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**Datasheet for the decision
of 14 October 2008**

Case Number: T 1867/07 - 3.2.04

Application Number: 01974059.6

Publication Number: 1434489

IPC: A22B 5/20

Language of the proceedings: EN

Title of invention:

Control means for an apparatus for the splitting along the symmetrical plane of slaughtered animals and method and apparatus

Applicant:

SFK Systems A/S

Headword:

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Relevant legal provisions:

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Relevant legal provisions (EPC 1973):

EPC Art. 54(1), 84, 113(1)

EPC R. 71(2)

RPBA Art. 15(3)

Keyword:

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Decisions cited:

T 1704/06

Catchword:

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Case Number: T 1867/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 14 October 2008

Applicant: SFK Systems A/S
Appellant: Albuen 37
DK-6000 Kolding (DK)

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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 4 June 2007
refusing European application No. 01974059.6
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. Scheibling
Members: A. de Vries
C. Heath

Summary of Facts and Submissions

- I. This appeal is against the decision of the Examining Division dated 4 June 2007 to refuse the patent application. The Examining Division considered that the subject-matter of claim 1 was not novel with respect to D1: DK-B-144 551. The Appellant's notice of appeal was received on 18 July 2007 and the appeal fee was paid simultaneously; the statement setting out the grounds of appeal was received on 1 October 2007.

- II. Oral proceedings took place on 14 October 2008 before the Board of Appeal.
With letter dated 3 October 2008, the Appellant (applicant) informed the Board that he would not attend the oral proceedings, which were held in his absence according to Rule 71(2) EPC 1973.

- III. The Appellant requested in writing that the decision under appeal be set aside and that a patent be granted in the version of the amended claims 1 to 10 filed with letter dated 10 September 2008.

The Appellant mainly argued as follows:

The subject-matter of claim 1 is novel with respect to D1 since this document does not teach to remove the skin of the animal and parts of underlying tissue in the back area opposite the spinal column so that the surface of the control element could rest directly against the spinal column. Independent claim 6 has been amended to specify the distance between the two control elements. D1 does not disclose this specific parameter.

IV. Claims 1 and 6 read as follows:

"1. Method for the splitting along the symmetrical plane of a slaughtered animal by using a cutting tool, preferable comprising a saw blade, wherein the position of the saw blade is controlled by control means (1), comprising at least two substantially identical control elements (2), (3), positioned on opposite sides of the saw blade, said control elements being in engagement with the opposite sides of the spinal column of the animal during the splitting operation, characterised in that before the splitting, the skin of the animal and parts of underlying tissue are removed at least in the back area opposite the spinal column by means of a cutting means, and that the control elements (2), (3) are brought into direct engagement with the spinal column (9) of the animal on each side of the spinous processes (4) which are cut free from the back side, so that parts of the surface (20) of the control element rest directly against the spinal column."

"6. Apparatus for the splitting along the symmetrical plane of slaughtered animals, for executing the method according to claims 1 - 5, comprising saw blade/splitting knives for the implementation of the symmetrical splitting, and comprising control means for use during the symmetrical splitting, said control means (1) comprising at least two and substantially identical control elements (2), (3), being disposed substantially opposite each other, and that each control element comprises a surface (20) for engagement against the animal's spinal column (9), characterised in that in relation to the saw blade (5) is the distance between

the two control elements, (2), (3) in the order of 5-10 mm, preferably 7 mm."

Reasons for the Decision

1. The appeal is admissible.
2. *New set of claims:*
 - 2.1 In his letter dated 10 September 2008 the Appellant stated "As a result of the Board of Appeal's observations of 12 June 2008 and prior to the oral proceedings on 14 October 2008 we hereby send amended claims in the above matter".
The Board understands this statement to mean that the previous requests were withdrawn and that the new set of claims should be considered as the sole request on file.
 - 2.2 The characterising part of independent claim 6 reads as follows: "in relation to the saw blade (5) is the distance between the two control elements, (2), (3) in the order of 5-10 mm, preferably 7 mm."
Apart from including an obvious error in word order ("is" is in the wrong place), the amendment to the characterising part of claim 6 introduces a lack of clarity. The control elements and the saw blade are different independent parts and the distance between the two control elements is in no relation to the saw blade at all. Consequently, the expression "in relation to the saw blade (5) is the distance" is unclear, contrary to Article 84 EPC 1973.

2.3 Furthermore, the Board considers that the new feature introduced into claim 6, i.e. that the distance between the two control elements is in the order of 5 to 10 mm, even if it were able to restore novelty would not render the claimed subject-matter inventive.

Indeed, it is clear from D1 that the guide wheel is divided in two (see translation of D1 page 4, lines 5 and 6 of the second paragraph) to provide guidance by abutting against the spinous process (see Figure 2) and further (see translation, page 5, last sentence of the description) it is stated: "... the farthest ends of the spinous processes on the back bone can be removed completely, and the guide roller can then have a peripheral part that is set to grip the spinous process and thus guide it directly".

However, in order to grip the spinous processes of a pig or to be guided by them, the distance between the two control elements must be close to that of the spinous processes themselves and is thus likely to lie within the claimed range. According to page 8 of the application as filed, lines 11 to 14, the preferred value of this range - 7 mm - is chosen for this very same reason "that it corresponds to the breadth of a spinous process".

3. *Procedural matters:*

3.1 Claim 6 according to the new main request was submitted about one month before the date of the oral proceedings before the Board, and with letter of 3 October 2008 the Appellant announced that he would not attend the oral proceedings. Indeed, the Appellant was not represented at the hearing. In view of the requirements of

Article 113(1) EPC 1973 (the right to be heard), the Board had to consider at the oral proceedings whether it was in a position to decide on claim 6 in respect of clarity, an issue that had certainly not been raised by the Board before, but that had arisen now due to the amendment of the claims on file.

3.2 Article 15(3) of the Rules of Procedure of the Boards of Appeal reads:

"The Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case".

3.3 The explanatory notes to this Article state the following (CA/133/02 dated 12 November 2002, available at the EPO web site):

"This provision does not contradict the principle of the right to be heard pursuant to Article 113(1) EPC since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity".

3.4 In the decision T 1704/06, the Board referred to the above passage and held that: "In the situation where an appellant submits new claims after oral proceedings have been arranged but does not attend these proceedings, a board can refuse the new claims for substantive reasons, specifically lack of inventive step, even if the claims have not been discussed before and were filed in good time before the oral proceedings. This will in particular be the case if an examination of these

substantive requirements is to be expected in the light of the prevailing legal and factual situation."

3.5 The present Board concurs with this view. A duly summoned party who by its own volition is absent at oral proceedings cannot be in a more advantageous position than this party would have been, had it been present. In the case at issue, the appellant had to expect a discussion on the formal and substantive issues of his newly filed set of claims during oral proceedings. The voluntary absence of the appellant cannot be a reason for the board not to raise issues it could have and would have raised had the appellant been present, and to decide accordingly.

3.6 It follows that the Board is in a position to take a decision on the request on file. The request is not admissible, because claim 6 does not fulfil the requirements of clarity under Article 84 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The registrar:

The Chairman:

G. Magouliotis

C. Scheibling