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**Datasheet for the decision  
of 19 October 2010**

**Case Number:** T 0202/09 - 3.2.04

**Application Number:** 04076819.4

**Publication Number:** 1493335

**IPC:** A22C 21/06

**Language of the proceedings:** EN

**Title of invention:**

Apparatus for breaking tissue connections in poultry suspended by the feet

**Patentee:**

Meyn Food Processing Technology B.V.

**Opponent:**

STORK PMT B.V.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 111(1), 123(2)  
RPBA Art. 13(1)

**Relevant legal provisions (EPC 1973):**

EPC Art. 100(a)(b)(c)

**Keyword:**

"Sufficiency of disclosure (yes)"  
"Novelty - main request and auxiliary request 1 (no)"  
"Added subject-matter - auxiliary requests 2 and 3 (yes)"  
"Novelty of auxiliary request 2 (yes)"  
"Remittal for further prosecution (yes)"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0202/09 - 3.2.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.04  
of 19 October 2010

**Appellant:** Meyn Food Processing Technology B.V.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 3 December 2008  
revoking European patent No. 1493335 pursuant  
to Article 101(3)(b) EPC.

**Composition of the Board:**

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

## Summary of Facts and Submissions

- I. By its decision dated 3 December 2008 the Opposition Division revoked the European patent 1 493 335. On 19 January 2009 the Appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 26 March 2009.
- II. The patent was opposed on the grounds based on Article 100 a) and b) EPC 1973. The Opposition division considered that claim 1 as granted and of auxiliary requests 3 and 5 lacked novelty, whereas claim 1 of auxiliary requests 1, 2 and 4 did not comply with the requirements of Article 123(2) EPC.
- III. The following documents played a role in the present proceedings:
- D1: WO-A-99/16321
  - D4: US-A-4 339 849
  - D9: US-A-5 816 904
  - D'142: English translation of NL-A-7100142.
- IV. Oral proceedings took place on 19 October 2010 before the Board of Appeal.

The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims filed as main request or, in the alternative, on the basis of any of the sets of claims filed as auxiliary requests 1 to 4, all filed with the grounds of appeal dated 24 March 2009. He further requested that the case be remitted to the department

of first instance for consideration of the inventive step issue.

He mainly argued as follows:

The invention disclosed can be carried out without undue burden by a skilled person.

None of D1, D4 or D9 discloses the features of the characterising part of claim 1 of the main request, which is therefore novel.

Claim 1 of the second and third auxiliary requests comprises inter alia the features of claim 5 dependent on claim 4 but not those of claim 4. However, from the whole description it is clear that the final upward movement described in claim 5 is not related to the specific trajectory disclosed in claim 4 so that these specific features could be omitted.

The subject-matter of claim 1 of auxiliary request 4 is not disclosed by any of D1, D4 or D9. Document D'142 submitted shortly before the oral proceedings should be rejected as late filed. Furthermore this citation does not disclose all the features of claim 1 of auxiliary request 4.

Inventive step has been discussed neither in the decision under appeal, nor in the Respondent's response to the grounds of appeal. The case should therefore be remitted to the department of first instance for consideration of this issue.

The Respondent (opponent) mainly submitted that the patent specification fails to define the starting position of the instrument so that a skilled person would be unable to carry out the invention.

Furthermore, each of documents D1, D2 and D9 is novelty destroying for the subject-matter of claim 1 of the

main request. The addition of the features of claim 5 dependent on claim 4 to claim 1 of the auxiliary requests 2 and 3 without the features of claim 4 introduces added subject matter contrary to the provisions of Articles 123 (2) and 100 c) EPC. The subject-matter of claim 1 of auxiliary request 4 lacks novelty with respect to D1, D4 or D9. D'142 is clearly novelty destroying for the subject-matter of claim 1 of auxiliary request 4. This citation is thus prima facie highly relevant and should therefore be admitted into the proceedings.

The Respondent requested that the appeal be dismissed.

V. Claims 1 of the main request reads as follows:

"1. An apparatus (50) for breaking tissue connections in poultry (20) suspended by the feet, prior to the evisceration of this poultry, which viscera comprises the gullet, gizzard (23) and the glandular stomach and which tissue connections connect a portion of the viscera with belly fat located at the breast side of the inner cavity wall of the poultry, comprising an instrument (30) to be inserted into the poultry via an incision provided at the vent side for performing a movement inside the poultry to break the tissue connections, characterised in that the instrument (30) breaks the tissue connections between the belly fat attached to the sides in the groin, and the gizzard (23)".

Claim 1 of auxiliary request 1 reads as follows:

"1. An apparatus (50) for breaking tissue connections in poultry (20) suspended by the feet, prior to the evisceration of this poultry, which viscera comprises the gullet, gizzard (23) and the glandular stomach and which tissue connections connect a portion of the viscera with belly fat located at the breast side of the inner cavity wall of the poultry, comprising an instrument (30) to be inserted into the poultry via an incision provided at the vent side for performing a movement inside the poultry to break the tissue connections, characterised in that the instrument (30) breaks the tissue connections between the belly fat and the gizzard (23), wherein the instrument (30) - viewed from the breast side of the poultry - performs a movement oriented to the left of an imaginary body axis of the poultry".

Claim 1 of auxiliary request 2 reads as follows:

"1. An apparatus (50) for breaking tissue connections in poultry (20) suspended by the feet, prior to the evisceration of this poultry, which viscera comprises the gullet, gizzard (23) and the glandular stomach and which tissue connections connect a portion of the viscera with belly fat located at the breast side of the inner cavity wall of the poultry, comprising an instrument (30) to be inserted into the poultry via an incision provided at the vent side for performing a movement inside the poultry to break the tissue connections between the belly fat and the gizzard (23), characterised in that during the upward movement, the instrument breaks the tissue connections between the

gizzard (23) and the belly fat, leaving the gizzard and the belly fat in the abdominal cavity of the poultry."

Claim 1 of auxiliary request 3 reads as follows:

"1. An apparatus (50) for breaking tissue connections in poultry (20) suspended by the feet, prior to the evisceration of this poultry, which viscera comprises the gullet, gizzard (23) and the glandular stomach and which tissue connections connect a portion of the viscera with belly fat located at the breast side of the inner cavity wall of the poultry, comprising an instrument (30) to be inserted into the poultry via an incision provided at the vent side for performing a movement inside the poultry to break the tissue connections between the belly fat and the gizzard (23), characterised in that the instrument (30) - viewed from the breast side of the poultry - performs a movement oriented to the left of an imaginary body axis of the poultry, and in that during the upward movement, the instrument breaks the tissue connections between the gizzard (23) and the belly fat, leaving the gizzard and the belly fat in the abdominal cavity of the poultry."

Claim 1 of auxiliary request 4 reads as follows:

"1. An apparatus (50) for breaking tissue connections in poultry (20) suspended by the feet, prior to the evisceration of this poultry, which viscera comprises the gullet, gizzard (23) and the glandular stomach and which tissue connections connect a portion of the viscera with belly fat located at the breast side of the inner cavity wall of the poultry, comprising an instrument (30) to be inserted into the poultry via an

incision provided at the vent side for performing a movement inside the poultry to break the tissue connections, characterised in that the instrument (30) breaks the tissue connections between the belly fat and the gizzard (23), wherein the instrument, after insertion into the poultry to a first predetermined position (2), is moved substantially sideways to a second position (4) near a side of the abdominal cavity of the poultry, from where the instrument is moved further into the poultry downward and forward to a third, deepest position (6) from where the instrument leaves the poultry in a substantially upward movement, scraping along the gizzard."

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Sufficiency of disclosure*

The Respondent argued that the patent does not disclose the pre-positioning movement of the instrument used for breaking the tissues with respect to the viscera of the bird. Without such information, a skilled person cannot understand the complex trajectory of the instrument as disclosed in the patent specification and in claim 4, i.e. how the instrument should be moved relative to the organs forming the viscera during the prepositioning trajectory.

However, according to claim 1 the instrument is inserted into the poultry via an incision provided at the vent side and paragraph [0023] of the patent



specification further indicates that the after insertion the instrument is moved to the left side (see also claim 3) near the abdominal cavity and then moved forward and downward where it is positioned next to the gizzard (since it is indicated that it is scrapping along the gizzard, see claim 4), between the gullet and part of the belly fat, because it breaks the connections these organs.

Thus, the skilled person is presented with sufficient information to carry out pre-positioning of the instrument, even if some experimentation by trial and error might be necessary.

Accordingly, the patent meets the requirement of sufficiency of disclosure (Article 100 b) EPC).

3. *Novelty - main request and first auxiliary request*

- 3.1 From D1 (abstract; page 14, lines 9 to 25; Figures 1, 2, 2a, 3, 3a) there is known an apparatus for breaking tissue connections in poultry (2) suspended by the feet, prior to the evisceration of this poultry, which viscera comprises the gullet, gizzard and the glandular stomach and which tissue connections connect a portion of the viscera with belly fat located at the breast side of the inner cavity wall of the poultry, comprising an instrument (18) to be inserted into the poultry via an incision provided at the vent side for performing a movement inside the poultry to break the tissue connections, wherein the instrument (18) breaks the tissue connections between the belly fat attached to the sides in the groin and the gizzard, wherein the instrument (18) - viewed from the breast side of the

poultry - performs a movement oriented to the left of an imaginary body axis of the poultry.

3.2 The Appellant contended that in D1 the instrument does not break the tissue connections between the belly fat attached to the sides in the groin and the gizzard but between the belly fat attached to the belly skin and the gizzard.

However the belly fat of a bird is always connected to the "sides of the groin". Therefore "attached to the sides of the groin" is not a limitation of claim 1 but plain bird anatomy.

3.3 The Appellant also argued that the movement performed by the instrument in D1 is a rotation not a movement oriented to the left. In D1 the active part of the instrument which is its free end (page 14, lines 22 and 23) rotates anticlockwise (page 14, lines 9 and 10) from the back side of the poultry to its breast side (Figures 2, 2a, 3, 3a). This movement is thus performed on the left side of an imaginary body axis of the poultry when viewed from the breast side and therefore fulfils the requirement of claim 1 "oriented to the left" since this requirement does not imply any specific type of movement but solely a general direction.

3.4 Consequently, the subject-matter of claim 1 of the main and of the first auxiliary request is not novel with respect to D1.

4. *Auxiliary requests 2 and 3 - compliance with Article 123(2) and 100 c) EPC*

4.1 Claim 1 of the auxiliary request 2 and 3 comprises in addition to the features of claim 1 (as granted and as filed) inter alia those of claim 5 (as granted and as filed) dependent of claim 4 but not those of claim 4 (as granted and as filed).

The Appellant argued that the patent specification makes clear that the upward movement disclosed in claim 5 is not linked to the pre-positioning of the instrument described in claim 4. This would also be evident from claim 6 which relates to a centring brace and is directly referring back to claim 1 and not to claim 4.

4.2 However, since in the application as filed, claim 5 is dependent on claim 4, which is itself dependent on claim 1, solely the combination of features of claims 1, 4 and 5 has been originally disclosed. Thus, the combination of the features of claims 1 and 5 without the limitation of claim 4 is not supported by the claims as filed.

4.3 The Appellant referred also to the description paragraphs [0008] and [0024] of the application as published.

Although in paragraph [0008] it is stated "Desirably then, during the upward movement the instrument breaks the tissue connections..." this paragraph also comprises the features describing how the instrument reaches its deepest position from which starts the upward movement. Even if the expression "Desirably then..." does not exclude that the tissue connections may be broken in a different manner, no such alternative has been disclosed, especially there is no disclosure that this

different manner of breaking the tissue connections could dispense with pre-positioning the instrument at a specific deepest position. For the purpose of added subject-matter the question is not whether the skilled person could envisage an alternative which needs no pre-positioning of the instrument but whether there is a direct and unambiguous disclosure that such a pre-positioning can be omitted. This however is not derivable from the above mentioned paragraph [0008].

Paragraph [0024] which refers to the specific embodiment disclosed in relation to the figures, starts with the words "During this upward movement..." and thus, does not refer to any upward movement but to the specific upward movement which is described in paragraph [0023] and which is performed by the instrument after having reached its deepest position. Therefore, this paragraph [0024] does not form a basis for omitting the pre-positioning of the instrument.

4.4 Accordingly, the fact that during the upward movement the instrument can break the tissue connections, without pre-positioning of the instrument is not directly and unambiguously derivable from the patent application as filed. Consequently, claim 1 of the auxiliary requests 2 and 3 contravenes the requirements of Articles 123(2) or 100 c) EPC.

5. *Auxiliary request 4*

5.1 Novelty with respect to D1, D4 and D9

5.1.1 In D1 the instrument, after insertion, performs a rotation over 180° and thus is moved substantially

sideways to a second position. However, although the body axis of the poultry is somewhat tilted with respect to the vertical, there is no clear movement of the instrument from the second position further into the poultry downward and forward to a third, deepest position from where the instrument leaves the poultry in a substantially upward movement. Moreover, this citation solely states that the tissue connections between the layer of fat and the stomach are broken (page 14, lines 20 to 22) there is no disclosure that the instrument (18) is scraping along the gizzard.

5.1.2 In D4 there is no indication that the tissue connections are broken between the belly fat and the gizzard. It is merely stated at column 3, lines 58 to 61 "The lower end of the hook-shaped end 30 is ... rounded and so cannot cause damage to the entrails when moving back" and column 4, lines 22 to 26 "the cutting edge of the knife moves around the area containing the entrails ... thus preventing any possibility of damaging the entrails...". Moreover there is no disclosure that the instrument is scraping along the gizzard. This citation does not give any indication about the relative position of the instrument with respect to the gizzard.

5.1.3 In D9 it is not indicated that the tissue connections between the belly fat and the gizzard are broken prior to evisceration. The position of the "flap" in Figure 17 showing the entire fat pad attached to the flap is reached after the removal tool has withdrawn the entrails from the body cavity (see column 9, lines 13 to 19). Moreover, this citation does not disclose that the instrument is scraping along the

gizzard (especially there is no indication that the inner organ depicted in Figure 12 adjacent to the instrument should be the gizzard).

5.1.4 Consequently, the subject-matter of claim 1 of auxiliary request 4 is novel over D1, D4 or D9.

5.2 Novelty with respect to D'142

5.2.1 Admissibility of this citation

This citation has been filed for the first time shortly before the date of the oral proceedings.

This document is nevertheless well known to the parties and the Board, since it has been extensively discussed in recent proceedings before this Board in the same composition by the same parties.

According to Article 13 (1) of the Rules of Procedure of the Boards of Appeal (RPBA) any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

In the present case this document has been cited with respect to a ground for opposition which had already been raised. The parties as well as the Board are familiar with the content of this document. It appears prima facie to be highly relevant for the assessment of patentability of the subject-matter of claim 1 of the

auxiliary request 4. Moreover the instrument used therein is more similar to that of the patent under appeal than the instrument disclosed in D1.

For these reasons the Board in exercising its discretion under Article 13 (1) RPBA decided to admit this citation into the proceedings.

- 5.2.2 The Respondent contended that both the cutting organ disclosed with respect to Figures 9 and 10 of D'142 as well as the spatula disclosed with respect to Figures 1 to 8 or 11 deprive the subject-matter of claim 1 of the auxiliary request 4 of novelty.

With respect to the incision to be made, D'142 (corrected paragraph of page 4) indicates "After being treated as indicated, the bird is conveyed suspended by the legs 12 by a conveyor 13 in the manner shown in fig 1, to a platform 14, in a direction ..." One possible interpretation of this passage is that the bird is suspended to the conveyor only after the cutting operation has taken place. This interpretation would also be in line with Figures 9 and 10 depicting a bird that does not have its legs clamped in the shackles of a conveyor, whereas Figures 1 to 8 represent it with its legs clamped in shackles.

Thus D'142 does not clearly and unambiguously disclose that the poultry is suspended by the feet when the instrument breaks the tissue connections.

In this citation, it is further stated that the "cross incision 6 is made by moving a cutting organ (not shown) via the tail incision 3 towards the groin 9 and by a subsequent curving movement of this cutting organ in accordance with the arrows 10 towards the end 7 of

the breast bone. The cutting organ thus moves between the mass 6' and along the stomach 11. The cross incision 6 is then formed as the cutting organ cuts from within the fat mass through the peritoneum and the corium."

There is however no indication that the instrument (cutting organ) leaves the poultry, scrapping along the gizzard.

With respect to the movement of the spatula neither the carriage 19 nor the rack 29 (Figure 1) allow a sideways movement of the spatula. The alternative embodiment of Figure 11 where the spatula is fixed on a lever 80 rotatable about a pin 83 does not allow any sideways movement of the spatula either.

It is further indicated in claim 1 of this citation (page 10, lines 12 to 15) that the spatula is introduced along the inside of the breast membrane between the fat mass and the stomach and subsequently (lines 19 and 20) while bracing the bird from the rear against moving, the spatula is retracted.

Thus, there is no indication that the instrument (spatula) leaves the poultry, scrapping along the gizzard.

Accordingly, the subject-matter of claim 1 of the auxiliary request 4 is novel with respect of D'142.

## 6. *Remittal*

- 6.1 Since the purpose of the appeal proceedings is to review decisions of the first instance departments, remittal in accordance with Article 111(1) EPC is normally considered by the Boards in cases where the



Opposition division issues a decision solely upon particular issues (e.g. novelty and added subject-matter) and leaves other substantive issues e.g. regarding inventive step (Article 56 EPC) undecided. Remittal to the first instance departments for further prosecution may also be normally considered when new matter comes to light at the appeal stage.

- 6.2 In the present case the Appellant has requested that the case be remitted to the department of first instance for consideration of the issue of inventive step. The Respondent did not formally object to having the case remitted to the department of first instance. Since i) the issue of inventive step has been discussed in substance neither by the Opposition division, nor in the grounds of appeal, nor in the response to the grounds of appeal (with respect to auxiliary request 4) ii) document D'142 cited for the first time shortly before the oral proceedings is admitted because it is particularly relevant and iii) the Board recognised that inventive step would have had to be discussed without any written preparation with respect to the further features introduced to claim 1 by the auxiliary request 4, the Board considered it appropriate to remit the case to the first instance for consideration of the inventive step issue.

**Order**

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

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The registrar:

The Chairman:

G. Magouliotis

M. Ceyte