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Datasheet for the decision of 9 December 2008

Case Number: T 0824/06 - 3.3.09

Application Number: 95200081.8

Publication Number: 0667102

IPC: A23B 4/06

Language of the proceedings: EN

Title of invention:
Method and device for preserving the meat of a slaughtered bird

Patentee:
STORK PMT B.V.

Opponent:
AIR PRODUCTS AND CHEMICALS, INC.
Meyn Food Processing Technology B.V.

Headword:
-

Relevant legal provisions:
EPC Art. 123, 83, 111
EPC R. 111

Relevant legal provisions (EPC 1973):
-

Keyword:
"Substantial procedural violation - no"
"Main request: added subject-matter - yes"
"First auxiliary request: sufficiency - yes"
"Remittal for further prosecution"

Decisions cited:
T 0301/87

Catchword:
-

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Case Number: T 0824/06 **-** 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 9 December 2008

Appellant: (Patent Proprietor)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 29 March 2006 revoking European patent No. 0667102 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Kitzmantel
Members: J. Jardón Álvarez
M-B. Tardo-Dino

Summary of Facts and Submissions

I. The grant of European patent No. 0 667 102 in respect of European patent application No. 95200081.8 in the name of STORK PMT B.V., which had been filed on 13 January 1995, was announced on 16 April 2003 (Bulletin 2003/16) on the basis of ten claims. Claim 1 read as follows:

"1. Method for preserving the meat of a slaughtered chicken or part thereof, **characterized by** the following successive steps:

(1) cooling of the slaughtered chicken or the part thereof in no more than 0.5 hour until the core temperature of the meat is lower than the temperature at which heat shortening occurs; and
(2) cooling of the slaughtered chicken or the part thereof in no more than 2 hours, in the course of which the core temperature of the meat remains higher than the temperature at which cold-shortening occurs;

during which successive steps the surface of the chicken or part thereof is cooled to such a temperature that the germ counts of the decay-causing and pathogenic microorganisms remain below a predetermined value."

Claims 2 to 10 were dependent claims.

II. Two Notices of Opposition requesting the revocation of the patent in its entirety on the grounds of

Article 100(a) EPC, for lack of novelty and inventive step, Article 100(b) EPC for lack of sufficient disclosure and Article 100(c) EPC for subject-matter which extended beyond the content of the application as originally filed were filed against this patent by:

AIR PRODUCTS AND CHEMICALS, INC. (Opponent 01) on 15 January 2004, and by

Meyn Food Processing Technology B.V. (Opponent 02) on 16 January 2004.

During the opposition proceedings *inter alia* the following documents were cited:

O1: C.M. Papa *et al.*, "MARKETING AND PRODUCTS, Effect of Aging Temperature on Broiler Breast Meat"; Poultry Science 1988, 67, pages 1147 - 1153

O2: A.A. Dunn *et al.*, "Effect of *Post-Mortem* Temperature on Chicken *M. Pectoralis Major*: Muscle Shortening and Cooked Meat Tenderness"; British Poultry Science 1993, 34, pages 689 - 697 and

O10: D. de Fremery *et al.*, "Biochemistry of Chicken Muscle as Related to *Rigor Mortis* and Tenderization" Food Research 1960, 25, pages 73 - 87.

III. By its decision announced orally on 16 February 2006 and issued in writing on 29 March 2006 the Opposition Division revoked the patent.

This decision related to four requests: a main request, a first and a second auxiliary request all filed with letter of 16 December 2005, and a third auxiliary request filed on 16 February 2006 during the oral proceedings before the Opposition Division.

The Opposition Division revoked the patent because in its opinion the subject-matter of Claim 1 of the main request did not fulfil the requirements of Article 123(2) EPC, the first and second auxiliary request did not fulfil the requirements of Article 83 EPC and the subject-matter of Claim 1 of the third auxiliary request did not fulfil the requirements of Article 123(3) EPC.

Concerning the main request the Opposition Division found that the feature of Claim 1 specifying a maximum temperature of 15°C separately for the first and the second cooling step was not supported by the application as originally filed, which indicated this value only for the overall cooling process.

Concerning the first and the second auxiliary requests, the Opposition Division concluded that they did not fulfil the requirements of sufficiency of disclosure, essentially because the patent specification did not provide sufficient guidance for the skilled person to derive which temperatures should be used for the two cooling steps, especially for the second cooling step.

IV. On 22 May 2006 the Patent Proprietor (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day.

With the Statement of Grounds of Appeal filed on 3 August 2006, the Appellant filed sets of amended claims for a main request and three auxiliary requests and requested that the compliance of the claims of the main or the auxiliary requests with the Articles 123, 83 and 84 EPC be acknowledged and the case be remitted to the Opposition Division for further prosecution.

Claim 1 of the main request read as follows:

"1. Method for preserving the meat of a slaughtered chicken or part thereof, characterized by the following successive cooling steps:

(1) a first cooling step performed in a first cooling zone in which the slaughtered chicken or the part thereof is moistened and placed in a cold air stream for no more than 0.5 hour until the core temperature of the meat is lower than the temperature at which heat shortening occurs; and

(2) a second cooling step performed in a second cooling zone in which the slaughtered chicken or the part thereof is placed in cold air for no more than 2 hours, in the course of which the core temperature of the meat remains higher than the temperature at which cold-shortening occurs;

during which first cooling step the temperature of the surface of the chicken or part thereof is brought to a maximum of 15°C, in particular to a maximum of 12°C, for keeping the germ counts of the decay-causing and pathogenic micro-organisms remain below a predetermined value, and during which second cooling step the temperature of the surface of the chicken or part thereof is brought to a maximum of 15°C, in particular to a maximum of 12°C, for keeping the germ counts of

the decay-causing and pathogenic micro-organisms remain below a predetermined value,
the first and the second cooling steps being in the processing line, the first cooling step following a step of making oven-ready of the chicken, and the second cooling step being followed by a step of jointing the chicken."

Claim 1 of the first auxiliary request read as follows:

"1. Method for preserving the meat of a slaughtered chicken or part thereof, characterized by the following successive cooling steps:

(1) a first cooling step performed in a first cooling zone in which the slaughtered chicken or the part thereof is moistened and placed in a cold air stream for no more than 0.5 hour until the core temperature of the meat is lower than the temperature at which heat shortening occurs; and

(2) a second cooling step performed in a second cooling zone in which the slaughtered chicken or the part thereof is placed in cold air for no more than 2 hours, in the course of which the core temperature of the meat remains higher than the temperature at which cold-shortening occurs;

during which successive steps the temperature of the surface of the chicken or part thereof is brought to a maximum of 15°C, in particular to a maximum of 12°C, for keeping the germ counts of the decay-causing and pathogenic micro-organisms remain below a predetermined value,
the first and the second cooling steps being in the processing line, the first cooling step following a step of making oven-ready of the chicken, and the

second cooling step being followed by a step of jointing the chicken."

V. By letter dated 29 August 2006, Respondent 01 (Opponent 01) requested that the comments made in its letter of 15 January 2004 be considered during the appeal proceedings and informed the Board that it did not intend to file further submissions in respect of the appeal.

VI. By letter dated 1 February 2007, Respondent 02 (Opponent 02) disputed all the arguments submitted by the Appellant and requested that the appeal be dismissed. It further supported the request of the Appellant that in the event that the decision was set aside, the case be remitted to the Opposition Division for further prosecution.

VII. On 22 April 2008 the Board dispatched the summons to attend oral proceedings. In a communication dated 19 June 2008 the Board drew the attention of the parties to the points to be discussed during the oral proceedings. It also drew Respondent's 01 attention to the requirements of Article 12(2) RPBA with respect to the form of the parties submissions before the Board of Appeal.

VIII. Oral proceedings were held on 9 December 2008 in the absence of Respondent 01. It had informed the Board by letter dated 4 November 2008 that it would not be attending the oral proceedings.

IX. The arguments presented by the Appellant may be summarized as follows:

– The Appellant argued that the feature in Claim 1 of the main request indicating that during the first cooling step the temperature of the surface of the chicken was brought to a maximum of 15°C fulfilled the requirements of Article 123(2) EPC as it could be unambiguously derived from Claim 6 as originally filed, this claim itself referring back to Claim 1. Claim 6 specified the term "such temperature" as used in Claim 1 of the application to be a maximum of 15°C. This was confirmed by the sentence on page 4, lines 1 to 5 of the description which indicated that the temperature of the surface of the bird was brought to a maximum of 15°C in order to keep the numbers of decay-causing and pathogenic micro-organisms within acceptable limits. This disclosure should be understood as referring to the temperature to be maintained during the whole cooling process and not the temperature at the end of the process.

– Moreover the amendment "for no more than 2 hours" for the second cooling step found a clear basis in Claim 14 as originally filed as well as on page 5, lines 1 to 3 of the description specifying the duration of the cooling steps when chicken was used.

– Concerning Article 83 EPC the Appellant maintained that the reason given by the Opposition Division, namely that no value was given in the specification for the core temperature at which cold-shortening occurs, was wrong because the specification as originally filed clearly

indicated that for "freshly slaughtered poultry this value was approximately 10 to 12°C" (page 2, lines 27 - 28). Concerning the apparent contradiction in Claim 1 indicating that the core temperature should remain higher than the temperature at which cold-shortening occurred and the information in the specification that after the second cooling step the temperature of the meat was lower than 10°C (page 3, lines 25 - 27), preferably lower than 6°C (page 4, lines 12 - 16), the Appellant pointed out that this was due to the fact that the temperature at which cold-shortening occurred was not a constant value but changed, i.e. dropped with time. The temperature value given for freshly slaughtered poultry in the specification was then the starting value for the skilled person's exercise who at the same time was aware that this phenomenon (lowering of the temperature at which cold-shortening occurs) was *inter alia* the consequence of the gradual *post mortem* decrease of the pH value (see for instance O10, figures 2 and 7). Thus, the skilled person was given the information in the specification that the second cooling step should not be carried out too fast and that if nevertheless cold-shortening did occur he would know how to modify the process by further reduction of the cooling rate in order to arrive at the desired tenderness of the meat.

X. The arguments presented by Respondent 02 in writing and at the oral proceedings may be summarized as follows:

– Respondent 02 pointed out that the written decision did not reflect some of the Opposition

Division's intermediate decisions during the hearing, and in particular the lack of any reasoning concerning the rebuttal of its objections under Article 84 EPC against the first and second auxiliary requests placed an undue burden on the Opponent/Respondent to contest the decision and amounted to a substantial procedural violation.

– It considered that the subject-matter of Claim 1 of all the requests did not fulfil the requirements of Article 123(2) EPC because the amendment concerning a maximum cooling time of two hours for the second cooling step was contrary to the clear teaching of the original application. Although it accepted that the value "no more than two hours" was explicitly mentioned in the application as originally filed for chickens, it argued that the general teaching of the application suggested that the second cooling step took at least approximately two hours. The amended claim now covered a duration between 0 minutes and 120 minutes embracing thus a fast cooling of the chicken that was not supported by the application as originally filed.

– Concerning sufficiency of disclosure it argued that the patent specification was devoid of any clear positive teaching which would enable the person skilled in the art to know when he was operating within the scope of the claims. It noted that several terms such as 'heat-shortening', 'core temperature', 'predetermined value', etc. used in the specification and the claims lacked

clarity making the teaching of the invention insufficiently clear and complete for it to be carried out by a person skilled in the art.

– It stressed by reference to O1 and O2 that there was uncertainty in the prior art concerning the extent to which cold-shortening occurred in poultry meat, the phenomenon of cold-shortening being very complex; consequently the skilled person was at a loss to react in a systematic way if cold-shortening happened.

– Moreover the specification was of no help to the skilled person, as it was contradictory. There was no disclosure in the description of how to simultaneously keep the core temperature at the end of the second cooling step higher than the temperature at which cold-shortening occurred, namely 10-12°C, and at the same time arrive at the end of the second cooling step at a core temperature lower than 10°C, preferably lower than 6°C.

XI. The Appellant requested that the decision under appeal be set aside. It requested further that the compliance of the claims of the main or any of the auxiliary requests 1 to 3 filed on 3 August 2006 with the requirements of Articles 123, 83 and 84 EPC be acknowledged and that the case be remitted to the Opposition Division for further prosecution.

Respondent 01/Opponent 01 did not file any request during the appeal proceedings.

Respondent 02/Opponent 02 requested that the appeal be dismissed, alternatively that, in the case that the decision under appeal be set aside, the case be remitted to the Opposition Division for further prosecution.
It maintained during oral proceedings its allegation of substantial procedural violation based on the Opposition Division's failure to deal in its written decision with its objections under Article 84 EPC against the first and second auxiliary requests.

Reasons for the Decision

1. The appeal is admissible.

2. *Procedural matters*

2.1 The Board notes that the allegation made by the Respondent 02 of a substantial procedural violation committed by the Opposition Division boils down to the request that the Board condemns this conduct on the basis of an alleged general principle of European Law, according to which each and every objection of a party should be dealt with in a final written decision irrespective of whether such objection was decisive for the relevant decision. In the present case this observation relates to Respondent O2's Article 84 EPC objections, which in its opinion should have been commented upon, irrespective of the fact that it was successful with regard to its overriding request for revocation of the patent.

2.2 The Board does not agree to this position. The fact that the Opposition Division did not specify why in its opinion the requirements of Article 84 EPC were met did not deprive the Respondent of any right and no grievance can be seen: it obtained before the department of first instance the requested revocation of the patent and did not lose thereby its entitlement to pursue its Article 84 EPC objections before the boards of appeal in the event the Patentee appealed, as happened. Indeed the Opponent/Respondent availed itself of the opportunity to resubmit its points of view concerning Article 84 EPC as well as Article 83 EPC.

2.3 In conclusion on this point, the Board adds that the requirement of Rule 111 EPC according to which the decisions of the EPO must be reasoned is to be understood in accordance with its aim. The department making the decision must give the reasons supporting its decision; this does not mean that it has to deal with arguments and/or grounds not relevant for the decision. The Board is not aware of any European regulation requiring it to act otherwise.
(cf. Article 125 EPC)

2.4 From the above, the Board concludes that the Opposition Division did not commit any substantial procedural violation.

MAIN REQUEST

3. *Amendments (Article 123 EPC)*

3.1 Claim 1 of the main request is based on Claim 1 as originally filed but limited to the preserving of a

slaughtered chicken in accordance with Claim 14 as filed. It further specifies the nature of the cooling treatment (support page 3, lines 12 - 24 for the first cooling step and page 3, lines 25 - 36 for the second cooling step), the duration of the treatment (support Claim 14 as filed; see also page 5, lines 1 - 3), the temperature of the surface of the chicken during both cooling steps (see Claim 6) and the position of the cooling steps within the general preserving method (support figure and the associated description on page 5, lines 32 - 36 and page 6, lines 23 - 25).

3.2 The Opposition Division rejected the main request because the subject-matter of its Claim 1 included a maximum for the temperature of the surface of the chicken of 15°C separately for the first and the second cooling steps, this amendment not being supported by the application as originally filed, according to which this temperature maximum was only disclosed in relation to the overall cooling treatment and was not specifically associated with both the first and the second cooling step.

3.3 The Board agrees with this conclusion of the Opposition Division. The application as originally filed is silent about the temperature of the surface of the chicken or part thereof during the separate cooling steps. The application only mentions that "during which first and second cooling steps the surface of the bird of part thereof is cooled to such a temperature that the germ counts of the decay-causing and pathogenic micro-organisms remain below a predetermined value" (see Claim 1). It further specifies in Claim 6 and on page 4, lines 1 to 5 that "the temperature of the surface of

the bird or part thereof is **brought** - emphasis by the Board - to a maximum of 15°C. This indication that the temperature is "brought" to a maximum of 15°C can be understood as being the result of the overall process and not as a requirement for each individual cooling step.

3.4 The Appellant argued essentially that the application as originally filed did not specifically indicate that the value of the temperature of the surface was that obtained after conclusion of the whole cooling process. Moreover, reducing the surface temperature to a maximum of 15°C during the first cooling step would be reasonable because in order to achieve a rapid cooling of the core of the chicken, i.e. a fast heat transfer, it was necessary to cool the surface to appropriately low temperatures.

3.5 The Board agrees with the Appellant that this interpretation is reasonable and would even be within the scope of the disclosure of the application as originally filed. However this is not a sufficient criterion for the allowability of an amendment; indeed for an amendment to be allowable Article 123(2) EPC requires its direct and unambiguous disclosure; a reasonable plausibility is insufficient. This condition is not met here.

3.6 Claim 1 of the main request therefore does not fulfil the requirements of Article 123(2) EPC.

FIRST AUXILIARY REQUEST

4. *Amendments (Article 123 EPC)*

4.1 Claim 1 of the first auxiliary request corresponds to Claim 1 of the main request but having the amendment discussed above in relation to the main request replaced by the feature: "during which successive steps the temperature of the surface of the chicken or part thereof is brought to a maximum of 12°C".

This amendment overcomes the objection under Article 123(2) EPC which was responsible for the rejection of the main request because it fully conforms to the original disclosure (Claim 6; page 4, lines 1 to 5).

4.2 Respondent 02 objected to Claim 1 of the first auxiliary request in respect of the maximum cooling time of two hours for the second cooling step.

4.3 Respondent 02 did not dispute that the application as originally filed explicitly mentions that for chickens the second cooling step may take "no more than about 2 hours" (page 5, line 3), but argued that in the light of the overall teaching of the application according to which the second cooling step should be slow and took at least two and at most five hours (Claim 1; page 3, lines 25 to 36) this specific statement must be interpreted to mean that for chickens the second cooling step should be carried out slowly and for "approximately two hours". Since the second cooling step of Claim 1 of the first auxiliary request was not restricted either to slow cooling or to a lower limit of "approximately two hours", but allowed fast cooling for any duration between 0 and 120 minutes, it contravened Article 123(2) EPC.

4.4 The Board cannot accept these arguments of Respondent 02. The amendment finds its explicit basis in the application as originally filed (see also Claim 14) from which the wording has been taken. The statement in the application as originally filed on page 3, lines 25 to 26 relates to a preferred embodiment within the broader scope of the application as originally filed directed to birds in general (including turkeys which, due to their size, require longer cooling times); there is thus no contradiction to the statement that for chickens, to which the current claims are now restricted, the second cooling step takes no more than two hours.

The Board also disagrees with the argument that the subject-matter of amended Claim 1 allows a fast cooling not covered by the original application. Amended Claim 1 requires that during the second cooling step "the core temperature of the meat remains higher than the temperature at which cold-shortening occurs". According to page 2, lines 23 - 27 of the description as filed cold-shortening is a contraction of muscles which occurs if the meat is cooled too rapidly. Consequently, this functional feature ensures that only a 'slow' cooling is covered by the amended claim. In this respect the Board accepts the argument presented by the Appellant, supported by the evidence in the citations, e.g. O10, that the temperature at which cold-shortening occurs is not a constant value, but is highest immediately after slaughtering and becomes lower in proportion to the biochemical phenomena occurring *post mortem*. The prevention of cold-shortening thus requires a cooling rate slow enough to accommodate these biochemical processes.

4.5 Additionally, the amendments made clearly restrict the scope of the claims.

4.6 The subject-matter of the claims of the first auxiliary request therefore fulfils the requirements of Article 123(2) and (3) EPC.

5. *Article 84 EPC*

5.1 When amendments are made to a patent during opposition, Article 101(3) EPC requires consideration to be given as to whether the amendments introduce any contravention of any requirement of the Convention, including Article 84 EPC. However Article 101(3) EPC does not allow objections to be based upon Article 84 EPC, if such objections do not arise out of the amendments made (see decision T 301/87, OJ 1990, 335, point 3.8 of the Reasons).

5.2 Concerning Article 84 EPC in the present case the Respondent argues that the terms "heat-shortening" and "core temperature" are unclear. It argues further that several expressions used in the claims ("the temperature of the surface of the chicken or part thereof is brought to a maximum of 15°C, in particular to a maximum of 12°C", "the temperature of the surface of the chicken is selected at a value for keeping the germ counts of the decay causing and pathogenic micro-organisms remain below a predetermined value", etc.) are unclear, inconsistent and contradictory to the description.

5.3 The terms and expressions objected to by the Respondent were already in the granted claims (see granted claims 1, 4, 5 and 10) and consequently these objections have no connection with the amendments made. They cannot be objected to under Article 84 EPC at this stage of the proceedings.

6. *Sufficiency of disclosure (Article 83 EPC)*

6.1 The patent relates to a method for preserving the meat of a slaughtered chicken or a part thereof. The invention aims to obtain a tender product in a relatively short time, in which contraction phenomena are avoided. To achieve this object the method encompasses two different cooling steps. In the first cooling step the chicken is moistened and placed in a cold air stream for no more than 0.5 hours "*until the core temperature of the meat is lower than the temperature at which heat-shortening occurs*" and a second cooling step in which the chicken is placed in cold air for no more than 2 hours, "*in the course of which the core temperature of the meat remains higher than the temperature at which cold-shortening occurs*".

Thus in both steps the final temperature to be achieved is defined in functional terms, that is to say by the result to be achieved.

6.2 Although not specifically disclosed in the patent in suit, it is not disputed that it can easily be verified in a shear test whether the claimed method renders a tender product or not, that is to say if heat or cold-shortening has taken place.

The question to be answered in relation to sufficiency of disclosure is thus whether the patent specification provides sufficient guidance for the skilled person, being aware of the general common knowledge in this field, to derive for each cooling step the temperatures which fulfil these requirements, that is to say the temperatures at which heat-shortening and cold-shortening is suppressed.

6.3 The Board is satisfied that this is indeed the case for the following reasons:

6.3.1 The terms "heat-shortening" and "cold-shortening" are well known in the field. Additionally, they are explained in the specification. Thus, according to paragraph [0008] heat-shortening is caused by a disturbance of the normal enzyme action in the muscle tissue, as a result of which the energy conversion occurs in an uncontrolled manner; cold-shortening is a muscle contraction which occurs if the meat is cooled too rapidly to below a temperature which depends on the type, mass and acidity of the meat of the slaughtered bird.

Turning now to the first cooling step, the specification in paragraph [0013] indicates that for avoiding the occurrence of heat-shortening the bird is placed in a cold air stream until the core temperature of the meat is lower than 25°C. In order to achieve such a core temperature the conditions of the air stream and moisture exposure must of course be adapted to the size of the bird to be cooled; it is evident that for big birds (turkeys) they must be more stringent than for smaller chickens. Finding out the

appropriate conditions when starting off with a meat temperature of about 40°C (or somewhat higher due to scalding) in order to get down to a final core temperature of approximately 25°C (the temperature above which heat-shortening can occur) or lower in no more than 0.5 hours is however a matter of simple routine experimentation.

6.3.2 Concerning the second cooling step, the patent gives the following guidance:

- the second cooling step takes no more than two hours ending when the core temperature of the meat is lower than 10°C, in order to avoid the occurrence of cold-shortening [0011],

- for freshly slaughtered poultry the temperature at which cold-shortening happens is approximately 10 to 12°C [0008], and

- in the second cooling step undesirable muscle contraction is effectively prevented by allowing sufficient cooling time for the acidity of the meat to fall in below a critical value [0010].

Thus, the skilled person is again given the necessary information to put this second cooling step into practice by mere routine experimentation. This second cooling step starts with a meat having a core temperature lower than approximately 25°C (after the first cooling step) which is then placed in cool air for no more than 2 hours while maintaining its core temperature higher than the temperature at which cold-shortening occurs, this temperature being 10-12°C for

the freshly slaughtered poultry, until the core temperature is sufficiently low, e.g. lower than 10°C, preferably lower than 6°C (paragraphs [0011] and [0016]). If during this second cooling step cold-shortening happens, the skilled person knows from paragraph [0010] as well as from his general common knowledge how to avoid this, namely by extending the cooling time up to a maximum of two hours (see also point 6.3.1. above).

6.4 The Opposition Division pointed out that the biochemical processes underlying heat- and cold-shortening during *rigor mortis* are very complex as they depend on temperature, cooling time and meat acidity and thus put an undue burden on the skilled person when he has to decide which temperature should be applied for the respective cooling steps, especially the second cooling step.

However, in the Board's judgment this complexity does not hinder the skilled person from putting the invention into practice. The skilled person is not required to understand the reasons why cold-shortening happens in order to measure it, this being done by measuring the tenderness of the meat. The information required by the skilled person to carry out the claimed process is merely that, if cold-shortening happens during cooling, this shortening can be avoided by increasing the cooling time.

6.5 For the same reasons the Board cannot accept the arguments of the Respondent 02, relying on O1 (page 1147, left column, last paragraph) and O2 (page 691, last paragraph), that there is in the

literature uncertainty concerning the extent to which cold-shortening occurs in poultry meat. As just explained the skilled person would know from the evaluation of initial failures (on "test chickens"), how to react in order to transform the initial failure into success.

6.6 As to the argument of Respondent 02 that there is contradictory information in the specification concerning the core temperature at the end of the second cooling step in that, at the one hand in order to prevent cold-shortening it must not be lower than approximately 10 to 12°C and on the other it should be lower than 10°C, preferably lower than 6°C, and that for that reason the claimed invention could not be carried out, it is answered by the fact referred to above on several occasions, namely that the temperature at which cold-shortening sets in is not a fixed value but decreases according to the biochemical processes occurring *post mortem*.

6.7 There is also no sufficiency problem related to the preferred embodiment of Claim 8, according to which the chicken is killed in an atmosphere which is high in carbon dioxide gas and the description requiring a certain acidity as argued by the Respondent 02. Indeed the use of carbon dioxide causes acidification of the tissues (see [0017]) and thus accelerates the (normally slow) *post mortem* falling of the pH of the meat (see [0010]) which is one of the parameters leading to a (desired quicker) drop of the cold-shortening temperature. The respective statements in the specification are therefore not contradictory and are

in line with the skilled person's general common knowledge.

6.8 For these reasons and in the absence of pertinent contrary evidence the Board considers that the requirements of Article 83 EPC are fulfilled.

7. *Remittal (Article 111 EPC)*

7.1 In view of the above findings, the Board concludes that the claims of the first auxiliary request fulfil the requirements of Articles 83 and 123 EPC.

7.2 The patent in suit was revoked for lack of compliance of the first auxiliary request with the requirements of Article 83 EPC. The Opposition Division has not yet taken a decision on the other patentability issues raised by the Opponents, namely novelty (Article 54 EPC) and inventive step (Article 56 EPC).

7.3 The Appellant has requested the remittal of the case to the Opposition Division for further consideration of these issues. Respondent 02 supported this request of the Appellant and Respondent 01 did not object to such remittal.

7.4 Under these circumstances, the Board considers it appropriate to exercise its discretion under Article 111(1) EPC to refer the case back to the Opposition Division for further prosecution.

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 on the basis of Claims 1 to 8 of the first auxiliary request filed with the Statement of Grounds of Appeal and of the specification as granted with the amendment (page 2) filed during the oral proceedings.

The Registrar: The Chairman:

K. Götz P. Kitzmantel