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Datasheet for the decision of 28 March 2014

Case Number: T 1268/10 - 3.2.04

Application Number: 03076157.1

Publication Number: 1374670

IPC: A01J7/02, A01K1/12

Language of the proceedings: EN

Title of invention:
A cleaning device

Patent Proprietor:
Lely Enterprises AG

Opponents:
WestfaliaSurge GmbH
DeLaval International AB
Patent & Trademark Department

Headword:

Relevant legal provisions:
EPC Art. 56
RPBA Art. 12(2), 12(4)

Keyword:
Inventive step - main request (no)
Reply: party's complete case - auxiliary requests (no)

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Catchword:

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Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1268/10 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 28 March 2014

Appellant: (Opponent 2)	DeLaval International AB Patent & Trademark Department P.O.Box 39 147 21 Tumba (SE)
Representative:	Gray, Helen Mary ZACCO GmbH Bayerstrasse 83 80335 München (DE)
Respondent: (Patent Proprietor)	Lely Enterprises AG Bützenweg 20 6300 Zug (CH)
Representative:	Corten, Maurice Jean F.M. Octrooibureau Van der Lely N.V. Cornelis van der Lelylaan 1 3147 PB Maassluis (NL)
Party as of right: (Opponent 1)	WestfaliaSurge GmbH Siemensstr. 25-27 59199 Bönen (DE)
Representative:	Neumann, Ditmar KNH Patentanwälte Kahlhöfer Neumann Rößler Heine Postfach 10 33 63 40024 Düsseldorf (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 9 April 2010 concerning maintenance of the European Patent No. 1374670 in amended form.**

Composition of the Board:

Chairman	A. de Vries
Members:	P. Petti
	C. Heath

Summary of Facts and Submissions

I. Two oppositions based upon Article 100 (a) EPC were filed against the European patent No. 1 374 670.

In its interlocutory decision dated 9 April 2010, the opposition division found that taking into consideration the amendments made by the patent proprietor the patent met the requirements of the European Patent Convention. It considered inter alia the following documents:

D3 = EP-A-270 165
D2.11 = "*Landbrukskatalogen 98*", Alfa Laval Agri Dairy Farming catalogue, front page, page 29, last page
D2.12 = "*Landbrukskatalogen 99*", Alfa Laval Agri Dairy Farming catalogue, front page, page 33, last page

II. Opponent O2 (hereinafter appellant) lodged an appeal against this decision on 8 June 2010 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 19 August 2010.

III. Oral proceedings were held on 28 March 2014. As announced with letter of 20 February 2014. Opponent O1 did not appear at the oral proceedings which, pursuant to Rule 115 (2) EPC, continued without him.

IV. The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of either the main request or one of auxiliary requests 1 and 2 filed by letter dated 2 March 2011.

V. Claim 1 of the main request reads as follows:
" A milking parlour (1) , the milking parlour (1) comprising a milking robot (2) and a bottom (3) on which an animal to be milked can stand as well as a cleaning device for cleaning the exterior of at least a part of the milking parlour (1), characterized in that the cleaning device is provided with a source (28) of cleaning foam."

Claim 1 of the first auxiliary request reads as follows:

"A milking parlour (1), the milking parlour (1) comprising a milking robot (2) and a bottom (3) on which an animal to be milked can stand as well as a cleaning device for cleaning the exterior of at least a part of the milking parlour (1), characterized in that the cleaning device is provided with a source (28) of cleaning foam, the cleaning device is an automatic cleaning device, and the cleaning device comprises a nozzle that is disposed in a fixed position relative to the milking parlour."

Claim 1 of the second auxiliary request reads as follows:

"A milking parlour (1), the milking parlour (1)comprising a milking robot (2) and a bottom (3) on which an animal to be milked can stand as well as a cleaning device for cleaning the exterior of at least a part of the milking parlour (1), characterized in that the cleaning device is provided with a source (28) of cleaning foam, the device is provided with a cleaning-starting element for starting the cleaning, the device is provided with a computer comprising a memory, the computer being suitable for storing the points of time

of the visits of the animals to the milking machine in the memory, and in that the cleaning-starting element is activated by a cleaning-starting signal emitted by the computer, on the basis of historical data stored in the memory in relation to the points of time of the visits of the animals, the device is provided with an identification system for determining the identity of animals and for detecting that animals are visiting the milking parlour, the computer storing the points of time of the visits of the animals in the memory with the aid of data from the identification system, the computer comprises an analysing-unit for determining the off-peak periods in the visits to the milking parlour, the average cleaning duration is stored in the memory of the computer, with the aid of the historical data, the computer emits an off-peak signal indicating that an offpeak period is expected within a predetermined period, and on reaching the beginning of an off-peak period with an expected duration that is at least comparable with the average cleaning duration, the computer emits an activation signal for the cleaning-starting element."

VI. The appellant argued as follows:

As regards the main request,the subject-matter of claim 1 did not involve an inventive step because the skilled person starting from the milking parlour known from document EP-A-270 165 and confronted with problem of how to clean the parlour in a more hygienic way would arrive at the claimed subject-matter without exercising any inventive skill having regard to a known cleaning device provided with a source of cleaning foam as described in D2.11) or D2.12.

VII. The respondent argued as follows:

The subject-matter of claim 1 of the main request involves an inventive step over document D3 in combination with D2.11 or D2.12, for the following reasons:

There is no need to provide the milking parlour of D3 with a cleaning device since this parlour it already provided with a cleaning system which works in an efficient way. Since the cleaning devices known from D2-11 and D2-12 are *manually operated*, the skilled person would not use them in the milking parlour of D3 which is provided with an *automatic* cleaning system. The skilled person would not use a foaming agent in the milking parlour of D3 since it would pollute the manure collected in the bins arranged under the floor of this milking parlour.

The auxiliary requests should be admitted into the appeal proceedings for the following reasons:

The inventions defined by the independent claims of the auxiliary requests continue in the same direction as the invention defined by claim 1 of the main request as they nearly define further refinement of the inventive concept defined in claim 1 of the main request. The independent claims of these requests are essentially based upon features specified in the dependent claims of the granted patent.

Reasons for the Decision

1. The appeal is admissible.

2. Main request : Admissibility

2.1 The main request differs from the request held allowable by the department of first instance in the decision under appeal only in that method claims 24 to 26 were deleted. Claims 1 to 23 of the main request are identical with claims 1 to 23 of the request held allowable by the department of first instance.

2.2 In the reply to the grounds of appeal, with respect to the question of whether the subject-matter of claim 1 of this request involves an inventive step over document D3 in view of D2.11 or D2.12, the respondent states that D3 discloses a milking parlour with a cleaning system and a manure collecting system and that "[t]he skilled person would not use a foam cleaning known from D2.11 or D2.12 in such a milking parlour for at least two reasons: firstly, the manure would be contaminated and secondly, the parlours are already equipped with a cleaning system".

2.3 Thus, the respondent's reply to the grounds of appeal, as required by Article 12 (2) RPBA, sets out clearly and concisely the reasons why it is requested that the patent be maintained on the basis of the new main request.

2.4 Therefore, the main request, which had not been presented during the proceedings before the opposition division, was taken into account by the board because it relates to the case under appeal and meets the

requirements in Article 12 (2) RPBA (see Article 12 (4) RPBA).

3. Main request : Inventive Step

3.1 D3 is considered to represent the closest prior art. This document discloses (see particularly Figures 1 and 2) a milking parlour ("movable accommodation") comprising a milking robot (19) and a floor with gratings (10), i.e. a bottom on which an animal to be milked can stand. This milking parlour also comprises side walls formed by insulated panels (5), further equipment for milking an animal and a cleaning device for cleaning the exterior of at least a part of the milking parlour. In particular, D3 refers to a sprinkler installation by means of which the panels (5) can be cleaned, see column 3, lines 7 to 17. Such a sprinkler installation is inherently provided with at least a nozzle by which a cleaning fluid can be sprayed against the insulated panels (5). D3 further mentions installations for automatically cleaning and rinsing the accommodation, see column 8, lines 40 to 43. Thus, the cleaning device of the parlour known from this document is provided with a source of cleaning fluid.

3.2 D3 does not refer to the cleaning fluid as containing a foaming agent or a detergent capable of generating foam. The subject-matter of claim 1 of the main request therefore differs from the milking parlour known from D3 in that the cleaning device is provided with a source of cleaning foam.

According to paragraph [0004] of the patent specification, this distinguishing feature ensures an extremely hygienic cleaning of the parlour. Thus, starting from the milking parlour according to D3, the

technical problem to be solved can be formulated as how to improve the milking parlour with respect to cleaning hygiene.

3.3 It is not disputed that a foam cleaner constituted by a pressure washer and a foam lance, i.e. a portable cleaning device provided with a source of cleaning foam, was known and marketed for use in dairy farms, as evidenced by document D2.11 or D2.12. Both documents shows, see the centre photograph and paragraph on the second page, a foam lance ("skumlans") in action. In so far as the skilled person would not already have been aware from his general knowledge that applying a cleaning agent as foam increases its cleaning effect, these documents in any case demonstrate that use of foam agent to that effect was already known in dairy industry. The skilled person would thus immediately realize that the use of cleaning foam would ensure an extremely hygienic cleaning of the surfaces to be cleaned. Therefore, it would be obvious for the skilled person - confronted with the problem of improving the milking parlour according to D3 with respect to cleaning hygiene -either to use a foam cleaner as disclosed in D2.11 or D2.12 in the parlour of D3 or to provide the cleaning system of D3 with a source of cleaning foam. In this way the skilled person would arrive at the subject-matter of claim 1 of the main request without exercising any inventive skill.

3.4 For the following reasons, the board does not find the arguments submitted by the respondent (see section X above) convincing:

3.4.1 In D3, the cleaning fluid is not specifically defined (see section 2.1 above). Thus, it can be reasonably assumed that the efficiency of the cleaning system of

D3 can be improved by the selection of an appropriate cleaning fluid. In any case, it should be noted that the problem and solution approach does not necessarily require that the solution shows improvement over the prior art. Thus, even if it were to be assumed that the efficiency of the cleaning system of D3 does not need to be improved, the technical problem to be solved could then be formulated as finding an alternative solution. Again, common general knowledge or D2.11 or D2.12 offer foam as an obvious alternative.

3.4.2 As to the compatibility of D3 and D2.11 or D2:12 the skilled person, on the basis of common general knowledge, undoubtedly realizes that the cleaning devices known from D2.11 or D2.12 ensure an extremely hygienic cleaning of dairy farm equipment exactly because they make use of cleaning foam and not because the agent is applied manually. The skilled person would therefore have no problem to abstract from D2.11 or D2.12 the general teaching of providing a cleaning device with a source of cleaning foam to improve cleaning and would arrive at the claimed subject-matter by applying this general teaching.

3.4.3 Finally, according to D3, the manure collected in the bins arranged under the gratings (10) of the floor of the milking parlour may be carried away via worm wheels (12) to manure discharges (13) which are connected to a tank (see column 3, lines 23 to 28). Therefore, the D3 arrangement is already configured to move the manure out of the way to avoid contamination during cleaning, should this be a problem. Indeed removing manure before cleaning would appear to be common sense and does not pose insurmountable obstacles to the skilled person.

D3 does not state that the cleaning system has to be necessarily operated before the manure collected in the bins is carried away. Moreover, claim 1 does not define a method of cleaning a milking parlour, but a milking parlour comprising a cleaning device which can also be operated after removal of the manure present in the parlour.

4. Auxiliary requests : Admissibility

4.1 The respondent, by his reply dated 2 March 2011, filed two auxiliary requests which had not been presented in the first instance proceedings.

4.2 According to Article 12 (2) RPBA, "[t]he statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely **the reasons why it is requested that the decision under appeal be reversed, amended or upheld**, and should specify expressly all the facts, arguments and evidence relied on" (cf. *Supplement to OJ EPO 1/2013*, page 44; emphasis added).

According to Article 12 (4) RPBA, "**[w]ithout prejudice to the power of the Board to hold inadmissible** facts, evidence or **requests which could have been presented** or were not admitted in the first instance proceedings, everything presented by the parties under (1) shall be taken into account by the Board **if and to the extent it relates to the case under appeal and meets the requirements in (2**)[i.e. in Article 12 (2) .RPBA]" (*ibi d.*; emphasis added).

4.3 Claim 1 of the *first auxiliary request* – compared with claim 1 of the main request – contains two additional features, which read as follows:

- "the cleaning device "is an automatic cleaning device" (as specified in granted claim 2), and
- "the cleaning device comprises a nozzle which is disposed in a fixed position relative to the milking parlour" (as specified in granted claim 5).

4.3.1 A milking parlour can be cleaned by an automatic cleaning device comprising a nozzle disposed in a fixed position relative to the milking parlour irrespective of whether the cleaning device is provided with a source of cleaning foam. Thus, the above mentioned additional features have no functional relationship to the features of claim 1 of the main request pertaining to the cleaning foam. In other words, these additional features do not contribute to the solution of the problem of improving the milking parlour with respect to cleaning hygiene, but solve a different partial problem which relates e.g. to how to reduce the manual intervention necessary to perform the cleaning operation.

4.3.2 The respondent in his reply submitted that claim 1 of this request is patentable essentially for the following reasons:

"Regarding Art. 123 (2) and (3) EPC and also regarding inventiveness the same arguments as given above in relation to the main request apply here. In addition, even a combination of the foam lances known from D2.11 or D2.12 with a known milking parlour, although not obvious for the skilled person, would not lead to the features of claim 1 of this request.".

4.3.3 Thus, although claim 1 of this requests contains the above-mentioned additional features, the respondent's reply only refers to the reasons given for the main request without setting out the reasons why these additional features would render inventive the claimed subject-matter of the first auxiliary request, should the claimed subject-matter of the main request be considered as lacking inventive step.

4.4 Claim 1 of the second auxiliary request – compared with claim 1 of the main request – contains the following additional features:

- "the device is provided with a cleaning/starting element" (as specified in granted claim 16),
- "the device is provided with a computer comprising a memory" (as specified in granted claim 17),
- "the computer [is] suitable for storing the points of time of the visits of the animals to the milking machine in the memory" (as specified in granted claim 17),
- "the cleaning/starting element is activated by a cleaning-starting signal emitted by the computer, on the basis of historical data stored in the memory in relation to the points of time of the visits of the animals" (as specified in granted claim 17),
- "the device is provided with an identification system for determining the identity of animals and for detecting that animals are visiting the milking parlour" (as specified in granted claim 18),
- "the computer stores the points of time of the visits of the animals in the memory with the aid of data from the identification system" (as specified in granted claim 18),

- "the computer comprises an analysing-unit for determining the off-peak periods in the visits to the milking parlour" (as specified in granted claim 19),
- "the average cleaning duration is stored in the memory of the computer" (as specified in granted claim 20),
- "with the aid of the historical data, the computer emits an off-peak signal indicating that an off-peak period is expected within a predetermined period" (as specified in granted claim 21),
- "on reaching the beginning of an off-peak period with an expected duration that is at least comparable with the average cleaning duration, the computer emits an activation signal for the cleaning-starting element" (as specified in granted claim 22).

4.4.1 These additional features, which essentially relate to the determination and analysis of off-peak periods for establishing the criterion for activating the cleaning, have no functional relationship to the features of claim 1 of the main request pertaining to the cleaning foam, in so far as a cleaning device provided with these additional features can be used in a milking parlour irrespective of whether the cleaning device is provided with a source of cleaning foam.

4.4.2 With respect to the second auxiliary request, the respondent in his reply submitted that claim 1 of this request is patentable essentially for the following reasons:
"Regarding Art. 123 (2) and (3) EPC and also regarding inventiveness the same arguments as given above in relation to the main request apply here. Furthermore, neither Opponent I nor Opponent II has cited any

relevant prior art against the added features of claim 1 of this request. The mere allegation that the features represent a normal and obvious choice for a skilled person is not convincing. The determining the peak-off periods in the visits to the milking parlour is neither shown nor suggested in any of the cited prior art documents".

4.4.3 Thus, although claim 1 of the second auxiliary requests contains *many* additional features, the respondent's reply refers *only to one* of the additional features, namely to the feature concerning the determination of the peak-off periods in the visits to the milking parlour. The sentence according to which this feature "is neither shown nor suggested in any of the cited prior art documents" cannot be considered as setting out the reasons why this additional feature would render the claimed subject-matter inventive, because in the reply there is no reference to the technical significance of this feature, or to the technical problem this feature contributes solve.

4.5 Having regard to the above considerations, the respondent's reply -in relation to the auxiliary requests - does not contain that party's complete case in so far as it does not set out clearly and concisely the reasons why based on these additional features the patent should be maintained on the basis of these auxiliary requests and, thus, does not comply with Article 12 (2) RPBA.

4.6 The board is not convinced that the added features go into the same direction as claim 1 of the main request, see section X above, because, as explained in sections 4.2 and 4.3 above, the additional features by which the independent claims of the auxiliary request differ from

claim 1 of the main request have no functional relationship to the features of claim 1 of the main request.

That the features have been added from granted, dependent claims does not release the proprietor, as party to appeal proceedings, whether as respondent or appellant, from complying with the requirement of Article 12 (2) RPBA that a party should state its complete case from the outset setting out the reasons why the decision under appeal should be reversed, amended or upheld as the case may be. This provision applies equally to appealing opponent and patent proprietor and serves the purpose of rendering the proceedings transparent and fair. In this particular case it required the respondent proprietor to explain clearly and concisely in his reply how and why the further amendments of the auxiliary requests address and overcome the objections raised in the opponent's statement of grounds .Such an explanation is lacking in the proprietor's reply.

4.7 As the respondent-proprietor's reply failed to meet the requirements of Article 12(2) RPBA in regards of the auxiliary requests 1 and 2, the board exercised its discretion according to Article 12 (4) RPBA and did not admit these requests into the proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated