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D E C I S I O N
of 15 March 2000

Case Number: T 0128/98 - 3.2.4

Application Number: 91202364.5

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IPC: A01K 13/00

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Title of invention:
A cleaning apparatus

Patentee:
MAASLAND N.V.

Opponent:
Alfa Laval Agri AB

Headword:
Milking-cleaning/MAASLAND

Relevant legal provisions:
EPC Art. 54, 56, 100(a), 100(b)

Keyword:
"Inventive step - main request (no)"
"Inventive step - auxiliary request (yes)"
"Objections based upon a fresh ground for opposition"

Decisions cited:

-

Headnote:
The mere reference to Article 100(c) EPC in the decision under appeal does not imply that the corresponding ground for opposition was introduced into the proceedings, if the decision under appeal does not deal in a substantial way with

this ground for opposition.



Case Number: T 0128/98 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 15 March 2000

Appellant: Alfa Laval Agri AB
(Opponent) P.O. Box 39
S-147 21 Tumba (SE)

Representative: Hasselgren, Erik Joakim
Alfa Laval Agri AB
Patents & Trademarks Department
P.O. Box 39
S-147 21 Tumba

Respondent: MAASLAND N.V.
(Proprietor of the patent) Weverskade 10
NL-3155 PD Maasland (NL)

Representative: Corten, Maurice Jean F. M.
Octrooibureau Van der Lely N.V.
Weverskade 10
NL-3155 PD Maasland (NL)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 19 December
1997 concerning maintenance of European patent
No. 0 476 771 in amended form.

Composition of the Board:

Chairman: C. A. J. Andries
Members: P. Petti
R. E. Teschemacher

Summary of Facts and Submissions

- I. An opposition based upon Articles 100(a) and (b) EPC was filed against the European patent No. 476 771. By the decision dispatched on 19 December 1997, the opposition division held that the patent could be maintained in an amended version based upon three independent claims.
- II. On 29 January 1998 the appellant (opponent) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 7 April 1998.
- III. Oral proceedings were held on 15 March 2000.

During the oral proceedings the respondent (proprietor) filed amended independent Claims 1, 2 and 13 and based its main request upon these three independent claims and its subsidiary request upon said Claims 1 and 2.

Independent Claims 1, 2 and 13 read as follow:

"1. An apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member (54) capable of being driven and taken, at least partly, under the udder of the dairy animal, the cleaning member (54) being provided with at least two cleaning tools (63) which are mounted to rotate about a shaft (60), characterized in that the cleaning tools (63) are fully or partly constituted by or have a surface constituted by a moisture absorbing material being made from a woven product or fabric, said cleaning tools operating with a rubbing motion."

"2. An apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member capable of being driven and taken, at least partly, under the udder of the dairy animal, the cleaning member being provided with at least two cleaning tools which are each mounted to rotate about a shaft, said shafts being parallel to one another while the cleaning tools are constituted by a closed cell structure, characterized in that the cleaning tools have such a direction of motion that the teats are drawn between the cleaning tools, said tools operating with a rubbing motion."

"13. An apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member (66) capable of being driven and taken, at least partly, under the udder of the dairy animal, the cleaning member (66) being provided with a cleaning tool (67) which is mounted to rotate about a shaft (64), characterized in that the cleaning tool (67) is constituted by a sponge-like material operating with a rubbing motion, the cleaning tool (67) or the cleaning member (66) being capable of being coupled or uncoupled by means of a quick-action attachment, such as a bayonet joint."

IV. The appellant based its arguments upon the documents DD-A-220 212 (D3), DD-A-127 384 (D4), GB-A-976 025 (D6), FR-A-2 559 351 (D7), which had already been filed during the proceedings before the opposition division, and upon the Japanese Book "Sakunyu-kenkyu", pages 54 to 60 (document D16) filed during the appeal proceedings with the appellant's letter dated 3 February 1999, for which an English translation (document D'16) was submitted.

V. With respect to the independent Claims 1, 2 and 13, the appellant argued as follows:

- (i) The amendment to Claim 13 is of substantial nature in so far as Claim 13 combines the features specified in Claims 12 and 16 of the patent as granted. This amendment - even if it were to be considered as being a reaction of the respondent to the filing of document D16 - should not be admitted because the respondent filed it only at the beginning of oral proceedings, although document D16 was filed more than one year before the oral proceedings.

- (ii) Claim 1 defines *inter alia* an alternative according to which the cleaning tools are "mounted to rotate about a shaft" and are "fully ... constituted by a moisture absorbing material ... made from a woven product". These features are disclosed in the application as filed only in the context of the embodiment described referring to Figure 6 according to which the cleaning tools made from a woven product are coupled to a single rotary shaft pointing upward. Since the present Claim 1 does not specify the feature that there is a **single** rotary shaft **pointing upward**, its subject-matter extends beyond the content of the application as filed. The feature concerning the upwardly pointing shaft, being specified in the independent Claim 11 of the application as filed, should be considered as being an essential feature.

- (iii) The present Claim 1 specifies the feature that the cleaning tools are fully or partly constituted by **a moisture absorbing material made from a woven product or fabric**, while according to Claim 1 of the patent as granted the cleaning tools either are fully or partly constituted by a moisture absorbing material or are **made from a woven product or fabric**. Thus the present Claim 1 infringes Article 123(3) EPC in so far its scope is wider than that of Claim 1 as granted which does not cover moisture absorbing materials made from a woven product.

- (iv) The subject-matter of Claim 1 lacks novelty with respect to document D6 and does not involve an inventive step with respect to the content of either document D16 or document D6.

- (v) The feature in Claim 2 according to which the cleaning tools **are constituted** by a closed cell structure extends beyond the content of the application as filed which refers in the context of the embodiment described relating to Figure 3 (page 10, lines 20 to 22) to flexible cleaning tools **having** a closed structure.

- (vi) Claim 2 does not specify the feature that the cleaning tools have a surface constituted by a moisture absorbing material, which has to be considered - on the basis of the application as filed - as being an essential feature.

(vii) The subject-matter of Claim 2 lacks novelty with respect to document D16 and does not involve an inventive step with respect to document D7 having regard to the teaching of either document D4 or document D3.

(viii) The subject-matter of Claim 13 does not involve an inventive step with respect to document D16 having regard either to the teaching of document D5 or the general knowledge of the skilled person.

VI. The respondent contested the arguments of the appellant.

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

VIII. The respondent requested that the decision under appeal be set aside and the patent be maintained on the basis of the independent Claims 1, 2 and 13 submitted as the main request during the oral proceedings. Alternatively, it was requested to maintain the patent on the basis of Claims 1 to 19 submitted as the auxiliary request during the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. *The admissibility of the amendments to Claim 13 according to the main request of the respondent*

- 2.1 The filing of Claim 13 represents the reaction of the respondent not only to the objections made by the appellant based upon the new document D16 which was filed with a letter dated 3 February 1999 but also to the opinion expressed by the board in a communication sent to the parties by telefax on 8 March 2000.
- 2.2 Although an earlier filing of this amended claim would have been desirable, the board - having also considered that Claim 13 essentially combines the features specified in Claims 12 and 16 of the patent as granted and that the appellant in its Notice of opposition dated 2 February 1996 mentioned a document with regard to dependent Claim 16 - finds that the appellant could not have been surprised by the content of the amended Claim 13.

The board therefore considers this amendment, considering the specific circumstances of the case, as being admissible.

3. *Observations concerning the claimed subject-matter*
- 3.1 Claim 1, which is the same for both requests of the respondent, corresponds *inter alia* with the embodiment described referring to Figure 6 according to which two cleaning tools, made from strip-shaped pieces of cloth, are mounted to a common shaft. However, the feature in Claim 1 of "a cleaning member provided with at least two cleaning tools mounted to rotate about a shaft" not only defines a plurality of cleaning tools rotating about a common shaft but can also relate to a plurality of cleaning tools, each of which rotates about its axis.

According to the description of the patent (see column 1, lines 12 to 55), the use of cleaning tools constituted by a moisture absorbing material as defined in Claim 1 makes it possible to moisten the cleaning tools only to a limited extent and to avoid the use of a spray unit applying cleaning liquid during cleaning and of any additional provisions for catching the cleaning liquid.

- 3.2 The feature in Claim 2, which is the same for both requests of the respondent, that "the cleaning tools are constituted by a closed cell structure" has to be construed as defining cleaning tools each of which comprises only a closed cell structure, i.e. which is **fully** constituted by a closed cell structure, wherein the term closed cell structure has to be construed as defining a **fully** closed structure.

The feature in Claim 2 according to which the cleaning tools have such a direction of motion that the teats are drawn between the cleaning tools has to be read together with the feature that the shafts about which the cleaning tools rotate are parallel to one another. These features implicitly define the mutual spatial relationship of the teats to the direction of the rotation axis of the cleaning tools. The rotation axes of the cleaning tools extend in such a direction that a teat, which generally extends vertically, can come from above into the space between two cleaning tools and is drawn downward in between the cleaning tools, due to their direction of motion. In other words, if the teats extend generally in a vertical direction, the shafts of the cleaning tools extend generally in a horizontal direction.

3.3 Claim 13, which is only present in the main request of the respondent, corresponds with the embodiment according to Figure 8 of the patent as granted which shows a cleaning member provided with a cleaning tool constituted by a sponge. The feature in Claim 13 "the cleaning member is provided with a cleaning tool" has to be construed as defining a cleaning member provided with a **single** cleaning tool.

The expression in Claim 13 "capable of being coupled or uncoupled" refers to the apparatus, i.e. this feature defines a cleaning tool or a cleaning member capable of being coupled to or uncoupled **from the apparatus** by means of a quick-action attachment.

3.4 During the oral proceedings, the appellant confirmed the above interpretations of Claims 1, 2 and 13.

4. *Claim 13 according to the main request of the respondent*

4.1 The subject-matter of Claim 13 is novel. Its novelty was not disputed.

4.2 The closest prior art with respect to Claim 13 is disclosed in document D16 (see Figures 3-8, 3-10 and 3-11), which relates to an apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member (i.e. the centre brush) capable of being driven and taken under the udder of the dairy animal, the cleaning member being provided with a cleaning tool mounted to rotate about a shaft, the cleaning tool being constituted by a sponge which operates with a rubbing motion.

It has to be noted that Figures 3-11 and 3-12 of document D16 show a cleaning member provided with a central cleaning tool and a plurality of side cleaning tools. According to the description of Figure 3-12 (see D'16, page 5) the central cleaning tool is for "mainly washing the bottom surface of a breast", i.e. for cleaning the teats of the udder, and the side cleaning tools are for washing the side of the udder. Thus, it has to be assumed that document D16 relates to an apparatus for cleaning the teats of an animal's udder provided with a cleaning member provided with a single cleaning tool **for cleaning the teats** of the udder.

- 4.3 The subject-matter of Claim 13 differs from this prior art in that the cleaning tool or the cleaning member is or are capable of being coupled or uncoupled by means of a quick-action attachment, such as a bayonet joint.

Having regard to these distinguishing features, the problem to be solved consists in increasing the efficiency of the apparatus in so far as the time necessary for demounting and mounting the cleaning tool or the cleaning members from the apparatus can be reduced.

- 4.4 The problem to be solved can easily be recognized from the use of the apparatus according to the prior art. It is well known that the cleaning tools of the cleaning members need to be cleaned themselves after teat cleaning operations in order to decontaminate them or to replace them when they are worn. Thus the formulation of the problem does not contribute to give the solution an inventive character.

The solution only consists in providing the apparatus with a means allowing a quick-action attachment and detachment of the parts to be mounted and demounted. Such a means is generally known in the art and has the purpose of reducing the time necessary for mounting and demounting operations. Thus, it would be obvious for the skilled person - when confronted with the problem to be solved - to provide the apparatus known from document D16 with such a means and thus to arrive at the subject-matter of Claim 13, which therefore lacks the inventive step required by Article 56 EPC.

4.5 Therefore, Claim 13 is not patentable and the main request of the respondent has to be rejected.

5. *Auxiliary request of the respondent - Admissibility of the amendments*

5.1 Claim 1 of the patent as granted specifies in the pre-characterising portion *inter alia* the feature that

(a) the cleaning member is provided with at least two cleaning tools "which are mounted to rotate about a shaft (60, 41)".

According to the characterising portion

(b) the cleaning tools are

(b1) **either** fully or partly constituted by **or** have a surface constituted by a moisture absorbing material,

said moisture absorbing material

(b11) having a texture or

- (b21) being made
 - (b211) from a woven product or fabric or
 - (b212) from a sponge-like material
- (b2) **or** constituted by a fully or partly closed cell structure, such as rubber or plastic-like material;
- (c) the cleaning tools operate with a rubbing motion.

5.1.1 It is clear from the wording of Claim 1 as granted that the expression "constituted by" in feature (b2) refers to the cleaning tools and has the same hierarchycal level as feature (b1). Features (b11), (b21), (b211) and (b212) represent further specifications of the moisture absorbing material defined in feature (b1). In other words, each of the terms in Claim 1 as granted "having a texture" and "being made from a woven product or fabric or from a sponge-like material" refers to the expression "moisture absorbing material".

This interpretation is also supported by the description of the patent as granted, which refers in column 1 (lines 44 to 48) to cleaning tools whose surface is "constituted by a moisture-absorbing material" and in column 2 (lines 14 to 16) to cleaning tools having "a fully or partly closed cell structure". The description of the patent as granted (see column 2, lines 35 and 36) discloses that "having a texture" is an alternative to "made from a woven product or fabric", so that it becomes clear that in the meaning of the opposed patent feature B21 has logically to be considered as an alternative to

feature B11.

5.2 The present Claim 1 differs from Claim 1 as granted

(i) in that features (b11), (b212) and (b2) have been deleted,

(ii) and in that reference signs have been deleted.

5.2.1 The amendments mentioned above result in limiting the alternatives defined in Claim 1 as granted and, therefore, are supported by the granted Claim 1 itself.

5.2.2 The objections referred to in the above section V(ii) are not linked to amendments to the claim after grant but to features which were already present in Claim 1 of the patent as granted. In other words, these objections do not relate to Article 123(2) EPC but to Article 100(c) EPC.

In the present case, the ground for opposition according to Article 100(c) EPC has to be considered as a "fresh ground for opposition" within the meaning of the opinion G 10/91 (OJ EPO 1993, 420), because it was neither raised or substantiated in the notice of opposition of the appellant nor introduced into the proceedings by the opposition division. Such a fresh ground may not be considered in appeal proceedings without the approval of the respondent as proprietor of the patent.

Since the respondent during the oral proceedings refused its approval, the objections referred to in the above section V(ii) are not considered by the

board.

5.2.2.1 The appellant argued that the opposition division introduced into the previous opposition proceedings the ground for opposition according to Article 100(c) EPC. In this respect, the appellant referred to sections 2 to 2.3 of the decision under appeal which are headed "Article 100(c) (Article 123(2))" (*sic*).

The board cannot accept this argument of the appellant for the following reasons:

- (i) The observations in sections 2 to 2.3 of the decision under appeal are linked to the amendments to Claim 1 in so far as they relate to the feature according to which the cleaning tools are "constituted **only** by a partly closed structure" (emphasis added), which was not specified in the granted Claim 1. Thus, although the heading of sections 2 to 2.3 of the decision under appeal refers - formally - to Article 100(c) EPC, in these sections the opposition division dealt - substantially - with Article 123(2) EPC. This is confirmed by the sentence in section 3 of the decision under appeal according to which "Claim 1 ... does not satisfy the requirements of Article 123(2)..".
- (ii) The remaining parts of the decision under appeal do not deal with the ground for opposition according to Article 100(c) EPC.
- (iii) The mere reference to Article 100(c) EPC in the decision under appeal does not imply that the corresponding ground for opposition was

introduced into the proceedings, if the decision under appeal does not deal in a substantial way with this ground for opposition.

5.2.3 The appellant's argument referred to in the above section V(iii) is based on an interpretation of the granted Claim 1 which considers feature (b211) as referring directly to the term "cleaning tools".

The board cannot accept this argument because, as already explained in the above section 5.1.1, feature (b211) does not refer to the term "cleaning tools" but to the expression "moisture absorbing material".

5.3 The present Claim 2 differs from Claim 1 as granted

(i) in that feature (a) (see above section 5.1) has been replaced by the feature that

(a') the cleaning member is provided with at least two cleaning tools which are **each** mounted to rotate about a shaft (60, 41)",

(ii) in that features (b1), (b11), (b21), B211) and (b222) have been deleted,

(iii) in that feature (b2) has been replaced by the feature that

(b'2) the cleaning tools are constituted by a closed cell structure,

(iv) in that the following features have been added:

(a'') the shafts are parallel to one another,

(b4) the cleaning tools have such a direction of motion that the teats are drawn between the cleaning tools,

(v) and in that the reference signs have been deleted.

5.3.1 Features (a') and (a'') have a basis in Claim 5 of the application as filed, while feature (b4) has a basis in Claim 3 of the application as filed.

5.3.2 The amendments according to items (ii) and (v) above result in limiting the alternatives defined in Claim 1 as granted and, therefore, are supported by the granted Claim 1 itself.

5.3.3 The amendment according to item (iii) results in the deletion of the alternative according to which the cleaning tools are constituted by a partly closed cell structure. This amendment is also supported by the granted Claim 1 itself, in so far as the expression "constituted by a closed cell structure" is equivalent to "constituted by a fully closed cell structure" (see the above section 3.2) and the terms in Claim 1 as granted "such as rubber or plastic-like material" had a facultative character.

Therefore, the objection referred to in the above section V(v) does not relate to Article 123 EPC but to Article 100(c) EPC in so far as it is not linked to the amendments to the claim but to a feature which was already present in Claim 1 of the patent as granted.

For the reasons specified in the above sections 5.2.2 and 5.2.2.1, this objection is not considered by the board.

5.3.4 The objection referred to in the above section V(vi) is based upon a misinterpretation of Claim 1 as granted which in fact defined, as explained in above sections 5.1.1 and 5.3.3, that the cleaning tools have to be constituted either by a moisture absorbing material or by a closed cell structure. Claim 2, being limited to this last alternative, does not need to quote features belonging to the first alternative.

5.4 Dependent Claims 3 to 19 correspond to Claims 2 to 11 and 13 to 19 of the patent as granted.

5.5 The amendments to the description represent its adaptation to the new claims.

5.6 The amendments to the patent do not infringe the requirements of Article 123 EPC.

6. *Novelty (auxiliary request)*

6.1 Document D6 discloses an apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member 11 capable of being driven and taken under the udder of the dairy animal, the cleaning member 11 being provided with a plurality of cleaning tools 12 which are mounted to rotate about a common shaft 10. According to the paragraph on page 2, lines 31 to 37, the cleaning tools 12 are constituted by brushes or by any other material of a soft texture suitable for brushing purposes.

6.1.1 The appellant asserted that the skilled person when interpreting the expression in document D6 "any other material of a soft texture" will immediately understand that this expression refers to materials like towels, i.e. that this expression defines a moisture absorbing material made from a woven product or fabric and operating with a rubbing motion, and argued that this document destroys the novelty of the subject-matter of Claim 1.

The board cannot accept this argument because the expression "any other material of a soft texture" is more general than the expression "moisture absorbing material made from a woven product or fabric". Moreover, document D6 refers to "any other material of a soft texture **suitable for brushing purposes**" (emphasis added) without any indication to a rubbing motion. This suggests to a skilled person rather the use of bristles instead of the use of a moisture absorbing material in the meaning of the present invention.

6.1.2 Thus, document D6 does **not** disclose cleaning tools constituted by a moisture absorbing material made from a woven product or fabric and operating with a rubbing motion.

6.2 Document D16 (see Figures 3-8, 3-10 and 3-11), which discloses an apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member capable of being driven and taken, at least partially, under the udder of the dairy animal. Figures 3-11 and 3-12 of document D16 show a cleaning member provided with a central cleaning tool and a plurality of side cleaning tools, each of said cleaning tools being

mounted to rotate about a shaft, the shafts being parallel to one another. It is also clear from document D'16 that the cleaning tools are constituted by a sponge and, therefore, operate with a rubbing motion. However, it is clear from the description of Figure 3-12 in document D'16 (see page 5) that only the central cleaning tool is for cleaning the teats of the udder, while the side cleaning tools are for washing the side of the udder (see also section 4.2 above).

- 6.2.1 According to the appellant, the sponge material as disclosed in document D16/D'16 can be considered as having a closed cell structure.

The appellant also referred to a sentence in document D'16 according to which the rotation directions of the cleaning tools "are always contrary each other" (see page 6, 1st paragraph). In this context the appellant asserted that the cleaning tools described in document D16 have such a direction of motion that the teats are drawn between the cleaning tools and argued that this document is prejudicial for the novelty of the subject-matter of Claim 2.

The board cannot accept these arguments of the appellant for the following reasons:

- (i) The assertion of the appellant that a "sponge" is a material constituted by a closed cell structure - an assertion contested by the respondent - is not credible. In any case, the appellant did not support this assertion with evidence.

(ii) Although document D'16 indicates that the rotation direction of the central cleaning tools is contrary to that of each side cleaning tool, it is clear that all cleaning tools shown in Figure 3-12 of document D16 extend generally vertically. Therefore, document D16 does **not** disclose that the teats are "drawn between the cleaning tools" in the meaning of Claim 2 (see the above section 3.2). Furthermore, since the side cleaning tools shown in Figure 3-12 of document D16 serve to clean the sides of the udder and not the teats, it cannot be derived from this document that a teat comes from above into the space between a side cleaning tool and the central cleaning tool.

6.2.2 Thus, document D16/D'16 does **not** disclose the features that there are "at least two cleaning tools" (for cleaning the teats of the udder), that the cleaning tools are constituted by "a closed cell structure" and have such a direction of motion that "the teats are drawn between the cleaning tools".

6.3 Since the remaining documents on file do not come closer, the subject-matter of each of the independent Claims 1 and 2 is novel within the meaning of Article 54 EPC.

7. *Inventive step (Claim 1 of the auxiliary request)*

7.1 Document D6 relates to a cleaning apparatus provided with a cleaning member whose cleaning tools are constituted by **brushes** or by any other material of a soft texture **suitable for brushing purposes**, each brush being made from a cluster of bristles (see

page 2, lines 31 to 47). This known apparatus is provided with a water delivering line terminating in the cleaning member, whereby water is delivered to the cleaning member during its brushing movement (see Claim 1, page 2, lines 85 to 94).

According to the description of the opposed patent, the use of brushes has the drawback that the brushes are hard to decontaminate after the teat cleaning operation. Furthermore, the use of a cleaning liquid moistening the brushes has the drawback that the liquid is splashed about, requiring provisions for catching the cleaning liquid (see column 1, lines 21 to 24).

7.1.1 Having regard to the observations in the above sections 6.1 to 6.1.2, the subject-matter of Claim 1 differs from the prior art disclosed in document D6 in that

- (a) the cleaning tools are constituted by **a moisture absorbing material being made from a woven product or fabric**, and in that
- (b) the cleaning tools **operate with a rubbing motion**.

Features (a) and (b) result in providing an apparatus for cleaning the teats which not only has a cleaning action different from that of brushing down with bristles (so that the decontamination of the cleaning can be made easier) but also makes it possible to moisten the cleaning tools to a limited extent without requiring additional provisions for catching the cleaning liquid.

Therefore, the problem solved by features (a) and (b) in combination with the remaining features of Claim 1 consists in eliminating the drawbacks of the apparatus known from document D6.

7.1.2 Starting from document D6, the appellant argued essentially as follows:

The skilled person generally knows that towels, which are made from an absorbing material, such as a woven product or fabric, are normally used to clean the teats of an animal to be milked. It is therefore obvious for the skilled person to select any absorbing material to replace brushes and, thus, arrive at the subject-matter of Claim 1.

The board cannot follow this argument because it is clearly based on an *ex post facto* approach. For the assessment of inventive step in the present case, the decisive question is not whether the skilled person **could have** selected any absorbing material to replace the brushes used in the prior art apparatus but whether he, when confronted with the technical problem to be solved, **would have** done so in the expectation of the technical results which can be achieved by selecting such a material. Since the skilled person cannot find in the prior art, i.e. in the framework of robotized milking devices, either a reference to these technical results (namely the avoidance of contaminated brushes in combination with the avoidance of spraying the cleaning liquid) or an indication making these results easily expected, he would not have selected a moisture absorbing material as defined by features (a) and (b).

7.2 Document D16 relates to a cleaning apparatus provided with a cleaning member having a central cleaning tool constituted by a sponge which can be considered as being normally a moisture absorbing material. This known apparatus is however provided with shower nozzles suitable for spraying warm water over all the surface of the lower part of the udder and with a washing vessel suitable for catching the water (see document D'16, page 4).

7.2.1 Having regard to the observations in the above sections 6.2 to 6.2.2, the subject-matter of Claim 1 differs from the prior art disclosed in document D16 in that

(c) the cleaning member is provided with **at least two cleaning tools** (for cleaning the teats), and

(a') the moisture absorbing material is made from **a woven product or fabric**.

Feature (a') results in providing an apparatus for cleaning the teats which makes it possible to moisten the cleaning tools without spraying a cleaning liquid and thus without requiring additional provisions for catching the cleaning liquid.

7.2.2 Starting from document D16, the appellant argued that it would be obvious for the skilled person to select any absorbing material to replace the sponge material and, thus, to arrive at the subject-matter of Claim 1.

Furthermore, the appellant referred to a sentence in document D'16 according to which "The spraying time may be set with a time switch..." and argued that the

apparatus known from document D16 makes it possible to avoid the use of a spray unit by setting the spraying time at zero.

The appellant also referred to a passage in the description (page 3, lines 2 to 15) of the application as originally filed corresponding to a passage in the description of the patent (column 2, lines 17 to 28) according to which the claimed invention also provides the possibility of using a cleaning liquid.

7.2.3 Having regard to the following observations, the board cannot accept these arguments of the appellant:

- (i) Document D'16 clearly refers to shower nozzles for spraying water over the surface of the udder and to a time switch for setting the spraying time but does not indicate either explicitly or implicitly the possibility of avoiding spraying. Moreover, it would not be technically meaningful to set the spraying time at zero in an apparatus which is conceived for spraying the teats with warm water.
- (ii) On the subject of the possibility of using a cleaning liquid in the apparatus defined by Claim 1, it has to be noted that the passage in the description of the patent referred to by the appellant explicitly indicates the possibility of moistening the cleaning tool "without requiring additional provisions, such as a tank containing cleaning or disinfecting liquid, or a spray unit" (column 2, lines 23 to 28).
- (iii) The skilled person cannot find in the prior art

any reference to the possibility of avoiding any additional provisions for spraying liquid and collecting the liquid splashed out during cleaning.

(iv) Document D16 discloses the use of a moisture absorbing material (sponge material) in combination with a spraying unit (shower nozzles) and a washing vessel. Therefore, the skilled person starting from this document and confronted with the problem to be solved, should firstly arrive at the idea of eliminating from the known apparatus the spraying nozzles and the washing vessel and, then, to the idea of replacing sponge material by fabric or a woven product as defined by feature (a'). Since the generally cylindrical washing vessel, the cleaning tools made of a sponge material contained in the vessel and the spraying nozzles arranged on the vessel constitute a structural and functional unity, it is unlikely that the skilled person would arrive at the idea of separating the elements of this unity and eliminating the washing vessel with the spraying nozzles.

(v) Document D16 indicates the possibility of using a dry cloth for wiping the udder at the end of the washing process (see D'16, page 10), i.e. for removing wash water from the udder. In other words, document D16 points towards the use of a dry cloth additionally and subsequently with respect to the use of a cleaning tool constituted by a sponge. Thus, document D16 teaches away from the sole use of a cloth (which

can be moistened) replacing the sponge.

7.3 Having regard to the above comments, the subject-matter of Claim 1 cannot be derived in an obvious way from the prior art referred to by the appellant.

8. *Inventive step (Claim 2 of the auxiliary request)*

8.1 According to both parties the closest prior art with respect to the subject-matter of Claim 2 is represented by document D7, which discloses an apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member capable of being driven and taken, at least partially, under the udder of the dairy animal, the cleaning member being provided with two cleaning tools 6A, 6B, which are each mounted to rotate about a shaft, the axes of rotation of the cleaning tools being parallel to one another, the cleaning tools being constituted by brushes which operate with a brushing motion and have such a direction of motion that the teats are drawn between the cleaning tools.

8.1.1 The subject-matter of Claim 2 differs from the prior art disclosed in document D7 in that

(a'') the cleaning tools are constituted by **a closed cell structure**, and in that

(b) the cleaning tools **operate with a rubbing motion**.

Features (a'') and (b) result in the advantages referred to in the above section 7.1.1 and contribute to the solution of the technical problem mentioned in

this section.

8.2 Document D4 discloses (see Figure 7 in combination with Figure 3) an apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member capable of being driven and taken under the udder of the dairy animal, the cleaning member being provided with a plurality of cleaning tools, which are each mounted to rotate about a shaft, the axes of rotation of the cleaning tools being substantially vertical and parallel to one another, the cleaning tools being constituted by a rubber body ("Gummiformteil" 12), which can be considered as being a closed cell structure and operating with a rubbing motion. Cleaning liquid is sprayed towards the udder ("Düsen 20").

Document D3 discloses (see Figure 1) an apparatus for cleaning the teats of a dairy animal's udder provided with a cleaning member capable of being driven and taken, at least partially under the udder of the dairy animal, the cleaning member being provided with a plurality of rigid cleaning tools ("starre Reinigungskörper" 2, 3) and with means ("Düsen 20") for distributing cleaning liquid to the udder. Therefore, this document is not more relevant than document D4.

8.3 The appellant referred to documents D4 and D3 and asserted that each of these documents describes a cleaning member provided with a plurality of cleaning tools which are constituted by a closed cell structure, and operate with a rubbing motion. In this respect the appellant argued that it would be obvious for the skilled person to replace the brushes of the

apparatus according to D7 by the cleaning tools disclosed either in D4 or in D3 and, thus, to arrive at the subject-matter of Claim 2.

8.4 Having regard to the following observations, the board cannot accept the arguments of the appellant:

- (i) Neither document D4 nor document D3 contains explicit or implicit indications to the problem to be solved. Therefore, the skilled person looking for a solution to its problem would have no reason to consider these documents, particularly since the cleaning devices in both documents use spraying of cleaning liquid and therefore cannot even solve part of the above indicated problem.

- (ii) Document D3 refers generally to rigid cleaning bodies without disclosing cleaning tools constituted by a closed cell structure. Moreover, the rigid cleaning bodies according to document D3 are arranged on a plate ("Tellerement") suitable for rotating about a vertical axis, so that the structure of the cleaning tools would make them hard to install in an apparatus as described in document D7, where two cleaning tools rotate about two parallel axis so that the teats can come from above into the space between the cleaning tools.

- (iii) The cleaning tools according to document D4 are generally conical. Therefore, their shape would make them difficult to arrange in the apparatus according to document D7 (see item ii) above).

- 8.5 Having regard to the above comments, the subject-matter of Claim 2 cannot be derived in an obvious way from the prior art referred to by the appellant.
9. Dependent Claims 3 to 19 concern particular embodiments of the inventions defined in Claim 1 or 2.
10. The patent can therefore be maintained on the basis of the 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:

Claims: 1 to 19,

Description: columns 1 to 9,

Drawings: Figures 1 to 7, as filed during the oral proceedings.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries