

**Internal distribution code:**

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

**Datasheet for the decision  
of 20 February 2020**

**Case Number:** T 0986/16 - 3.2.04

**Application Number:** 07252552.0

**Publication Number:** 2005819

**IPC:** A01K1/00

**Language of the proceedings:** EN

**Title of invention:**

Method and apparatus for cooling an animal

**Patent Proprietor:**

DeLaval Holding AB

**Opponent:**

Octrooibureau Van der Lely N.V.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54, 111(1)

RPBA 2020 Art. 11, 12(2)

**Keyword:**

Novelty - (yes)

Appeal decision - remittal to the opposition division (yes)

**Decisions cited:**

G 0010/91

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 0986/16 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 20 February 2020**

**Appellant:** DeLaval Holding AB  
(Patent Proprietor) Box 39  
147 21 Tumba (SE)

**Representative:** Gray, Helen Mary  
ZACCO GmbH  
Bayerstrasse 83  
80335 München (DE)

**Respondent:** Octrooibureau Van der Lely N.V.  
(Opponent) Weverskade 110  
3147 PA MAASSLUIS (NL)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 24 February  
2016 revoking European patent No. 2005819  
pursuant to Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** C. Kujat  
T. Bokor

## Summary of Facts and Submissions

I. The appellant proprietor lodged an appeal, received on 22 April 2016, against the decision of the Opposition Division of the European Patent Office, posted on 24 February 2016 concerning revocation of the European Patent No. 2 005 819 pursuant to Article 101(3)(b) EPC, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 23 June 2016.

II. Opposition was filed under Article 100(a) EPC based on lack of novelty and on lack of inventive step, and under Article 100(b) EPC based on insufficiency of disclosure. The Opposition Division held that the patent according to the main request, first and second auxiliary requests did not meet the requirements of Article 100(a) or 54 EPC, and thus, revoked the patent.

The Opposition Division cited *inter alia* the following evidence:

D1: EP 1 260 137 A2

D2: WO 01 10197 A1

D7: US 4 476 809

III. In preparation for oral proceedings the Board issued a communication dated 19 June 2019 setting out its provisional opinion on the issues of sufficiency, novelty and remittal.

IV. With letter of 3 February 2020, the respondent opponent withdrew its request for oral proceedings. While the respondent repeated its request for remittal to the first instance for dealing with the matter of inventive step, it did not comment on the Board's provisional opinion concerning sufficiency and novelty.

Thereupon, the appellant withdrew its request for oral proceedings before the Board in the event that the Board maintains its preliminary opinion.

The oral proceedings scheduled for 4 March 2020 were subsequently cancelled.

- V. The appellant requests that the opposition be rejected and the patent thus be maintained as granted (main request) or, auxiliarily, the patent be maintained in amended form on the basis of the first auxiliary request filed with letter of 5 November 2015, or on the basis of the second auxiliary request filed as first auxiliary request during the oral proceedings before the Opposition Division, or on basis of the third or fourth auxiliary requests filed with the statement of grounds of appeal.
- VI. The respondent requests dismissal of the appeal. Further, in case the appeal would be allowed, it requests remittal to the Opposition Division for the examination of further objections not dealt with in the decision under appeal, in particular inventive step.
- VII. Independent claim 1 according to the relevant main request (patent as granted) reads as follows:

"Apparatus for undertaking a method of increasing the milk productivity of an animal, in particular a cow (5), the method comprising the step of (a) determining the condition of the animal and/or of the environment in which the animal is located; and being characterised by the further steps of: (b) selecting a method of cooling the animal, which comprises selecting one or more of a plurality of cooling techniques available for cooling the animal (5) wherein said plurality of

available cooling techniques comprises (i) wetting the animal (5); (ii) blowing air over the animal (5); (iii) wetting the animal (5) and blowing air over the wet parts of the animal (5); and (iv) reducing the temperature of ambient air in the vicinity of the animal (5), and wherein the selected cooling method is chosen on the basis of said determined condition; and (c) cooling the animal with the selected cooling method."

VIII. The appellant argued as follows:  
The subject matter of independent claim 1 is novel over each of documents D1, D2 and D7.

IX. The respondent argued as follows:  
The subject matter of independent claim 1 is not novel over any of the documents D1, D2 and D7.

### **Reasons for the Decision**

1. The appeal is admissible.

2. *Background*

The invention concerns an apparatus for undertaking a method of increasing the milk productivity of an animal, in particular a cow, the method comprising the steps of

(a) determining the condition of the animal and/or of the environment in which the animal is located;

(b) selecting a method of cooling the animal, which comprises selecting one or more of a plurality of cooling techniques available for cooling the animal wherein said plurality of available cooling techniques comprises

(i) wetting the animal;

- (ii) blowing air over the animal;
- (iii) wetting the animal and blowing air over the wet parts of the animal; and
- (iv) reducing the temperature of ambient air in the vicinity of the animal, and wherein the selected cooling method is chosen on the basis of said determined condition; wherein the selected cooling method is chosen on the basis of said determined condition, and
- (c) cooling the animal with the selected cooling method.

By choosing a method of cooling on the basis of the determined condition of the animal or environment, account can be taken of medical events, health problems or pregnancy of the animal, as well as of the environmental conditions in which the animal is located (patent, paragraphs 13 and 15).

### 3. *Novelty*

The appellant proprietor disputes the decision's finding that the subject-matter of independent claim 1 of the main request lacks novelty over D1, D2 or D7.

- 3.1 In its communication, the Board was of the preliminary opinion that none of these documents discloses such an apparatus for undertaking a method of increasing the milk productivity of an animal. The Board presented the following preliminary view (see paragraphs 2 and 3 of the communication):

*"2. Feature "plurality of available cooling techniques"*

*Before it can evaluate whether the subject-matter of claim 1 is novel, the Board must interpret the feature*

"plurality of available cooling techniques" (emphasis added by the Board).

2.1 In this regard, the feature seems to be self explanatory in the sense that devices for performing these cooling techniques must be present in the claimed apparatus in order to make the cooling techniques "available". In the Board's preliminary view, feature (c) of claim 1 therefore stipulates that the claimed apparatus contains devices for all four of the cooling techniques (i) to (iv). Therefore, a prior art apparatus seems to be relevant for the assessment of novelty only if it can select all four techniques separately, i.e. independently from each other.

2.2 Turning to the issue of the separate availability (also treated as "mutual exclusivity" in the submissions), the skilled person, using normal reading skills, seems to recognize from the four explicitly mentioned cooling techniques in claim 1 that techniques (i) or (ii) are not a subset of technique (iii). Otherwise, there would not be any need to separately mention these techniques. The Board therefore holds the preliminary view that technique (i) cools the animal exclusively by wetting, i.e. without blowing air over the animal. By the same token, technique (ii) cools the animal exclusively by blowing air over it. Therefore, a prior art apparatus which only performs cooling technique (iii) does not (implicitly) seem to be suitable for separately performing techniques (i) or (ii).

2.3 Summarizing the above, the Board preliminarily construes said feature as relating to four mutually exclusive cooling techniques which must be separately



available in the apparatus such that cooling techniques (i) to (iv) are selectable.

### 3. Novelty - Main Request

The Board is not convinced that the subject-matter of independent claim 1 according to the Main Request lacks novelty over documents D1, D2 or D7:

3.1 Document D1 only seems to disclose cooling techniques (i) and (iii) (paragraphs 17 and 18). With regard to ventilation area 18, a proper reading of claim 1 ("generating an air flow along the wetted part", emphasis added by the Board), as well as the references to data from the first animal identification means, and to the milking box 1 seem to imply that a previous wetting took place before an animal is admitted to ventilation area 18 (paragraphs 20 and 21). Cooling technique (ii), i.e. cooling exclusively by ventilation, therefore does not seem to be available in D1.

Further, with regard to cooling technique (iv), it seems to be immaterial whether it is an inevitable effect of the cooling techniques (i) and (iii) of D1 that the ambient air also cools down. In the absence of any relevant disclosure, cooling technique (iv) does not seem to be separately available in D1.

3.2 Document D2 only seems to disclose cooling technique (iii) (page 5, lines 3 to 9). With regard to cooling technique (ii), D2 does not seem to disclose directly and unambiguously that the shielding means used during wetting are removed before cooling by directing air over the cow takes place (page 5, lines 16 to 18).

*Further, in view of the single cooling technique (iii), D2 does not seem to disclose the step of selecting a method of cooling.*

*3.3 Document D7 only seems to disclose cooling technique (iii) (column 3, lines 36 to 45). With regard to cooling techniques (i) and (ii), the manual override of the sequence disclosed in D7 is not considered a direct and unambiguous disclosure of sprinkler means operating independent of the fans (column 3, lines 39 and 40). In the Board's preliminary view, this rather relates to an activation of the sprinkler heads at a lower temperature than that set in thermostat 22.*

*With regard to cooling technique (iv), D7 does not seem to disclose that cooling by means of the ventilation openings 18 can be selected, since thermostat 22 seems to be decisive for starting the fans, i.e. cooling by blowing air over the animals, even if cooling technique (iv) was preferred at that time."*

3.2 The respondent in its letter requesting remittal and withdrawing their request for oral proceedings did not comment on the Board's preliminary view. In the absence of such comments, the Board sees no reason to depart from its preliminary view. Hence, contrary to the Opposition Division's finding, the Board considers the subject-matter of granted claim 1 to be novel over each of D1, D2 or D7, Article 54 EPC.

4. *Remittal*

4.1 The Opposition Division did not allow the main request (rejection of the opposition) because it found the subject matter of claim 1 of the patent as granted to lack novelty. In its decision, the Opposition Division only examined sufficiency of disclosure according to Article 83 EPC and novelty according to Article 54 EPC. Given that the decision's positive finding on the issue of sufficiency within the meaning of Article 83 EPC was not contested by the respondent, the Board sees no reason to examine this issue on its own motion and to depart from this finding. However, the impugned decision did not consider the remaining ground of opposition raised against claim 1 of the main request, namely lack of inventive step (Article 100(a) EPC).

4.2 In accordance with Article 111(1) EPC, second sentence, the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. Since the main purpose of the appeal proceedings is to give the losing party a possibility to challenge the decision of the Opposition Division on its merits (see G0010/91, point 18), remittal in accordance with Article 111(1) EPC has normally been considered by the Boards in cases where the Opposition Division issues a decision solely upon a particular issue (e.g. novelty) and leaves other substantive issues e.g. regarding inventive step undecided. This existing practice realizes the primary object of appeal proceedings to review the decision under appeal in a judicial manner as expressed in Art 12(2) RPBA 2020.

Furthermore, the respondent has requested and the appellant agrees with the remittal.

In the Board's view all these elements constitute special reasons (further to fundamental deficiencies) that justify a remittal of the case to the opposition division in accordance with Article 11 RPBA 2020.

- 4.3 In the light of the above, the Board therefore decides to remit the case to the Opposition Division for further prosecution, in particular to allow it to examine the opposition ground of lack of inventive step.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated