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Datasheet for the decision of 16 September 2008

Case Number: T 0440/06 - 3.2.04

Application Number: 98962778.1

Publication Number: 1035764

IPC: A01J 7/00

Language of the proceedings: EN

Title of invention:
A device arranged to permit an air flow from an environment to an inner space

Patentee:
DeLaval Holding AB

Opponent:
Octrooibureau Van der Lely N.V.

Headword:
Airflow/DELAVAL

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Lack of novelty (main and first auxiliary requests)"
"Lack of inventive step (second and third auxiliary requests)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0440/06 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 16 September 2008

Appellant: (Patent Proprietor)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 27 January 2006 revoking European patent No. 1035764 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: P. Petti
T. Bokor

Summary of Facts and Submissions

I. The European patent No. 1 035 764, against which an opposition had been filed, was revoked by the opposition division in its decision dated 27 January 2006.

The opposition division was of the opinion that the claimed subject-matter lacked novelty over document US-A—3 611 993 (D2).

II. The patent proprietor (hereinafter appellant) lodged an appeal against this decision on 23 March 2006 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 7 April 2006.

III. By letter dated 15 August 2008 the opponent (hereinafter respondent) filed NO-A-83 848 (D5) as well as an English translation of this document.

IV. Oral proceedings before the board were held on 16 September 2008.

V. The appellant requested that the decision under appeal be set aside and the patent be maintained as granted (main request) or, alternatively, in amended form on the basis of claim 1 of the first auxiliary request filed with the grounds of appeal or on the basis of claim 1 of the second or third auxiliary request, both filed during oral proceedings before the board.

Claim 1 of the main request reads as follows:

"1. A member (1, 10) comprising a device (8) located in a wall section (2a, 15) of said member (1, 10) and arranged to permit an air flow from an environment to an inner space (3, 17) of said member (1, 10), the device (8) comprising a passage (20) which permits said air flow from the environment to said inner space (3, 17), wherein the device comprises a convex surface area (19) which faces said environment, and wherein the passage (20) extends through said convex surface area (19), **characterized in that** the passage (20) is defined by a wall portion in said convex surface area (19) and is tapered in a direction from the inner space (3, 17) to said environment."

Claim 1 of the first auxiliary request reads as follows:

"1. A member (1, 10) comprising a device (8) located in a wall section (2a, 15) of said member (1, 10) and arranged to permit an air flow from an environment in which flies may be present to an inner space (3, 17) of said member (1, 10), the device (8) comprising a passage (20) which permits said air flow from the environment to said inner space (3, 17), wherein the device comprises a convex surface area (19) which faces said environment, and wherein the passage (20) extends through said convex surface area (19), **characterized in that** the passage (20) is defined by a wall portion in said convex surface area (19) and is tapered in a direction from the inner space (3, 17) to said environment."

Claim 1 of the second auxiliary request reads as follows:

"1. A member (1, 10) comprising a device (8) located in a wall section (2a, 15) of said member (1, 10) and arranged to permit an air flow from an environment to an inner space (3, 17) of said member (1, 10), the device (8) comprising a passage (20) which permits said air flow from the environment to said inner space (3, 17), wherein the device comprises a convex surface area (19) which faces said environment, and wherein the passage (20) extends through said convex surface area (19), **characterized in that** the passage (20) is defined by a wall portion in said convex surface area (19) and is substantially conically tapered in an outward direction from the inner space (3, 17) to said environment."

Claim 1 of the third auxiliary request reads as follows:

"1. A member (1, 10) comprising a device (8) located in a wall section (2a, 15) of said member (1, 10) and arranged to permit an air flow from an environment in which flies may be present to an inner space (3, 17) of said member (1, 10), the device (8) comprising a passage (20) which permits said air flow from the environment to said inner space (3, 17), wherein the device comprises a convex surface area (19) which faces said environment, and wherein the passage (20) extends through said convex surface area (19), **characterized in that** the passage (20) is defined by a wall portion in said convex surface area (19) and is substantially

conically tapered in an outward direction from the inner space (3, 17) to said environment."

VI. The opponent (hereinafter respondent) requested that the appeal be dismissed.

VII. The appellant essentially submitted that

– the subject-matter of claim 1 of the main request as well as that of claim 1 of the first auxiliary request are novel over document D5, and

– the subject-matter of claim 1 of the second auxiliary request as well as that of claim 1 of the third auxiliary request involve an inventive step with respect to documents D5 and D2.

VIII. The respondent essentially contested the appellant's arguments.

Reasons for the Decision

Since the European patent was already granted at the time of the entry into force of the EPC 2000 on 13 December 2007, the transitional provisions according to Article 7 of the Act revising the EPC of 29 November 2000 and the Decisions of the Administrative Council of 28 June 2001 and of 7 December 2006, Article 2, have been applied. When Articles or Rules of the version of the EPC 1973 are cited, the year is indicated.

1. The appeal is admissible.

2. *Newly filed document D5*

2.1 With the statement setting out the grounds of appeal the appellant has not only argued that the opposition division had misinterpreted the term "environment" in claim 1 of the main request in so far as it had equated the closed pulse space of document D2 with the "environment" referred to in the patent, but has also filed an amended claim 1 (first auxiliary request) in which the term "environment" was followed by the clause "in which flies may be present".

2.2 In the board's communication dated 27 June 2006, the parties were informed that the question of whether the pulse space 22 of the teat cup disclosed in D2 represents an "environment" within the meaning of claim 1 of the main request could be decisive with respect to the issue of novelty.

2.3 Document D5 - in so far as it refers to a passage connected with an environment in which flies may be present - represents a clear response to the amendment of the claims (first auxiliary request) as well as a reaction to the board's communication. If follows that this submission cannot be rejected on the grounds of being late filed.

2.4 The appellant submitted that document D5 was not *prima facie* relevant, in particular because it has been considered during the examination proceedings (i.e. in the International Preliminary Report as well as in a

communication of the examining division) as disclosing a device with a non-tapered passage.

However, as is apparent from the following considerations concerning novelty, D5 is a highly relevant document.

2.5 The Board therefore concludes that document D5 must be taken into consideration in the appeal proceedings.

3. *Main and first auxiliary request (novelty)*

3.1 Document D5 (see particularly Figures 5 and 6) discloses a member (i.e. the "teat cup" 1) comprising a device (i.e. the "rivet-like device 11) located in a wall section 3 of said member 1 and arranged to permit an air flow from an environment in which flies may be present to an inner space of the member, the device 11 comprising a passage which permits said air flow from said environment to said inner space and a convex surface area which faces said environment, wherein the passage extends through said convex surface area, is defined by a wall portion in said convex surface area and becomes narrower in a direction from the inner space to said environment.

3.2 The appellant essentially argued that D5 does not disclose a tapered passage because the enlarged rounded cavity represented in Figure 6 of D5 does not form part of the "passage". A passage within the meaning of the patent should be equated with the small end hole of D5, which is clearly non-tapered.

However, claim 1 does not require that the passage is tapered only at its end but that the passage is tapered in a direction from the inner space to the environment. Figure 6 of D5 clearly shows an outward convex surface defining a passage comprising not only the small end hole 14 but also by the adjoining rounded cavity which is enclosed in the outward convex surface. Such a passage is also tapered because it becomes narrower in an outward direction from the inner space to the environment.

3.3 Therefore, the subject-matter of claim 1 of the main request as well as that of claim 1 of the first auxiliary request lack novelty (Article 54 EPC). Both main and first auxiliary requests are thus unallowable.

4. *Second and third auxiliary requests (inventive step)*

4.1 The subject-matter of claim 1 of the second auxiliary request and that of claim 1 of the third auxiliary request differ from the prior art known from D5 in that the passage is substantially conically tapered.

4.2 This feature provides the advantage that possible dirt which penetrates the passage will be sucked into the inner space in a simple manner (see patent specification, paragraph [0008]). Thus, the problem to be solved may be seen in insuring that the passage is kept open.

4.3 The above mentioned distinguishing feature is known from document D2 (see particularly column 3, lines 1 to 27), which discloses a teat cup provided with a flexible liner 14 comprising a valve element 26

comprising a passage 25 which permits an air flow from the pulse space 22 of the teat cup to the inner space 23 of the flexible liner 14, this passage being substantially conically tapered in an outward direction from the inner space 23 to the pulse space 22.

According to column 3, lines 28 to 32, the taper of the passage "insures a non-restricted passage and allows for discharge of liquid back into the liner during the milking operation...".

4.4 The skilled person confronted with the problem of insuring that the passage is kept open would take into consideration D2 which solves in essence the same problem. He would therefore apply the teaching of D2 to the member of D5 and arrive in an obvious way at the claimed subject-matter.

4.5 In this respect, the appellant essentially argued as follows:

- In document D5 the passage is located in the upper part of the teat cup, in a region in which the vacuum is not high enough to draw dirt into the teat cup. Thus, the problem addressed by the present invention does not arise in the device of D5.

- Document D2 does not refer to the dirt which may clog the passage.

The board cannot accept these arguments for the following reasons:

– In D5, the passage admits a limited quantity of air into the teat cup (see English translation of D5: page 5, lines 1 to 5). Any air flow - even if it were to be small - could draw dirt into the passage.

– Document D2, even if it does not expressly refers to dirt, clearly relates to the problem underlying the claimed subject-matter. i.e. that of keeping the passage open. It is true that this citation solves the general problem of avoiding milk leakage from the liner to the pulse space by providing an air passage in a valve element. However, it solves also the more particular problem of insuring a non-restricted air passage, which is achieved by providing the passage with an essentially conically tapered shape.

4.6 Therefore, the subject-matter of claim 1 of the second auxiliary request as well as that of claim 1 of the third auxiliary request do not involve an inventive step (Article 56 EPC). Thus, both second and third auxiliary requests are unallowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis M. Ceyte