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D E C I S I O N
of 23 January 2003

Case Number: T 0501/01 - 3.2.4

Application Number: 94908981.7

Publication Number: 0689382

IPC: A22B 1/00

Language of the proceedings: EN

Title of invention:

A method for suspending live poultry by the legs and apparatus for carrying out the method

Patentee:

Lindholst & Co. A/S

Opponent:

Machinefabriek Meyn B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 99(1), 100(a)

Keyword:

"Novelty (yes)"
"Inventive step (yes)"

Decisions cited:

-

Catchword:

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Case Number: T 0501/01 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 23 January 2003

Appellant: Machinefabriek Meyn B.V.
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Respondent: Lindholst & Co. A/S
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 19 February 2001
rejecting the opposition filed against European
patent No. 0 689 382 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: C. D. A. Scheibling
C. Holtz

Summary of Facts and Submissions

I. By its decision dated 19 February 2001 the Opposition Division rejected the opposition. On 18 April 2001 the appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 19 June 2001.

II. The patent was opposed on the grounds based on Articles 100(a) (Articles 54 and 56) and 100(b) EPC. The ground for opposition based on Article 100(b) EPC was rejected during opposition proceedings and has not been raised again in the statement setting out the grounds of appeal.

III. The following documents played a role in the appeal proceedings:

E1: US-A-5 129 857

E3: US-A-4 658 476

E4: US-A-4 467 745

E5: US-A-4 600 351

E6: US-A-4 301 769

E7: US-A-4 037 565

E8: US-A-3 785 349

E9: US-A-4 602 594

E10: US-A-4 215 654

E11: NL-A-79 07 249

IV. Claim 1 as granted reads:

"1. A method of suspending live poultry in particular chickens, by their legs, whereby the poultry is placed on a running conveyer (12; 11) running in its conveying direction, such as a belt conveyer, to be forwarded thereby one by one, and is caught by mechanical means (28) by the legs to be carried on suspended by the legs, characterized in that the poultry is forwarded standing or sitting on the running conveyer (12; 11) having their feet on the conveyer (12; 11) and is passed so over the downstream end (22; 21) of the conveyer to be dropped down to following conveyer means (11; 28) running in its conveying direction before they are caught by the legs".

Claim 5 as granted reads:

"5. An apparatus for suspending live poultry in particular chickens, by their legs, comprising at least one running conveyer (12; 11) running in its conveying direction, such as a belt conveyer, for forwarding the poultry one by one and means (28) for catching and conveying the poultry by the legs, characterized in that said running conveyer (12; 11) comprises a downstream end (22; 21) located above following conveyer means (11; 28) running in its conveying direction, so that poultry that is forwarded one by one standing or sitting on the conveyer (12; 11) having their feet on the conveyer (12; 11) is passed so over said downstream end (22; 21) to be dropped down to the following conveyer means (11; 28) before they are caught by the legs".

V. Oral proceedings took place on 23 January 2003.

The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked. The appellant's alternative request that the appeal proceedings be continued in writing to allow the appellant to conduct experiments and file further evidence of results therefrom was refused and this decision announced during the oral proceedings.

The respondent (patentee) requested that the appeal be dismissed and that the patent be maintained as granted.

Reasons for the Decision

1. The appeal is admissible.
2. *Interpretation of the independent claims*
 - 2.1 "Conveyor"

According to the Webster's Revised Unabridged Dictionary (1913) (consultable on Internet site www.dict.org) a conveyor is a contrivance for carrying objects from place to place.

- 2.2. "To be passed so over the downstream end of the conveyor to be dropped down to the following conveyor means"

Interpretations of the wording of a claim should at least be such that the aims of the patent are met, i.e. that the problem to be solved is in fact solved.

Interpretations of the wording of a claim which do not contribute anything to the solution, although according to the patent this wording should clearly do so, cannot reasonably be accepted by the Board.

In the present case, it is clear from the teaching of the patent in suit that the poultry is dropped down to the following conveyor means to make the poultry turn to face a determined direction (patent specification, column 2, lines 14 to 17 and column 5, lines 10 to 17; WO-A-94/19957, page 3, lines 9 to 12 and page 8, line 29 to page 9, line 1) and that, taking account of the race of the chickens, some conditions of speed of the conveyor and height of the fall have to be fulfilled in order to achieve the expected result (patent specification, column 5, lines 36 to 46; WO-A-94/19957, page 9, lines 20 to 30). This passage makes also clear that no further technical constructional means are necessary in order to obtain the expected result, i.e. that said expression has to be interpreted so as to exclude any further supplementary constructional means in order to obtain the desired effect.

Thus, in the meaning of the patent in suit the said expression should be interpreted as meaning that the poultry reaches the end of the conveyor with a speed and falls down towards the following conveyor means from a height such as to be stimulated to counteract the conveyor movement and thereby to turn round, without any other means being provided in order to obtain said expected result. It should be emphasized that "dropping down to" means "falling down towards the next conveyor".

3. *Novelty*

3.1 With respect to E1

3.1.1 According to the description of E1, column 2, lines 26 to 32: "The upper surface of the inlet conveyor 18 is ... at a level about four inches above the interior surface of the drum at its upstream end. The outlet conveyor ... is ... level with the interior drum surface".

Thus, according to E1, poultry is dropped only once, between the end of conveyor 18 and the upstream end of the drum.

As can be seen in Figure 1 of E1, the drum 12 transfers the poultry from the end of conveyor 18 to conveyor 20. Therefore, according to the definition of "conveyor" given in section 2.1 above, the drum 12 is a conveyor in the meaning of the patent in suit.

As disclosed in E1, column 2, lines 39, 40 and 67, 68 the drum is rotated while prevented from moving axially.

Thus, the drum is, with respect to conveyor 18, the "following conveyor means", however, said drum is not "running in its conveying direction".

Furthermore, according to the description of E1 (column 3, lines 11 to 21) the birds turn to point uphill within the drum, due to the rotation of the drum, when they start sliding inside it and not as a consequence of a drop towards the drum (conveyor). Thus, according to the teaching of E1, it is not the

"drop" experienced by the poultry in E1 which brings the birds to all face the same direction and thus, that drop is not a "drop" in the meaning of the patent in suit (see section 2.2 above). Indeed, it should be emphasized moreover, that E1 does not disclose the importance of the parameters "chicken type", "speed" and "height of the fall", so that there is even not the smallest suggestion, that these parameters could be used in order to obtain the effect obtained in E1 by the drum.

- 3.1.2 The appellant argued that the drum disclosed in E1 is to be considered as an intermediate feature, the poultry being subjected to a "sliding drop" from conveyor 18 towards conveyor 20 and that conveyor 20 should be considered to be the "following conveyor means" with respect to the downstream end of conveyor 18.

The Board cannot share this point of view. As indicated in section 2.2 above, the wording of the claims is considered to imply that no intermediate feature is needed to achieve the expected result; whereas in E1 the expected result is clearly achieved just by what the appellant considers to be an intermediate feature (the drum). Furthermore, falling down from a conveyor 18 into the rotating drum 12 and further sliding down within the drum towards the final conveyor 20, is different from falling or dropping down from a conveyor towards the final conveyor directly.

- 3.1.3 The appellant also argued in his written statement, that in the patent in suit the conveyor means 28 does not immediately follow conveyor means 11 because the poultry passes some time on the table 17 and/or stick

16 before being caught by the conveyor means 28. However, as acknowledged by the appellant in his statement setting out the grounds of appeal, neither table 17 nor stick 16 are moving i.e. able to transport the poultry and thus, are not conveyors or following conveyor means in the meaning of the patent in suit, whereas the drum according to E1 is transporting the poultry and thus, is a following conveyor means in the meaning of the patent in suit. Thus, in the patent in suit, the conveyor which follows conveyor means 11 is conveyor means 28 since there is no other conveyor means in between. Furthermore, it is clear from Figure 1 that the poultry is falling down from conveyor 11 directly towards conveyor 28. Therefore, the conclusion drawn by the appellant i.e. that the "rotating drum 12 is at the same line as the intermediate table 17 and supporting stick 16" is not accepted by the Board.

- 3.1.4 The appellant further referred to E1, column 1, lines 38 to 41 where it is indicated that: "Various attempts have been made by others to orient chickens, ... or by passing the chicken over a series of non-aligned conveyor intersections" and concluded that this passage anticipates the subject-matter of claims 1 and 5.

The Board cannot agree with this point of view either. In the view of the Board, to pass the chickens over a series of non-aligned conveyor intersections does not imply at all that the chickens experience any kind of drop when being passed over said series of non-aligned conveyor intersections, let alone a drop in the meaning of the patent in suit as indicated in section 2.2 above.

3.1.5 Consequently, the features of claim 1 according to which "the poultry ... is passed so over the downstream end (22; 21) of the conveyor to be dropped down to following conveyor means (11; 28) running in its conveying direction" and the features of claim 5 according to which "... following conveyor means (11; 28) running in its conveying direction" and "is passed so over said downstream end (22; 21) to be dropped down to the following conveyor means (11; 28)" are not disclosed by E1.

3.2 With respect to E3

As a matter of fact, E3 does not disclose that there is some purpose in making the poultry experience a drop.

Instead, to obtain the same effect, a specific turntable is provided.

The appellant argued that in E3 poultry can experience a drop when being moved from conveyor belt 17 to the following conveyor.

However, even if supposing that the chickens, to a certain extent, could experience a drop when passing from conveyor belt 17 to the tongue 28, due to the construction of the device, it is clear from Figure 3 of E3 that the following conveyor means 26, 27 are located (in height) above the conveyor means 17 (instead of having the downstream end of the first conveyor above the following conveyor means; see claim 5 of the patent in suit) and that therefore the poultry cannot be "dropped down to the following conveyor means" as requested by claims 1 and 5 of the patent in suit.

Furthermore, from the description of E3 it is clear that even if some kind of "drop" occurs, it serves no purpose and in any case, is not able to make the chickens turn round, since guide plates 19, 20; 21, 22 and the tongue 28 are provided to ensure that the chickens are unable to turn from a position with their heads facing forward to a position with their heads facing back or inversely (see column 5, lines 14 to 35). Indeed, in E3 measures are taken to exclude that the effect sought after in the patent in suit occurs when the chicken pass from conveyor belt 17 towards conveyor 3.

Thus, E3 does not disclose a "drop" in the meaning of the patent in suit.

The appellant further argued that claim 1 of the patent in suit does not "qualify" the "drop" and that therefore, any "drop" would fulfil the requirements of said claim. The Board cannot share this point of view either. According to the interpretation given in section 2.2 above, to be a drop in the meaning of the patent in suit the said drop has to fulfil the conditions (of speed and height) which bring the expected result.

3.3 Since neither E1, nor E3 nor any of the other documents cited by the appellant discloses in combination all the features of claims 1 or of claim 5 as granted, the subject-matter of claims 1 and 5 as granted is novel.

4. *Closest prior art*

4.1 In agreement with the parties, the Board considers E1 to be the closest prior art document.

4.2 From E1 there is known a method of suspending live poultry in particular chickens, by their legs (implicit, see column 1, lines 61 to 63; column 2, lines 24 to 26), whereby the poultry is placed on a running belt conveyor (18) running in its conveying direction to be forwarded thereby one by one, and is caught by mechanical means (column 1, lines 62, 63) by the legs to be carried on suspended by the legs (implicit), wherein the poultry is forwarded standing or sitting on the running conveyor (18) having their feet on the conveyor (18) and is passed over the downstream end of the conveyor (18) to following conveyor means (drum 12) before they are caught by the legs.

4.3 From E1 there is also known an apparatus for suspending live poultry in particular chickens, by their legs (implicit, see column 1, lines 61 to 63; column 2, lines 24 to 26), comprising at least one running belt conveyor (18) running in its conveying direction for forwarding the poultry one by one and means (column 1, lines 62, 63) for catching and conveying the poultry by the legs (implicit), wherein said running conveyor (18) comprises a down stream end located above following conveyor means (drum 12), so that poultry that is forwarded one by one standing or sitting on the conveyor (18) having their feet on the conveyor (18) is passed so over said down stream end to the following conveyor means (12) before they are caught by the legs.

5. *Inventive step*

5.1. Thus, the method according to claim 1 as granted as well as the apparatus according to claim 5 as granted differ from the method and apparatus of E1 in that:

the poultry is passed so over the downstream end of the conveyor to be dropped down to the following conveyor means running in its conveying direction.

5.2 Thus, the problem to be solved by the patent in suit is to provide another method and apparatus to bring the poultry into facing a certain direction before being suspended in slaughter shackles by their legs.

5.3 This is achieved, according to the patent in suit, in that the poultry is passed so over the downstream end of the conveyor that it is dropped down to the following conveyor means running in its conveying direction.

5.4 The appellant argued in writing that a single drop is not sufficient to carry out the invention and referred to the patent specification, column 3, lines 25 to 28. This passage reads "the chickens may be passed several times over a conveyor end; thereby obtaining more safety that all chickens have rotated correctly upon reaching a collection station".

In the view of the Board, this passage only forms a basis to assert that the rate of success may be further increased by repeating the operation, but does not form a basis to assert that a single drop is not sufficient to carry out the invention.

5.5 The appellant also argued that the subject-matter of claim 1 as granted does not involve an inventive step with respect to E1. The appellant based his conclusion on the assumption that the feature "running in its conveying direction" was the only feature distinguishing the subject-matter of claim 1 from the

object of E1. Since, according to the appellant said feature does not contribute to the solution of the problem to be solved (having the poultry oriented in a desired direction) said feature should be disregarded and thus, the subject-matter of claim 1 does not involve an inventive step.

The Board cannot share this point of view, because said feature is not the sole distinguishing feature with respect to E1, since E1 is neither considered to disclose a "drop" in the meaning of the patent in suit nor is the following conveyor means running in its conveying direction.

- 5.6 The appellant also argued that a skilled person could leave out the drum and thus, would arrive at the method and the apparatus of the patent in suit, since in E1 poultry does experience a drop when being passed over the end of conveyor 18 and therefore, the desired effect (having the poultry all oriented in a same direction) would be obtained.

However, in the view of the Board such a manner of proceeding cannot be contemplated by a skilled person without inappropriate hindsight. Throughout E1 the drum is presented as being the feature which achieves the desired effect (see column 3, lines 17 to 21).

Therefore, a skilled person would not leave out said drum since he cannot expect to achieve the expected result without it. The Board wishes also to remind that not every "drop" is a "drop" in the meaning of the patent in suit, since some conditions of speed and height are to be fulfilled (see section 2.2 above). The information that the expected result can be obtained by a "drop" is part of the teaching of the patent in suit

and not disclosed in the state of art. A skilled person could only expect a "drop" to achieve the expected result in knowledge of the teaching of the patent in suit, i.e. in knowledge of the conditions under which a "drop" can achieve the expected result.

- 5.7 The appellant also argued in writing that, since E3 although disclosing a drop, does not achieve the effect sought after by the invention, the patentee should submit evidence that the invention suits to solve the problem.

However, E3 does not disclose a "drop" in the meaning of the patent in suit (see section 3.2 above) and thus, cannot question the effectiveness of the invention.

- 5.8 The appellant further argued that the independent claims do not provide a solution to the problem of bringing the poultry into facing the same direction and that consequently, no inventive step can be seen in the measures proposed in the independent claims of the patent in suit.

In this respect, the Board wishes to point out that each party carries the burden of proof for the facts it alleges and that accordingly, it would have been up to the appellant to submit evidence that the invention is not able to solve the problem.

In the absence of such evidence, the Board cannot see any reason why said problem should not be solved by the subject-matter of claims 1 or 5, since it is stated in the description of the patent in suit, column 5, lines 41 to 46: "In successful experiments carried out by the inventors there was used ...".

5.9 During oral proceedings, the appellant also requested that the appeal proceedings be continued in writing to allow the appellant to file evidence for his allegation, in form of experiments to be carried out by himself to prove that the teaching of the patent does not produce the desired effect.

In this respect the Board wants to point out that such evidence should have been filed within the nine months period of opposition according to Article 99(1) EPC. Moreover, in view of the priority date of the patent (01 March 1993) and since, if the Board would accede to the appellant's request, the respondent must be allowed the possibility to challenge said results by carrying out and producing the result of his own experiments, the Board considers that such a request would lead to an excessive delay in the proceedings. Therefore, the Board refused the appellant's request.

5.10 In writing, the appellant was also of the opinion that the subject-matter of claims 1 and 5 does not involve an inventive step in view of E1 in combination with E3.

The appellant referred in particular to E3 column 5, lines 18 to 21 where, with reference to the fall of the chickens out of the chute 16 down onto the conveyor 17, it is said "This already brings them largely into the correct position".

However, the "correct position" referred to in this passage is, as stated in column 5, lines 23, 24, to have each chicken "in a position with its head facing forward or back, as shown in FIG. 3".

Indeed, this is neither the result to be achieved by

the patent in suit, nor by E1. In E1 and in the patent in suit, the correct position to be achieved is to have all chickens facing the same direction, opposite to the direction of transportation.

As a matter of fact, the "drop" experienced by the chickens in E3 is not able to achieve this result. This result, however, is obtained in E3 by the use of turntables.

Since, according to E1, the drum system of E1 already achieves the expected result (to have all chickens facing the same direction) whereas in the system disclosed in E3 it is the use of turntables which achieves that result, the Board considers that not only there is no incentive to simply delete the drum system, but that at most a skilled person could be guided to replace the rotating drum of E1 by a system of turntables according to E3. Anyway, a system without a rotating drum or without turntables is neither disclosed nor suggested in the state of the art.

5.11 Concerning the documents E4 to E11

Documents E4 to E8 referred to in the written proceedings show apparatuses in which successive conveyor belt sections are used. None of these documents comprises a reference to the positioning of poultry in the way as described by the patent.

Thus, since none of these documents is concerned with the problem of having all the chickens facing in the same direction, there is no reason for a skilled person to consider these documents in order to solve the problem of the patent in suit.

Documents E9 and E10 were cited by the appellant as evidence to what a skilled person in the field of handling technologies concerning live poultry, is aware of. Thus, they are not intended to challenge the patentability of the claims of the patent in suit and indeed, they are not concerned with the problem of having all the chickens facing the same direction.

Document E11 shows a series of conveyor-belts, where the downstream end of each conveyor-belt section is located above the upstream end of the following conveyor-belt section. However, E11 is not concerned with the problem of having all the chickens facing the same direction and remains silent about said problem.

Thus, there is no reason for a skilled person to consider one of the documents E4 to E11 on its own or in combination, let alone to take into account the parameters "conveyor speed" and "dropping height", in order to solve the problem of the patent in suit.

5.12 Therefore, the Board comes to the conclusion that the subject-matter of claim 1 and of claim 5 of the patent in suit involves an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries