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D E C I S I O N
of 12 May 1998

Case Number: T 0521/96 - 3.2.4

Application Number: 89108565.6

Publication Number: 0332235

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:

An implement for automatically milking animals

Patentee:

C. van der Lely N.V.

Opponent:

Prolion B.V./Manus AB

Headword:

Milking unit/VAN DER LELY

Relevant legal provisions:

EPC Art. 100(c), 123

Keyword:

"Main request, first and second auxiliary requests (no -
extended subject-matter)"
"Third auxiliary request (allowed - not challenged by the
opponents)"

Decisions cited:

-

Catchword:

Unclear statements in the originally filed patent application
can normally not be used to claim, by way of amendments,
subject-matter which was not unambiguously disclosed in that
patent application.



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Case Number: T 0521/96 - 3.2.4

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D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 12 May 1998

Appellants:
(Opponents)

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Respondent:
(Proprietor of the patent)

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Weverskade 10
3155 PD Maasland (NL)

Representative:

Mulder, Herman
Octrooibureau Van der Lely N.V.
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Decision under appeal:

Interlocutory decision of the Opposition Division
of the European Patent Office posted 9 April 1996
concerning maintenance of European patent
No. 0 332 235 in amended form.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
J. P. B. Seitz

Summary of Facts and Submissions

I. An opposition based upon Articles 100(a) and (c) EPC was filed against the European Patent No. 332 235 granted on the European divisional application No. 89 108 565, which was based on the earlier European patent application No. 86 201 137 (parent application) filed on 27 June 1986. The patent was maintained in amended form by the interlocutory decision of the opposition division dispatched on 9 April 1996.

II. On 7 June 1996 the appellants (opponents) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 7 August 1996.

III. Oral proceedings were held on 12 May 1998.

During the oral proceedings the respondent (proprietor of the patent) filed an amended Claim 1, upon which its main request was based, and maintained the three auxiliary requests submitted with its letter dated 20 April 1998.

IV. The appellants essentially argued that the subject-matter of the independent claim 1 according to each of the main, the first and the second auxiliary requests of the respondent extended beyond the content of the parent application as filed (Articles 100(c) and 123(2) EPC). The appellants did not raise any objection with respect to the third auxiliary request of the respondent.

The respondent contested the arguments of the appellants.

V. The appellants requested that the decision under appeal be set aside and that the patent be revoked if based on either the main request, or the first auxiliary request or the second auxiliary request of the respondent.

VI. The respondent requested that the decision under appeal be set aside and that the patent be maintained in amended version on the basis of either the independent Claim 1 filed during the oral proceedings (main request), or of one of the independent claims 1, designated respectively "first auxiliary request" and "second auxiliary request" and filed with the letter dated 20 April 1998 (first and second auxiliary requests).

As a third auxiliary request, the respondent requested that the decision under appeal be set aside and the patent be maintained in amended version on the basis of the following documents:

- Claim 1 filed with the letter dated 20 April 1998, designated "third auxiliary request"; Claims 2 to 10 filed during the oral proceedings on 12 May 1998;
- Description: columns 1 and 2 filed during the oral proceedings on 12 May 1998; columns 3 to 7 of the patent as granted;
- Drawings: Figures 1 to 9 of the patent as granted.

VII. The independent claims on which the respondent based its requests read as follows:

Claim 1 according to the main request:

"An implement for automatically milking animals, such as cows, comprising a milking parlour and a milking machine (14) with at least one milking unit (33) including a single teat cup, said milking unit being movable in the vertical direction and a control apparatus for automatically connecting the teat cup of said milking unit (33) to a teat of an animal's udder, characterised in that the milking unit (33) comprises means for cleaning the teat (17), said means being activated by the control apparatus after connection of the milking unit (33) to said teat (17) and before the subsequent automatically performed milking operation, the milking unit (33) still being in alignment with said teat (17), whereby together with the positioning of the milking unit (33) relative to the teat also the cleaning means is brought into the cleaning position."

Claim 1 according to the first auxiliary request:

"An implement for automatically milking animals, such as cows, comprising a milking parlour and a milking machine (14) with at least one milking unit (33) including a single teat cup, said milking unit being movable in the vertical direction and a control apparatus for automatically connecting the teat cup of said milking unit (33) to a teat of an animal's udder, characterised in that the milking unit (33) comprises means for cleaning the teat (17), the teat cup and the cleaning means being simultaneously connectable to the relevant teat (17) of the udder, said cleaning means being activated by the control apparatus after connection of the milking unit (33) to said teat (17) and before the subsequent automatically performed milking operation, the milking unit (33) still being in alignment with said teat (17)."

Claim 1 according to the second auxiliary request:

"An implement for automatically milking animals, such as cows, comprising a milking parlour and a milking machine (14) with at least one milking unit (33) including a single teat cup, said milking unit being movable in the vertical direction and a control apparatus for automatically connecting the teat cup of said milking unit (33) to a teat of an animal's udder, characterised in that the teat cup includes a cleaning device, so that together with the positioning of the teat cup relative to the teat (17) also the cleaning device is brought into the cleaning position, the cleaning device and the teat cup being simultaneously connectable to the relevant teat (17) of the udder, said cleaning device being activated by the control apparatus after connection of the milking unit (33) to said teat (17) and before the subsequent automatically performed milking operation, the milking unit (33) still being in alignment with said teat (17)."

Claim 1 according to the third auxiliary request:

"An implement for automatically milking animals, such as cows, comprising a milking parlour and a milking machine (14) with at least one milking unit (33) including a single teat cup, and a control apparatus for automatically connecting the teat cup of said milking unit (33) to a teat of an animal's udder, characterised in that the milking unit (33) comprises means (16) for cleaning the teat (17), said means (16) being provided with a catching part (19), said milking unit being movable in the vertical direction to be connected to the teat (17) of the animal so that it is brought into a position in which the catching part (19) is contiguous with the udder, wherein in this position the teat cup is pre-positioned in alignment with the teat (17) but not yet connected to the teat (17),

whereby together with the pre-positioning of the teat cup relative to the teat (17) also the cleaning means (16) is brought into the cleaning position, said cleaning means (16) being activated by the control apparatus when the milking unit (33) is in the said position, the teat cup being movable upwardly relative to the means (16) for cleaning the teat (17)."

Reasons for the Decision

1. The appeal is admissible.
2. *The main request of the respondent*
 - 2.1 Claim 1 of this request, which inter alia defines "a milking unit including a single teat cup and comprising means for cleaning the teat", refers to the connection of the teat cup to the teat of the animal as well as to the connection of the milking unit to the teat. Moreover, Claim 1 specifies the feature that "together with the positioning of the milking unit relative to the teat also the cleaning means is brought into the cleaning position".
 - 2.2 With regard to the question of whether the subject-matter of Claim 1 extends beyond the content of the parent application as filed (EP-A-207 572), the respondent argued as follows:

The subject-matter of Claim 1 of the main request covers two different embodiments.

According to a "first embodiment", which corresponds to the example described in detail in the second part of the description of the patent by referring to the drawings, together with the connection of the milking

unit to the teat also the cleaning means is brought into the cleaning position and the teat cup is pre-positioned relative to the teat but not yet connected to the teat. According to this embodiment the teat cup 15 is movable in height relative to the cleaning device 16.

According to a "second embodiment", together with the connection of the milking unit to the teat, also the teat cup is connected to the teat. According to this "second embodiment" the teat cup itself includes a cleaning means such that the teat cup and the cleaning means are simultaneously connected to the teat. In other words, the cleaning of the teat may occur with the teat cup being attached to the teat. According to this second embodiment the teat cup is not movable relative to the cleaning device.

Although this "second embodiment" is not described in detail in the part of the description which refers to the drawings, there is a basis for this embodiment in the introductory portion of the description of the parent application as filed in so far as in the paragraph bridging pages 1 and 2 of the parent application as filed it is stated that

"... the teat cup includes a cleaning device, so that together with the positioning of the teat cup relative to the teat also the cleaning device is brought into the desired position. In this manner, an effective cleaning may take place, [...]. In addition, a saving of time may be obtained, since **the cleaning device and the teat cup** are simultaneously brought to the desired position and **may be simultaneously connected to the**

relevant teat of the udder. Preferably, the cleaning device is arranged ... so that, during the cleaning step, the said teat cup is situated under the teat" (cf. page 1, line 18 to page 2, line 4; emphasis added).

Thus, the "second embodiment" is unambiguously disclosed in the parent application, in particular because it is stated that "the cleaning device and the teat cup ... may be simultaneously connected to the relevant teat".

Moreover, the presence of the word "preferably" at the beginning of the last sentence of the above mentioned paragraph makes clear that the feature that "the teat cup, during the cleaning step, is situated under the teat" - which feature is also disclosed in the context of the "first embodiment" - is merely a preferred (i. e. an optional) feature. The inclusion of a feature which limits the claimed matter only to the first embodiment would unduly reduce the scope of the claim.

2.3 The board cannot accept the arguments of the respondent because - having regard to the following comments - the "second embodiment" referred to by the respondent is not unequivocally disclosed in the parent application as filed (Articles 100(c) and 123(2) EPC).

2.3.1 According to the first sentence of the above mentioned paragraph of the description of the parent application as filed, "the teat cup includes a cleaning device". To this sentence corresponds a feature in Claim 1 of the parent application, according to which "the teat cup is provided with a cleaning device". The meaning of the term "teat cup" in these sentences (namely: "the teat

cup includes a cleaning device" and "the teat cup is provided with a cleaning device") has to be determined having regard to the whole content of the parent application as filed.

- 2.3.2 It has to be considered that the detailed description of the embodiment shown in the drawings of the patent application as filed clearly discloses an implement comprising milking units, **each milking unit including a cleaning device and a teat cup** which is movable in height relative to the cleaning device (see particularly Figures 2, 3, 8 and 9; page 10, lines 12 to 15; page 12, line 28 to page 13, line 3).

On the other hand, the sentence bridging pages 8 and 9 of the detailed description of the parent application states that

"Figure 2 ... shows a **teat cup 15 including a cleaning device 18** which is **connected** to the ... teat 17 of an animal" (see page 8, line 38 to page 9, line 2; emphasis added).

This sentence repeats the content of line 19 on page 1 of the patent application as filed (paragraph bridging pages 1 and 2).

- 2.3.3 Therefore, it must be understood that in the paragraph bridging pages 1 and 2 of the description and in the sentence bridging pages 8 and 9 of the patent application as filed the term "teat cup" is used synecdochically, i.e. making the part (i.e. the teat cup 15 proper) comprehend the whole (i.e. the milking unit 33 comprising the teat cup 15 and the cleaning device 16). This interpretation is supported also by the fact that in the divisional application as filed (see Claim 1; page 1, line 25 to page 2, line 4; page 5, lines 7 to 9) and in the patent as granted (see

Claim 1; column 1, lines 3 to 9 and 32 to 38; column 3, lines 51 to 54) the expression "a teat cup including a cleaning device" has been replaced by the expression "milking unit including a teat cup and means for cleaning the teat".

The fact that the description of the divisional application (see page 2, lines 8 to 12) as well as of the patent as granted (see column 1, lines 43 to 48) contains the sentence

"In addition, a saving of time may be obtained, since the teat cup and the cleaning means ... may be simultaneously connected with the relevant teat...",

which sentence is also contained in the paragraph bridging pages 1 and 2 of the parent application, cannot be regarded as a clear and unambiguous disclosure of the so-called "second embodiment", because also in this sentence, the term "teat cup" is clearly used in a synecdochical way. Thus, this sentence cannot be read isolated from the context to which it belongs and which is defined, firstly, by the paragraph bridging pages 1 and 2 of the PA and, secondly, by the whole content of the parent application.

2.3.4. Moreover, the last sentence of the paragraph bridging pages 1 and 2 of the description of the parent application ("Preferably, the cleaning device is arranged ... so that, during the cleaning step, the said teat cup is situated under the teat"), which clearly concerns the so-called "first embodiment" (see the above section 2.2), relates to the preceding sentences in the same paragraph since this last sentence defines in a more specific way the implement which is defined in a general way by the preceding sentences. If the preceding sentences were to define

the so-called "second embodiment" (in which there would be no relative movement between teat cup and cleaning device), the last sentence would be inconsistent with the preceding sentences. Thus, the whole paragraph clearly refers to the so-called "first embodiment", i.e. to the example described in detail referring to the drawings.

2.3.5 Thus, the board concludes that the paragraph bridging pages 1 and 2 of the description of the parent application does not disclose clearly and unambiguously the so-called "second embodiment" according to which the teat cup and the cleaning device are simultaneously connected to the teat, as referred to by the respondent.

2.4 The interpretation of Claim 1 made by the respondent (i.e. the fact that this claim also covers the so-called "second embodiment") could be possible on the basis of the literal wording of the claim but has no clear basis in the parent application.

In the present case, the respondent tried to interpret an unclear statement in the introductory part of the description of the parent application as filed in order to support an amendment to the patent. It has to be emphasized that neither the claims nor the second part of the description contains any further statement which point toward the so-called "second embodiment".

The board wishes to emphasize that unclear statements in the originally filed patent application can normally not be used to claim, by way of amendment, subject-matter which was not unambiguously disclosed in that patent application.

2.5 Therefore, the main request of the respondent has to be rejected because Claim 1 contravenes Article 123(2) EPC.

3. *The first and second auxiliary requests of the respondent*

Claim 1 according to the first auxiliary request and Claim 1 according to the second auxiliary request both specify the feature "the teat cup and the cleaning means being simultaneously connectable to the relevant teat of the udder".

According to the respondent, this feature defines the so-called "second embodiment" referred to in the above section 2. The respondent also agreed that these independent claims are inconsistent with the detailed description of the patent because these claims do not cover the example which is described in detail referring to the drawings. Further the respondent pointed out that this part of the description would have to be excised if the patent were to be maintained on the basis of either the first or the second auxiliary request.

Thus, having regard to the comments in the above section 2, the subject-matter of Claim 1 of each of the first or the second auxiliary requests extends beyond the content of the parent application as filed.

Therefore, also the first and the second auxiliary requests have to be rejected because they contravene Article 123(2) EPC.

4. *The third auxiliary request of the respondent*

This request of the respondent has not been challenged by the appellant.

Having taken into consideration the amendments which this request of the respondent refers to, the board is of the opinion that a patent - based on this request - meets the requirements of the EPC (cf. Article 102(3) EPC).

In particular, the amendments made by the respondent do not contravene Article 123(2) and (3) EPC. Moreover, the subject-matter of Claim 1 not only is novel (Article 54 EPC) but also - having regard to the fact that the available prior art does not suggest the idea of connecting the milking unit for cleaning purposes while simultaneously pre-positioning the teat cup in a position in which it is aligned with but not yet connected to the teat - involves an inventive step (Article 56 EPC).

5. The patent can therefore be maintained on the basis of the third auxiliary request of the respondent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to maintain the patent in the following version:
 - Claim 1 filed with the letter dated 20 April 1998 (designated "third auxiliary request"); Claims 2 to 10 filed during the oral proceedings on 12 May 1998;
 - Description: columns 1 and 2 filed during the oral proceedings on 12 May 1998; columns 3 to 7 of the patent as granted;
 - Drawings: Figures 1 to 9 of the patent as granted.

The Registrar:

N. Maslin

The Chairman:

C. Andries



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18. JUNI 1998

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