

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen
(D) No distribution

**Datasheet for the decision
of 9 October 2012**

Case Number: T 0165/10 - 3.2.04

Application Number: 00305277.6

Publication Number: 1166625

IPC: A01J 7/04, A01J 5/017

Language of the proceedings: EN

Title of invention:
Method and apparatus for treating the teats of an animal

Patent Proprietor:
DeLaval Holding AB

Opponents:
Octrooibureau Van der Lely N.V.
WestfaliaSurge GmbH

Headword:
Topical composition/DELAVAL

Relevant legal provisions:
EPC Art. 52, 54, 56

Keyword:
"Novelty: no (main request)"
"Inventive step: yes (auxiliary request)"

Decisions cited:
-

Catchword:
-



Case Number: T 0165/10 - 3.2.04

DECISION
of the Technical Board of Appeal 3.2.04
of 9 October 2012

Appellant I: Octrooibureau Van der Lely N.V.
(Opponent 1) Weverskade 110
NL-3147 PA Maassluis (NL)

Representative: Corten, Maurice Jean F.M.
Octrooibureau Van der Lely N.V.
Weverskade 110
NL-3147 PA Maassluis (NL)

Appellant II: DeLaval Holding AB
(Patent Proprietor) P.O. Box 39
SE-147 21 Tumba (SE)

Representative: Lerwill, John
A.A. Thornton & Co.
235 High Holborn
London WC1V 7LE (GB)

Party as of right: WestfaliaSurge GmbH
(Opponent 2) Siemensstr. 25-27
D-59199 Bönen (DE)

Representative: Neumann, Ditmar
KNH Patentanwälte
Kahlhöfer Neumann Rößler Heine
Postfach 10 33 63
D-40024 Düsseldorf (DE)

Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
4 December 2009 concerning maintenance of
European patent No. 1166625 in amended form.

Composition of the Board:

Chairman: A. de Vries
Members: P. Petti
T. Bokor

Summary of Facts and Submissions

I. The opposition division in its interlocutory decision dated 4 December 2009 found that the European patent No. 1 166 625, against which two oppositions - based upon Articles 100(a) and (b) EPC - had been filed, met the requirements of the EPC in the amended version submitted by the patent proprietor during the oral proceedings on 12 October 2009.

In its decision the opposition division found that the claimed subject-matter involved an inventive step having regard inter alia to the prior art disclosed in document EP-A-945 057 (P3) and WO-A-00/4767 (P14).

II. Opponent 01 (hereinafter appellant I) lodged an appeal against this decision on 22 January 2010 and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 14 April 2010.

On 27 January 2010 the patent proprietor (hereinafter appellant II) lodged against this decision a further appeal for which the appeal fee was paid on 1 February 2010. A statement setting out the grounds of appeal was received on 13 April 2010.

III. Oral proceedings before the board were held on 9 October 2012.

IV. Appellant I requests that the decision under appeal be set aside and the patent be revoked.

Appellant II requests that the appeal of appellant I be dismissed, i.e. that the patent be maintained in the

amended form as allowed by the opposition division (main request) or that the decision under appeal be set aside and the patent be maintained on the basis of a first auxiliary request filed during oral proceedings before the board, corresponding to a former eighth auxiliary request filed with letter dated 8 September 2010.

As appellant II withdrew his earlier requests and based the present main request on the version allowed by the opposition division, the original request of opponent 02 who as party as of right requested dismissal of appellant II's appeal is moot.

V. The wording of claim 1 of the main request reads as follows:

"1. An apparatus for applying topical composition to at least a part of an udder, in particular a teat, of an animal, comprising a robot arm (2) and at least one composition applying member (5) positionable by the robot arm for applying the topical composition to the teat, **characterised in that** different topical compositions are applicable by the at least one composition applying member, and a control device is arranged to control the robot arm (2) and the at least one composition applying member (5) for one of the topical compositions selected in accordance with information relating the skin health condition of an animal teat and/or climatic conditions of the animal environment to be applied to a teat, and wherein a plurality of composition applying members (5) are provided for applying different respective topical compositions, and the control device is operable for a

selected one of the plurality of composition applying members (5) to be positioned by the robot arm with respect to the teat to be treated and to apply the respective topical compositions to the teat."

Claim 1 of the first auxiliary request - compared with claim 1 of the main request - contains the following additional wording:

"wherein the control device is arranged to select the composition applying member (5) to be used for treating a teat of an animal in accordance with data relating to that specific animal."

VI. Appellant II submitted that claim 1 of the main request is novel over P14, in so far as this document does not disclose the selection of a topical composition in accordance with information relating to skin health condition of an animal teat and/or climatic conditions of the animal environment. He further submitted that the subject-matter of claim 1 of the auxiliary request involves an inventive step over P14.

Appellant I and the party as of right submitted that the subject-matter of claim 1 of the auxiliary request lacks an inventive step over P14 in combination with either common general knowledge or WO-A-00/11933 (P6) or P3.

Reasons for the Decision

1. The appeals are admissible.
2. *The claimed subject-matter*
 - 2.1 According to claim 1 of the main request,
 - (i) "the control device is arranged to control the robot arm (2) and the at least one composition applying member (5) for one of the topical compositions *selected* in accordance with information relating the skin health condition of an animal teat... to be applied to the teat" (emphasis added), and
 - (ii) "a plurality of composition applying members (5) are provided for applying different respective topical compositions, and the control device is operable for a *selected* one of the plurality of composition applying members (5) to be positioned by the robot arm with respect to the teat to be treated and to apply the respective topical composition to the teat" (emphasis added).

These two wordings, which have to be read in conjunction with each other, make it clear that the control device may control or operate the robot arm for a selected composition applying member to be positioned with respect to the teat to be treated and to apply to the teat a selected composition, wherein the selection of the composition to be applied is the result of the selection of the composition applying member.

Although claim 1 defines a control device and refers to the criteria to be used to select the composition to be applied ("selected in accordance with information relating the skin health condition of an animal teat and/or climatic conditions of the animal environment"), it does not define either explicitly or implicitly the selection of the composition as being performed by the control device which controls the robot arm and the composition applying members. Thus, claim 1 does not exclude that the selection is performed by the user of the apparatus. In other words, the selection criteria referred in claim 1 do not limit that claim structurally or functionally.

2.2 Claim 1 of the auxiliary request contains the following additional wording:

(iii) "the control device is arranged to select the composition applying member (5) to be used for treating a teat of an animal with data relating to that specific animal".

This wording, which has to be read in conjunction with wording of features i) and ii) referred to above, defines a functional feature of the control device and makes it clear that the control device is capable of selecting the composition applying member and the respective composition to be used for treating a teat of an animal in accordance with information relating the skin health condition of the animal teat and/or climatic conditions of the animal environment *and* with data relating to that specific animal.

3. *Main request (novelty)*

3.1 P14 discloses (see page 3, line 17 to page 4, line 2; Figure 1) an apparatus for applying a topical composition to a teat of an animal, the apparatus comprising

- a robot arm (2),
- a plurality of composition applying members, namely a cleaning means (4b) suitable for applying a cleaning liquid (see particularly page 3, lines 28 to 30 in conjunction with page 7, lines 11 and 12) and a teat disinfection means (4c) provided with a nozzle (4d) for spraying a disinfecting liquid, the composition applying members (4b and 4c) being suitable for applying different respective topical compositions,
- and a control device (page 4, lines 28 and 29),

wherein

- each of the composition applying members is positionable by the robot arm for spraying the respective topical composition to the teat (page 5, lines 1 to 6, Figure 3),
- the composition applying members are suitable for applying different respective topical compositions, i.e. different topical compositions are applicable by respective ones of the composition applying members, with the cleaning means (4b) applying a cleaning liquid (page 3, lines 28 to 30) and the disinfecting means (4c) applying a disinfectant such as iodine (page 4, lines 1 and 2),
- the control device is arranged to control the robot arm and each of the composition applying

members to apply a topical composition selected by the user of the apparatus, wherein the control device is operable for a selected one of the composition applying members (4b or 4c) to be positioned by the robot arm with respect to the teat to be treated and to apply the respective topical composition to the teat, as inferred from the use of a robot arm and associated control means to perform cleaning and disinfection.

- 3.2 Since the selection criteria ("*selected* in accordance with information relating the skin health condition of an animal teat and/or climatic condition of the environment") do not structurally or functionally limit the claim (see section 2.1 above), the board finds that the matter for which protection is sought is not distinguished with respect to novelty from the prior art disclosed in P14.

Thus, the fact that P14 does not disclose a selection made in accordance with information relating the skin health condition of an animal teat and/or climatic condition of the environment, as submitted by Appellant II, is irrelevant for this finding.

- 3.3 In this regard the board is unable to see any distinction in the fact that P14 does not expressly indicate that the cleaning liquid is used to clean the teat. For the skilled person who is genuinely intent on understanding the teaching of P14 this is the only reasonable use of the cleaning liquid which is in keeping with the stated purpose of the cleaning means (4b) to clean the teat. That the cleaning liquid might serve only to clean the brush - and thus not to be

applied topically on the teats - is not considered a reasonable reading of P14's technical teaching.

- 3.4 Therefore, the main request has to be rejected because the subject-matter of claim 1 lacks novelty (Article 52 EPC).

4. *Auxiliary request (amendments)*

Claim 1 of this request combines the features specified in granted claims 1, 2 and 10. Dependent claims 2 to 12 correspond to granted claims 3 to 9 and 11 to 14. The claims of this request are thus based on straightforward combinations of granted claims, against which the ground of Article 100 (c) EPC was not raised in opposition or the present appeal proceedings.

The description is merely amended in view of adapting it to the amended claim 1 and to excise the subject-matter of granted method claims 15 to 23. No objections under Article 123 EPC have been raised against these straightforward adaptations nor do these appear to add subject-matter or extend the scope in any way.

5. *Auxiliary request (inventive step)*

- 5.1 Having regard to above sections 2.2 and 3.1, the claimed subject-matter differs from the apparatus known from P14 in that *the control device is arranged to select the composition applying member and thus the respective composition to be used for treating a teat of an animal in accordance with information relating the skin health condition of the animal teat and/or*

climatic conditions of the animal environment and with data relating to that specific animal.

5.2 The problem to be solved is to provide an apparatus which ensures "greater choice and versatility in teat treatment, with a view to maintain animal teats in good and healthy condition", see patent specification, column 1, line 57 to column 2, line 2.

5.3 In the apparatus of P14 both composition applying members, i.e. teat cleaning means (4b) and teat disinfecting means (4c) are actuated to respectively clean and disinfect the teats *of all animals* to be milked. The teat cleaning means (4b) is operated to spray a cleaning liquid before a teat cup is applied to the teat and the teat is milked, while the teat disinfecting means (4c) is operated to spray a disinfecting liquid (iodine) after the teat has been milked and the teat cup has been removed from the teat. P14 is silent as to whether or not the control of the composition applying members which apply their respective topical compositions occurs in dependence on the specific needs of an individual animal and of the skin health condition of the animal teat or the climatic conditions of the animal environment.

The composition applying members of the apparatus of P14 may be *potentially* capable of applying a topical composition selected in accordance with information relating the skin health condition of the animal teat or climatic conditions of the animal environment, there is however no suggestion in P14 that might lead the skilled person to *actually* use the composition applying members in this manner.

5.4 Starting from the apparatus of P14, the skilled person confronted with the problem of providing greater choice and versatility in teat treatment with a view to maintain animals teats in good and healthy condition must realize first of all that the composition applying members of P14 can be used to apply different respective compositions that are selected in accordance with information relating to the skin health condition of the animal teat and/or climatic conditions of the animal environment, i.e. that they can be used to treat the animal for such conditions.

Secondly he must then realize that he can select the composition also in accordance with data relating to a specific animal.

5.5 However, none of the prior art documents referred to by appellant II and the party as of right suggests such a use, let alone that it addresses the stated problem.

5.5.1 Document P3, see e.g. claim 1, describes a device for cleaning and/or disinfecting an animal teat comprising a composition applying member connected to a pressure vessel containing a cleaning fluid or a disinfecting fluid to be applied to the teat. According to column 3, lines 16 to 23, "the choice is limited to either cleaning or disinfecting the teat", but "if both cleaning and disinfecting *or any other treatment* are desired, it will be possible to connect a plurality of pressure vessels ... so that there can be chosen between different treatments" (emphasis added). However, P3 fails to specify the nature of any such other

treatment and even less that "other treatment" might be chosen for a specific animal.

In this regard the board finds that an interpretation of the terms "different treatments" or "other treatments" as suggested by appellant I is the result of an ex post analysis of the document. There is neither explicit nor implicit reference to treatments of the teats in accordance with the skin health conditions or the climatic condition of the environment. As acknowledged by appellant II a "different" or "other" treatment could also refer to that of drying the teat skin after cleaning or after disinfecting. Not only is there no suggestion in P3 to select different compositions in accordance with information relating to teat skin health or climatic conditions and depending on the specific animal, P3 does not address the problem of providing greater choice and versatility in teat treatment. The skilled person would therefore not consider P3 as offering a solution to the problem he faces starting from P14. Even if he combined P3 with P14, it would not lead to the solution claimed.

- 5.5.2 P6 relates to a method of cleaning the teats of an animal and teaches to perform the cleaning of the teats by first cleaning one or more healthy teats, and then infected teats in order of increasing level of infection (see claims 1 and 5) in accordance with data relating to each individual animal, wherein the level of infection of a teat is determined by detecting a property of the milk extracted from that teat (see page 4, lines 23 to 28).

This document is concerned with the specific problem of "preventing transfer of infection from one teat to another teat, not reducing the presence of infection nor curing the infection" (see page 5, lines 19 to 21). Thus, P6 does not directly relate to the problem of greater choice and versatility in teat treatment, with a view to maintain animals teats in good and healthy condition, nor does it suggest the application of a topical composition selected in accordance with information relating to the skin health condition of the animal teat and/or climatic conditions of the animal environment.

Moreover, cleaning of the teats is performed for *all animals* with the *same cleaning composition* and even if some of the teats of an animal are healthy (see particularly claim 1). Thus, P6 does not disclose and cannot suggest the use of a control device to *select* one out of a plurality of topical compositions or one of a plurality of composition applying members to apply a different composition. Again, the skilled person starting from P14 has no clear incentive to apply P6's teaching, but even if he did, such an application would not result in the claimed solution.

5.5.3 Finally, the board is unconvinced that the claimed solution would belong to or be obvious in the light of common general knowledge. Firstly, no evidence is provided to substantiate the otherwise contested allegation that it is common general knowledge to adapt teat cleaning to the degree of dirtiness of the teats of an individual animal. The skilled person would therefore not immediately derive from such knowledge the idea of selecting different topical (cleaning)

compositions in dependence on information relating the skin health condition of the animal teat or climatic conditions of the animal environment. Thus, even such an assumption of common general knowledge would not lead the skilled person to the claimed solution.

Even if this were so this does not necessarily imply the selection of different compositions. A most straightforward way of cleaning with teats that are dirty to a different degree would be to adjust the duration or the intensity of the cleaning operation depending on how dirty the teats of the specific animal are.

- 5.6 In view of the above the board concludes that the subject-matter of claim 1 of the first auxiliary request involves an inventive step (Article 56 EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent as amended in the following version:

Description: Columns 1 to 6 as filed during oral proceedings.

Claims: 1 to 12 of the eighth auxiliary request filed with letter of 8 September 2010, re-filed as First auxiliary request during oral proceedings.

Drawings: Figures 1 and 2 of the patent specification.

The Registrar:

The Chairman:

G. Magouliotis

A. de Vries