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**Datasheet for the decision
of 1 July 2010**

Case Number: T 2249/08 - 3.2.04

Application Number: 03078505.9

Publication Number: 1413204

IPC: A22C 21/06

Language of the proceedings: EN

Title of invention:

Method and device for processing a slaughtered bird prior to the removal of viscera from the bird

Patentee:

STORK PMT B.V.

Opponent:

Meyn Food Processing Technolgy B.V.

Headword:

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Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 100(a)

Keyword:

"Novelty - all requests (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 2249/08 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 1 July 2010

Appellant: Meyn Food Processing Technology B.V.
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
11. November 2008 concerning maintenance of the
European patent No. 1413204 in amended form.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Scheibling
T. Bokor

Summary of Facts and Submissions

- I. In its interlocutory decision posted 11 November 2008, the Opposition Division found that, taking into consideration the amendments made by the patent proprietor, the European patent and the invention to which it relates met the requirements of the EPC. On 1 December 2008 the Appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 3 March 2009.
- II. The patent was opposed on the grounds based on Article 100(a), (b) and (c) EPC.
- III. The following documents played a role in the present proceedings
- D2: GB-A-1 321 203
D3: Translation into English of NL-A-7 100 142
D7: Photographs of entrails packages and eviscerated carcasses obtained by the invention and the prior art.
- IV. Oral proceedings before the Board took place on 1 July 2010.

The Appellant (Opponent) requested that the decision under appeal be set aside, the patent be revoked and the appeal fee be reimbursed.

He mainly argued that the subject-matter of claim 1 of the main request and of auxiliary requests 1 to 3 was not novel with respect to either D3 or D2.

During the oral proceedings the Appellant submitted that the opposition division committed a substantial procedural violation justifying the reimbursement of the appeal fee, in that the division refused to admit the novelty objection based on D3 into the proceedings, the grounds for this refusal being plainly wrong in fact and in law.

The Respondent (Patentee) contested the arguments of the Appellant and submitted that:

The aim of D2 and D3 is to remove all the inner organs without damaging them. There is no clear and unambiguous disclosure that in D2 or D3 the connections between the belly fat situated on the inside of the belly skin and the stomach are broken. On the contrary from the Figures together with the description it becomes clear that the spatula is moved between the belly fat and the carcass in order to remove as much belly fat as possible.

The Respondent (Patentee) requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained on the basis of one of the auxiliary requests 1 to 3 filed with letter dated 1 June 2010.

V. Claim 1 held allowable by the Opposition division reads as follows:

"1. Method for processing a slaughtered bird prior to evisceration of the carcass of the bird, characterized in that tissue connections between the belly skin and the viscera are broken in such a way that tissue

connections between the belly fat situated on the inside of the belly skin and the stomach are broken."

Claim 1 of auxiliary request 1 adds with respect to claim 1 of the main request the following "in order to leave the belly fat attached to the carcass during subsequent evisceration, thereby increasing the weight yield of the eviscerated carcass".

Claim 1 of auxiliary request 2 is identical with claim of auxiliary request 1.

Claim 1 of auxiliary request 3 reads as follows
"1. Method for processing a slaughtered bird prior to evisceration of the carcass of the bird, characterized by
inserting a means for breaking the tissue connections between the belly skin and the viscera through a vent opening of the bird, and
breaking tissue connections between the belly skin and the viscera by the means for breaking the tissue connections in such a way that tissue connections between the belly fat situated on the inside of the belly skin and the stomach are broken, in order to leave the belly fat attached to the carcass during subsequent evisceration, thereby increasing the weight yield of the eviscerated carcass".

Reasons for the Decision

1. The appeal is admissible.

2. *Interpretation of the claims*

2.1 Meaning of the expression "tissue connections"

In his response to the grounds of appeal (see point 5) the Respondent stated "Likewise, the tissue connections are made from the same material as the belly fat, i.e. fat tissue."

This is in line with the photographs (D7) filed by the Respondent showing that not all belly fat is removed from the stomach, and which bear the statement that in comparison to the prior art "less fat remains attached to the eviscerated entrails".

Thus, "breaking tissue connections between the belly fat situated on the inside of the belly skin and the stomach" means severing the fat tissue which links the belly skin to the stomach.

2.2 Meaning of the expression "the belly fat"

The Respondent argued that the expression "the belly fat" has been used to stress that according to the claimed invention not the whole belly fat but "far more belly fat than in the prior art" remains attached to the carcass. However the difference between the prior art and the invention is merely a matter of degree in the division of how much belly fat remains attached to the carcass (a little amount in the prior art and much more belly fat in the invention) and how much belly fat remains attached to the eviscerated entrails, including

the stomach (more belly fat in the prior art and less belly fat in the invention).

The claims however are not limited to a method in which "far more belly fat than in the prior art" remains attached to the carcass so that this statement cannot be taken into account when considering novelty.

Furthermore, introducing this statement into the claimed method would only render it obscure, because there is in the prior art no established standard quantity of belly fat which remains attached to the carcass. Therefore, this statement would be of unclear limitative effect as regards the quantity of belly fat remaining attached and would be unable to distinguish the claimed invention from the prior art.

3. *Novelty of claim 1 of the main request*

- 3.1 From D3 (page 4, lines 9 to 21; claim 1; Figures 9 and 10) there is known a method for processing a slaughtered bird prior to evisceration of the carcass of the bird. To this effect a cutting organ is moved between the fat mass and along the stomach (page 4, lines 18 and 19). Claim 1 specifies that "one introduces through the thus obtained opening a broad, flat spatula along the inside of the breast membrane between the fat mass and the stomach..." Such an operation necessarily breaks the tissue connections between the belly skin and the viscera in such a way that tissue connections between the belly fat situated on the inside of the belly skin and the stomach are broken.

3.2 The Respondent argued that there is no clear disclosure of the path of the spatula in D3 because if it is introduced along the breast membrane it is necessarily located (with respect to figure 9) above the fat mass and thus cannot break the tissue connections between the belly fat and the stomach. Furthermore, a spatula and a hook located above the spatula are used in D3 to eviscerate the bird. However if the spatula would cut the tissue between the belly fat and the stomach, the hook could not be introduced because it would bump into the fat mass. Finally, it is stated in D3 that the hook takes along all the entrails from the bird (page 2, lines 29 to 31; page 7, lines 38 and 39; page 10 lines 25, 26) thus also the fat mass.

This point of view cannot be shared. On page 3, lines 4 to 7 of D3 it is stated that the hook follows the path inside the bird that was already prepared by the much wider spatula. Furthermore, D3 is the priority document of D2. So that both of them should in principle relate to the same invention. Figure 9a of D2 clearly shows how the spatula cuts through the fat mass (and not above it, the upper part of the fat mass being masked by the spatula 53 which follow the path 89) and moves along the breast membrane; whereas Figure 9b of D2 shows how the hook means (located above the spatula) follows the path 90 which is the same as that of the spatula through the cut in the fat mass and along the breast membrane. Thus, there is no doubt that the tools of D3 can be operated in the manner described therein. Regarding the statement of D3 that all entrails are removed from the bird, it is observed that the fat mass is usually not considered as part of the entrails. In this citation the entire mass that is removed from the

poultry is said to comprise the stomach, the heart, the liver, the lungs, the intestines and the crop (page 1, lines 2 to 4). There is thus no mention of the fat mass as being part of the entire mass either.

3.3 Accordingly, the subject-matter of claim 1 of the main request is not novel over D3.

4. *Novelty of claim 1 of auxiliary requests 1 and 2*

4.1 Claim 1 of auxiliary requests 1 and claim 1 of auxiliary request 2 are identical and add with respect to claim 1 of the main request the following feature "in order to leave the belly fat attached to the carcass during subsequent evisceration, thereby increasing the weight yield of the eviscerated carcass".

4.2 This additional feature only indicates the result to be achieved by the invention, which is to leave the belly fat attached to the carcass after evisceration so as to increase the weight yield of the eviscerated carcass. As already explained above, "the belly fat" does not mean the whole belly fat, but a certain part of it. This result is also achieved in D3, which therefore is still novelty destroying.

4.3 The Respondent submitted that this additional feature implies that there will be more belly fat remaining in a carcass after evisceration.

However, as has been explained, this meaning is not derivable from the claim itself and furthermore would be unable to distinguish the claimed method from the prior art, because there is no established standard

amount of belly fat remaining into the carcass of a bird after evisceration in the prior art method.

4.4 Consequently, the subject-matter of claim 1 of auxiliary requests 1 and 2 lacks novelty with respect to D3.

5. *Novelty of claim 1 of auxiliary request 3*

5.1 Claim 1 of auxiliary request 3 adds with respect to claim 1 of auxiliary request 2 the following steps

- inserting a means for breaking the tissue connections between the belly skin and the viscera through a vent opening of the bird, and
- breaking tissue connections by the means for breaking the tissue connections.

5.2 This additional method steps are likewise known from D3. According to claim 1 of D3 (lines 12 to 14) a broad, flat spatula is introduced through the thus obtained opening (which is the tail incision between tail piece and cloaca, page 4, lines 9, 10 and 15) along the inside of the breast membrane between the fat mass and the stomach up to the heart.

Since the spatula passes between the belly fat and the stomach it also passes between the belly fat and the viscera, because otherwise the spatula would have to travel between the stomach and viscera which would necessarily be damaged since they are connected to the stomach. This however would be contrary to the object of D3 (page 1, lines 17 and 18).

The afore mentioned operation of the spatula necessarily breaks the tissue connections between the belly fat and the viscera too.

5.3 Accordingly for the same reasons as those given in sections 3.1, 4.2 and 5.2 above, the subject-matter of claim 1 of auxiliary request 3 is not novel with respect to D3.

6. *Reimbursement of the appeal fee*

6.1 The opposition division held that "no opinion can be reached as to whether D3 is prima facie relevant or not and hence exercises discretion and decides not to allow the novelty objection based on D3 into the proceedings (Rule 116 EPC)." (see point 8.2 of the decision under appeal). Thus it is apparent that the opposition division exercised its discretion to disregard "facts and evidence" presented belatedly, i.e. after a final date in preparation for oral proceedings. Such discretionary decisions are normally not subject to review, unless the decision was based on the wrong principles or was otherwise manifestly unreasonable (see CLBA 5th edition (2006), Chapter VII.D.6.6). Thus any finding of a substantial procedural violation through a discretionary decision also presupposes such grave errors, as opposed to mere errors of judgement (see CLBA Chapter VII.D.15.4.5). Further, it is also required that the criticised discretionary decision was decisive for the outcome of the decision under appeal (see cases T 712/97, J 14/99, J 21/98 (OJ EPO 2000, 406), J 6/99, cited in CLBA Chapter VII.D.15.4.1)

6.2 In the present case the decision of the opposition division was reasoned with the following arguments:

- (a) no specific argumentation based on D3 with respect to lack of novelty ... had previously been submitted
- (b) throughout the written procedure no indication had been given that D3 might potentially be considered relevant for assessing novelty...
- (c) no full, uncontested translation of D3 being presented and the provided translation being ambiguous...
(see point 8.2 of the decision under appeal).

6.3 As to the arguments a) and b), the appellant submitted that D3 has been timely mentioned during the opposition procedure as being basis for a possible novelty attack. As to the argument c, pursuant to Rule 3(3) EPC, a party is not required to file a translation of a document being in a non-official language of the EPO, unless being explicitly invited to do so. In that case, the party must be given a reasonable time limit to file a translation. Given that document D3 has been in the proceedings from the very beginning, both the opposition division and the proprietor had ample opportunity to demand a translation, and the fact that a translation was filed only during the oral proceedings ought not have entailed adverse consequences for the opponent. Accordingly, the appellant maintained that the decision of the opposition division not to admit D3 into the proceedings for the question of novelty was manifestly wrong, amounting to a substantial procedural violation.

6.4 *Timeliness of D3 as a novelty attack on its own*

Document D3 was cited in the notice of opposition. The grounds for opposition were *inter alia* based on Article 100(a) EPC, explicitly mentioning lack of novelty and inventive step. The facts and arguments accompanying the notice of opposition (referred to as F&A) further explicitly dealt with documents D1 and D2 as both depriving novelty of the patent in suit. D3 is first mentioned in the passages dealing with inventive step, being identified as the priority document of D2 and cited to illustrate the purpose of the spatula employed in D2. As such, no independent novelty attack based on D3 *per se* is elaborated in the detailed grounds of opposition. On the contrary, it appears that the specific arguments for a novelty objection based on D3 were raised only in the oral proceedings. This is also illustrated by filing only during the oral proceedings a translation of the relevant parts of D3, see Annex I of the minutes from the oral proceedings.

6.5 However, as submitted by the appellant, point 26 of the F&A states: "In case ... [the claims were to be limited in a certain manner] ... , the Opponent would object to such a limitation in view of the fact that the same would not be novel and/or inventive in view of the cited documents D1-D3". In fact, the claims were limited in the auxiliary request as foreseen by the opponent. Thus at least formally, D3 has been indicated as novelty destroying even in case of a more limited claim, so that argument b, of the opposition division (see point 6.2 above) is unfounded. The validity of argument c, is equally questionable, as the wording of Rule 3(3) EPC explicitly permits parties to file

documents without translation. If doubts arise, the party must be given an appropriate time limit for filing the translation, which - when filed within the time limit - apparently cannot be regarded as late, and hence cannot be ignored. See Rule 3(3) EPC, last sentence: "*If a required translation is not filed in due time, the EPO may disregard the document in question.*" (emphasis added by the board).

6.6 That said, argument a) of the opposition division (see point 6.2 above) still has some merit even on its own. While it is true that arguments can normally be advanced at any stage of the proceedings (as opposed to new evidence, such as a new document), in the given case the new arguments could not have been verified by the opposition division without a translation. However, the possibility of demanding a translation as foreseen by Rule 3(3) EPC, but only at a relatively late stage, - e.g. due to an issue which arises only in oral proceedings - clearly contradicts with the need for the parties to have their case completely prepared for the oral proceedings so that the case may be ready for a decision (Rule 116 (1) in combination with Rule 111(1) EPC). The board notes that the Guidelines appear to be completely silent on the application of Rule 3(3) EPC, and the board is also not aware of any applicable case law. In the absence of clear guidelines in case of such a contradiction the opposition division cannot be reprimanded for having decided in a manifestly unreasonable manner or for having relied on the wrong principles (see also T 234/86, OJ EPO 1989,79).

6.7 Further, it is also questionable if the decision under appeal would have had a different outcome, had document D3 been considered for the issue of novelty. After all, this document and the disputed parts were taken into consideration for the examination of inventive step (see point 7 of the decision under appeal), and the opposition division found that the patent as amended is not obvious in light of these documents. Thus, it appears to the board that *a fortiori* these documents could also not have taken away the novelty of the patent as amended, as least in the opinion of the opposition division. In other words, the decision of the opposition division not to discuss D3 for novelty does not appear to have been decisive, hence the procedural violation, if any, could not have been substantial. The fact the finding on novelty or inventive step could have been erroneous or that it has been overturned by the board does not alter the character of this finding with respect to the question of a substantial procedural violation.

6.8 Based on the above, the board finds that the opposition division did not commit a substantial procedural violation which could justify the reimbursement of the appeal fee. Arguments that a reimbursement would be equitable for other reasons have not been put forward.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for reimbursement of the appeal fee is refused.

The registrar:

The Chairman:

G. Magouliotis

M. Ceyte