January 2017 after an earlier issued summons to attend oral proceedings. The Board expressed its preliminary opinion that concerning the issue of deemed filing, the relevant facts of the case appeared to be the comparable to those in cases T 0595/11, T 1037/11 and T 2554/11, so that the Board was inclined to consider the appeal as deemed filed and admissible.

The communication of the Board further addressed the substantive issue of extended subject-matter, Articles 123(2) and 100(c) EPC, and indicated that the case may

be remitted to the opposition division for examination of the other opposition grounds.

- IV. The oral proceedings were duly held on 10 February 2017. As indicated in its letter of 9 January 2017, no one was present on behalf of the respondent.
- V. The appellant requests that the decision under appeal be set aside, and the patent be maintained in an amended form on the basis of Claims 1-26 filed as main request, or on the basis of Claims 1-23 of the auxiliary request, both filed with the grounds of appeal dated 4 June 2012.
- VI. The wording of the independent claims of the main request reads as follows:

"1. An assembly for feeding and milking animals, which assembly is provided with:

a feeding system comprising a movable feed platform (1) and a drive unit (6) for driving the feed platform, a number of feeding places (9) being provided on the feed platform, an area (12) where the animals are allowed to move freely, and with an entrance (13) from said area to the feed platform, and in that the entrance has a width that is sufficiently large to enable simultaneous access of several animals to the feed platform, and a milking system for, in particular automatically, milking animals on the feed platform during a milking period, which milking system comprises sets of teat cups (44), characterized in that at least a large number of the sets of teat cups are disposed separately from the feed platform, and that the drive unit (6) is controlled by a control unit (7) for adapting the speed

of movement of the feed platform such that the animal is provided a span of time on the feed platform in which the animal is not milked, said span of time having a magnitude amounting to at least approximately half the milking period."

"21. A combination of a cleaning device (59) suitable for cleaning a feed platform of an assembly as claimed in claim 8 or in any one of claims 9 to 19 with reference to claim 8 and an assembly as claimed in claim 8 or in any one of claims 9 to 19 with reference to claim 8, characterized in that the cleaning device is provided with a cleaning control unit (66) for controlling the functioning of the cleaning device, and in that the cleaning device comprises a device for determining the degree of contamination of the platform and for supplying contamination-degree-signals to the cleaning control unit."

"22. A combination of a separation device (80) for separating an animal, which separation device is suitable for use in an assembly as claimed in claim 13 or in any one of claims 14 to 19 with reference to claim 13 and an assembly as claimed in claim 13 or in any one of claims 14 to 19 with reference to claim 13, characterized in that the separation device is provided with a separation control unit (B1), and in that the separation device comprises a cage (82) and a cage displacing device (84) for placing the cage over an animal, the displacing device comprising a drive unit (83)."

"23. A combination of a milking system suitable for use in an assembly as claimed in any one of claims 1 to 19 and an assembly as claimed in any one of claims 1 to 19, characterized in that the milking system comprises

a movable teat cup carrier (257) and a movable connection device for connecting a set of teat cups to the teats of an animal, the movable teat cup carrier being a self propelled (autonomous) mobile teat cup carrying robot, which mobile teat cup carrying robot is provided with milking means for milking an animal on the feed platform, the milking means comprising at least a milk storage vessel for storing milk, a milking vacuum source (266) and a pulsation vacuum source (267), and with a control unit for controlling the functioning of the mobile teat cup carrying robot, and the movable connection device for connecting a set of teat cups to the teats of an animal is a separate self-propelled (autonomous) mobile teat cup connecting robot, the mobile teat cup connecting robot being provided with a control unit for controlling the mobile teat cup connecting robot."

"24. A method of milking an animal, in which method is used an assembly with a movable feed platform (1) as claimed in any one of claims 1 to 19, and which method comprises the following steps:

setting the movable feed platform (1) in motion, allowing an animal access to the feed platform, subsequently allowing the animal exit from the feed platform, milking the animal on the feed platform during a milking period, characterized in that the method further comprises the step of providing the animal a span of time on the feed platform in which the animal is not milked, said span of time having a magnitude amounting to at least approximately half the milking period, and in that the milking of the animal comprises the connection of a teat cup, the teat cup being arranged separately from the feed platform, and

in that the animal is allowed free access to the feed platform."

VII. As to the deemed filing of the appeal, the appellant argued as follow:

The EPO 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 the respondent nor third parties had noticed anything wrong for over three years. The *ratio decidendi* of J 14/94 was applicable in the present case. In particular, the Office itself acted as if everything were 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. Even if the appellant could not have expected a warning from the Office still within the time limit for filing the notice of appeal, a warning in good time, sufficiently early for the filing of a request for re-establishment of rights ought to have been given by the Office. Given the duty of the EPO to check formalities, such a warning could have been expected at least within some months after the notification of the impugned decision, essentially within the time limit for the filing of the grounds of appeal, but certainly within one year, in order to permit a request for re-establishment of rights. Further, the relevant facts of the present case were essentially the same as those underlying decision T 0595/11 by the present Board. Therefore, the principle of the protection of legitimate expectations should be applied similarly in favour of the appellant and the appeal should be deemed as filed.

As to the main request, the appellant argued as follows:

Having regard to the basis of granted claim 1, a large number of passages support the interpretation that the drive speed is indeed controlling the dwell time. In particular, reference is made to paragraphs 0241, 0242, and 0381 to 0383 of the application. It is moreover noted that, it is not the drive speed alone which determines the dwell time, due to other factors like the length of the feed platform, the opening and closing of entrance and exit means, or locking devices. Claims 21 to 23 have been adapted to the assembly of claim 1. Therefore claim 1 does not contravene Article 100 (c) EPC. A remittal of the case to the first instance is agreed to.

VIII. As to the main request, the respondent argued in writing as follows:

The fact that claim 1 as granted now recites a direct causality between drive speed and dwell time, in isolation from other factors thereby stands out as unsupported in the context of the original disclosure. The underlying application presents many factors associated with dwell time, none of which is recited in isolation. For this reason, the isolation of a single factor as a determination for dwell time has introduced new subject-matter. Thus, claim 1 of the main request does not meet the requirements of Article 123(2) EPC.

Reasons for the Decision

1. Deemed filing and admissibility of the appeal

- 1.1 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.
- 1.2 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 02 April 2012. A reduced appeal fee pursuant to Rule 6(3) EPC was paid on 29 March 2012, and a full appeal fee was paid on 3 June 2015 (see point III, fourth paragraph above).
- 1.3 It is undisputed that the appellant was 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. as deemed

filed, both with regard to the used language and the fee payment, through the application of the principle of the protection of legitimate expectations.

- 1.4 It appears uncontested by the parties that the relevant facts of the present case concerning the deemed filing of the appeal are very similar to those underlying the decisions T 595/11 of 27 May 2015, T 1037/11 of 29 June 2015 and T 2554/11 of 23 June 2016, to which respondent and appellant were also party and which were decided by the present Board in the same composition. The written reasons of all three decisions were available to the public at least since October 2016. Furthermore, having received the preliminary opinion of the Board (see point III above) none of the parties provided arguments why the Board should decide differently in the present case. The Board itself has carefully reviewed the facts and concludes that the reasoning given in the cited cases is also applicable in the present case. In particular, explicit reference is made to Nos. 1.1-1.16 of the Reasons in T 595/11 and to Nos. 1.1-1.24 of the Reasons in T 1037/11.
- 1.5 The differences in the length of time at various stages of the proceedings do not appear to be materially different from those in the cited cases. Here, the time limit of Article 108 EPC for filing the notice of appeal expired on 2nd April 2012, while the EPO received the notice of appeal three workdays earlier. More than three years have passed before the EPO or the respondents became aware of the deficient fee payment. Other procedural differences exist, but they do not appear to affect the issue of the deficient fee payment. Thus the Board has not identified any relevant fact that would motivate a different decision in the present case.

1.6 Therefore, following decisions T 595/11 and T 1037/11 the Board finds that the Office had a duty to inform the appellant about the deficient fee payment within a reasonable time frame after expiry of the Article 108 EPC time limit but did not do so. Three years cannot be regarded as a reasonable time frame. An objective observer relying on the duty of the Office to act within a reasonable time 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 in the file that it were or ought to have been subjectively aware of its own error or the fact that the Office also did not discover it.

1.7 Having established that legitimate expectations of the appellant arose, the Board also finds that overall less harm is done if the appeal is deemed filed. The Board is aware that this may put the respondent in a worse position, in the sense that it will be prevented from immediately achieving its obvious and legitimate goal, the failure of the appeal, in the sense that the appeal would have failed without regard to its substantive merits.

1.8 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. However, the failure of the Office to check correct fee

payment and issue a warning in good time cannot be remedied here without at least one party suffering some disadvantage or detriment.

1.9 Weighing up the legitimate interests of both sides and also that of third parties, and considering the overall circumstances of the 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. The Board further considers that the possibility of a real, but otherwise in itself not necessarily decisive setback for a party is more preferable than a certain decisive loss of all rights for another party. Therefore 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. 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.

1.10 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. Amendments main request

2.1 Assembly of claim 1

2.1.1 The assembly according to claim 1 as granted is firstly based on claim 1 as filed. Moreover, with respect to

claim 1 as filed, the following clause has been newly added at the end:

"..., and that the drive unit (6) is controlled by a control unit (7) for adapting the speed of movement of the feed platform such that the animal is provided a span of time on the feed platform in which the animal is not milked, said span of time having a magnitude amounting to at least approximately half the milking period."

- 2.1.2 This newly added clause is partly based on the embodiment described under paragraph 0241, column 49, lines 2-14, of the application (as published). In particular, it is derivable from this passage that in a certain span of time the cow is not milked (in which she is able to consume the basic feed). This certain span of time may have, inter alia, a magnitude that amounts to at least approximately half the milking period, see col. 49, lines 11-14 (as published).

A further basis of disclosure forms paragraph 0242 of the application (as published). This passage again refers to the magnitude of the span of time, regarding the identity of a particular cow. It is stated that the feeding system control unit 7 has to control the drive unit 6 in such a way that the cow with the longest feed-duration will have sufficient time to consume feed. To this end, the drive unit 6 is capable of decelerating or accelerating the speed of movement of the feed platform 1. The Board moreover notes that, as argued by the appellant, this adaption of the speed of movement of the feed platform is also generally derivable from paragraph 0381 of the application (as published).

2.1.3 As held by the opposition division, claim 1 as granted indeed requires that the speed of movement of the feed platform is invariably adapted such that the span of time on the feed platform in which the animal is not milked, i.e. a dwell time, has a magnitude amounting to a certain span of time. It is common ground that there may well be other means or parameters influencing the dwell time. However, contrary to the appellant's view, the speed of the controlled drive unit always has to be chosen such that, at least for about half a milking period, milking of the animal does not take place. In other words, according to granted claim 1, the drive speed - in the end - determines a certain dwell time. For example, if the total milking time amounted to 10 minutes (cf. application, paragraph 0243), and the length of the feed platform was made shorter, claim 1 stipulates that the speed of movement has to be reduced, such that the span of time in which the animal is not milked invariably remains approximately half the milking period, i.e. 5 minutes.

2.1.4 The Board in any case concurs with the appellant that the skilled person would directly and unambiguously glean from paragraphs 0381 and 0242 of the application, that the control unit may control the drive unit 6 to vary the speed of the feed platform for a certain time span of any identified cow in which the cow is not milked. Moreover, following from the skilled person's reading in context with the foregoing paragraph 0241, this certain span of time may have a magnitude that amounts to at least approximately half the milking period, as is also required by claim 1 as granted.

Hence, contrary to the opposition division's finding, the Board considers the subject-matter of granted claim 1 to be originally disclosed.

- 2.2 Device claims 21 to 23 include the assembly of claim 1 and have now been amended in that the devices of claims 21 to 23 are indeed suitable for the assembly, cf. claims 23, 24, and 25 as originally filed.
- 2.3 Method claim 24 corresponds to method claim 26 as filed, and uses the assembly of claim 1.
- 2.4 The Board concludes, therefore, that the subject-matter of the independent claims of the main request fulfills the requirements of Articles 100(c) and 123(2) EPC.
3. Remittal

Since only the ground of Article 100(c) EPC in conjunction with Article 123(2) EPC has been dealt with in the first instance, and further substantive issues were not raised in the appeal proceedings, the Boards exercises its discretion under Article 111(1) EPC by remitting the case to the opposition division for further prosecution, as has also been agreed with by the appellant. Since the subject-matter of the independent claims of the main request complies with Article 123(2) EPC, there was no need for the Board to consider the auxiliary request.

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

A. de Vries

Decision electronically authenticated