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**Datasheet for the decision  
of 14 December 2015**

**Case Number:** T 2079/11 - 3.2.04

**Application Number:** 06114410.1

**Publication Number:** 1731038

**IPC:** A22C21/00

**Language of the proceedings:** EN

**Title of invention:**

Method and apparatus for harvesting an inner fillet from poultry

**Patent Proprietor:**

Meyn Food Processing Technology B.V.

**Opponent:**

Marel Stork Poultry Processing B.V.

**Headword:**

**Relevant legal provisions:**

EPC Art. 54

**Keyword:**

Novelty - (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern  
Boards of Appeal  
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Case Number: T 2079/11 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 14 December 2015**

**Appellant:** Meyn Food Processing Technology B.V.  
(Patent Proprietor) Noordeinde 68  
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**Respondent:** Marel Stork Poultry Processing B.V.  
(Opponent) Marel Meat Processing B.V.  
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**Representative:** EP&C  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 3 August 2011  
revoking European patent No. 1731038 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** A. de Vries  
**Members:** S. Oechsner de Coninck  
C. Heath

## Summary of Facts and Submissions

I. The appellant (proprietor) lodged an appeal received on 21 September 2011 against the decision of the opposition division dispatched on 3 August 2011 on the revocation of the patent EP1731038, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 10 November 2011.

The opposition was filed against the patent as a whole and based on Art 100(a) together with 52(1), 54(1) and 56 EPC, as well as Article 100(b) together with 83 EPC.

The opposition division held that the grounds for opposition mentioned in Article 100(a) together with 52(1), 54(1) EPC prejudiced the maintenance of the patent, having regard to the following documents:

D1: US-A-5 314 374  
D2: US-A-4 477 942  
D5: EP-A-0 695 506

II. During the proceedings the Board considered the following further evidence:  
Annex A (photograph) filed with the respondent  
opponent's letter of 12 May 2011  
Annex B (photographs I to III) filed with the  
respondent opponent's letter of 28 October 2015

III. Oral proceedings were held on 14 December 2015.

IV. The appellant requests that the decision under appeal be set aside, and that the patent be maintained as granted (Main Request), in the alternative that the patent be maintained in the version of auxiliary requests I to VI, all filed with letter dated 21 September 2015. Further the appellant requests

remittal of the case if claim 1 of any of the requests should be found novel.

The respondent requests the appeal to be dismissed.

V. The wording of the independent claims as granted (main request) reads as follows:

1. "A method for harvesting an inner fillet (11) from poultry, wherein a tendon (17) with which the inner fillet is or was connected to a wing bone of the poultry projects from the inner fillet (11), characterised in that the tendon (17) is gripped, and in that subsequently the tendon (17) and the inner fillet (11) attached thereto are pulled over a predetermined first distance off the carcass part (10) of the poultry, so as to completely or partly detach them from the carcass part (10)."

10. "An apparatus (13) for harvesting an inner fillet (11) from poultry, wherein a tendon (17) with which the inner fillet is or was connected to a wing bone of the poultry projects from the inner fillet (11), comprising a carrier (3) for a carcass part of the poultry, characterised in that a gripping element (16) is provided for gripping the tendon (17), and in that the gripping element (16) and the carrier (3) are movable in relation to each other for completely or partly pulling the inner fillet (11) off the carcass part (10)."

VI. The appellant argues as follows:

D1 is silent as regards the tendon and merely discloses gripping the meat, which is a different teaching from gripping the tendon. Several passages of the description as well as the related prior art define the tendon as being the portion thereof projecting away

from the fillet. The skilled person would therefore construe the tendon accordingly, as being the projecting part thereof. This is also confirmed by the preamble of claim 1, whereby the tendon should project from the fillet. The characterising portion thus further defines gripping the tendon in relation to that projecting portion. As such a gripping does not feature in D1, the claimed subject-matter is novel.

VII. The respondent argues as follows:

Claims 1 and 5 are not limited to gripping the tendon at the portion projecting away from the inner fillet. As can be seen in the annexes A and B showing pictures of a poultry fillet, the tendon extends along most of the length of the fillet. Gripping the upper part of the fillet as disclosed in D1 due to the anatomy of the poultry and the position and length of the tendon, as shown in the annexes, necessarily means that the tendon is also gripped. The description and claim 5 also foresee gripping near or at the tendon, which includes the possibility to grip both meat and tendon as in D1, which therefore takes away novelty.

### **Reasons for the Decision**

1. The appeal is admissible.
2. Background of the invention, interpretation of claim 1
  - 2.1 The patent is concerned with harvesting an inner fillet from poultry, wherein a tendon with which the inner fillet is or was connected to a wing bone of the poultry projects from the inner fillet. The purpose is to provide a high yield of superior quality inner fillets that are free from projecting tendons or pieces of tendon. According to claim 1 this is obtained by a

method in which the tendon is gripped, and in that subsequently the tendon and the inner fillet attached thereto are pulled over a predetermined first distance off the carcass part of the poultry, so as to completely or partly detach them from the carcass part.

- 2.2 It is established case law that when interpreting a claim, the skilled person should try with synthetical propensity, i.e. building up rather than tearing down, to arrive at an interpretation which is technically sensible and takes into account the whole of the disclosure of a patent, see Case Law of the Boards of Appeal, 7th edition, 2013, (CLBA) II.A.6.1.
- 2.3 The preamble of claim 1 defines an inner fillet from poultry, wherein a tendon with which the inner fillet is or was connected to a wing bone of the poultry projects from the inner fillet. Then the first characterising step of claim 1 requires that "the tendon is gripped". According to the anatomic knowledge of the skilled person in the field of poultry processing, and as also depicted in the pictures of the Annexes A and B submitted by the respondent the tendon forms the attachment part of the inner fillet, which is in fact a muscle, to the bone. In this particular case the tendon connects the inner fillet muscle to the wing bone of the poultry and extends in a forward area of the carcass corresponding to or near a first rib facing the head. Further taking into account the anatomy of the poultry the skilled person will understand the instruction to grip the tendon as operating a gripping means with the specific aim and intent of firmly taking hold of or grasping the tendinous portion which by nature is resistant and can support a higher tension force than the muscle meat itself. When still attached to the carcass this forward

facing region also corresponds to the area in which, after removal of the outer fillets, the tendon is visible and within easy reach. Solely on the basis of the claim as interpreted on the basis of his anatomic knowledge the skilled person is able to derive a clear instruction whereby he should perform the method by intentionally gripping the tendon, when still attached to the carcass and implicitly in a region where it is within reach.

2.4 This interpretation of the first step is also supported by description in relation to the figures 4 to 10. Paragraph 16 specifies that the inner fillet can be "gripped firmly near or at the tendon, preferably as much as possible the tendon itself to avoid the meat of the inner fillet". This is illustrated in figure 4 where the tendon is shown at reference sign 17, see further paragraph 44, projecting upwards from the fillet 11. In the same figure a gripping element 16 is shown that in the subsequent figures 5 to 6 grasps the tendon 17 (hidden from view by the gripping element), to pull the fillet by the tendon away from the carcass. This latter operation corresponds to the second characterising step of the claimed method (cf paragraphs 044 to 054 in relation with figures 4 to 10).

2.5 In apparatus claim 10, the corresponding feature is defined as a gripping element provided for gripping the tendon. Here again the skilled person reading the claim with a mind willing to understand and to make technical sense of it, clearly derives the instruction to provide and operate a gripping element with the specific aim of grasping the tendinous part of the inner fillet.

3. Novelty

3.1 According to established case law for an invention to lack novelty its subject-matter must be clearly and directly derivable from the prior art. It is thus a prerequisite for the acceptance of lack of novelty that the claimed subject-matter is "directly and unambiguously derivable from the prior art". In other words, it has to be "beyond doubt - not merely probable - that the claimed subject-matter was directly and unambiguously disclosed in a patent document" see Case Law of the Boards of Appeal, 7th edition, 2013, (CLBA) I.C.3.1. The implicit disclosure, that is the disclosure which any person skilled in the art would objectively consider as necessarily implied in the explicit content is also taken into account see Case Law of the Boards of Appeal, 7th edition, 2013, (CLBA) I.C.3.3.

3.2 The document D1 (column 3, lines 3-8; column 4, lines 6-16 and figures 2,4) discloses an apparatus for removing tenders, i.e. fillets, from the sides of the keel bone of a poultry carcass 10 including a series of knives 17 and plows 19,21 that partly detach the tender/fillet from the carcass 14. At a final stage of removal of the fillets, a pair of rotatively mounted gripper assemblies 22 each carrying a pair of jaws 28, grip a large middle portion of the fillet and tear it off by rotating the jaws on either side of the centrally translating carcass. As shown in Figure 2 of D1, a relatively large middle portion of the fillet is gripped by the jaws 28. During this gripping operation, the external part of the toothed areas 31 of these jaws are closed and come into contact with the carcass. The inner fillet then lies on the internal part thereof (see figure 4).



- 3.3 It is common ground that there is no explicit mention of a tendon to be found in the description or claims of D1. Nor does D1 contain an express instruction to grip the tendon in any way, let alone intentionally. D1 rather teaches to take hold of the fillet itself over a substantial part of its length, see e.g. figure 2 of D1. In the Board's opinion the skilled person will perceive this gripping action as different and distinct from the intentional gripping of the tendon of claim 1.
- 3.4 As explained above the skilled person in the field of poultry knows that the inner fillet as a muscle will include a tendon for attaching it to the bone, cf. specification paragraph 4 of the contested patent describing attachment of the tendon of the inner fillet to the wing bone (humerus). In D1 once the wings have been removed from the carcass a portion of the loose tendon necessarily projects from the fillet. Taking into account the anatomy of a poultry as for example illustrated on the photographs of Annex A and B submitted by the respondent at the oral proceedings, the other end of the tendon extends over a relatively large distance towards the middle portion of the muscle where it merges with the muscle fibers. As shown in particular in photograph III of Annex B, at a forward portion of the inner fillet, near the shoulder bone, the tendons extends along the surface of the inner fillet. However in photograph II of Annex B this surface of the inner fillet including the tendon faces the breast bone when the fillet is still attached to the carcass, and is therefore neither visible nor within easy reach. Therefore there is a high degree of probability that the toothed profile 31 of the jaws 28 gripping the large middle portion of the inner fillet as depicted in figures 2,3 and 4 will not even touch the section of the fillet where the tendon extends on

its outer surface. Nevertheless, it is possible that the jaws may accidentally or unintentionally touch the tendon or an area near the tendon. However this does not correspond to the intentional gripping of the tendon that is the subject of claim 1.

- 3.5 In this regard the Respondent has argued that claim 5 as well as several passages of the description also encompass the possibility of gripping near or at the tendon (see e.g. paragraph 16 and 24 or claim 5), and that justifies a broader interpretation of the requirement of gripping the tendon. The gripping shown in D1 would then fall within this broader interpretation of claim 1.

The Board is unconvinced by the Respondent's submissions on this point. It does not see any contradiction between claims 1 and 5, as the intentional gripping of the tendon required by claim 1 does not exclude that the fillet is also gripped near the tendon. Such a gripping action, however, still does not correspond to that shown in D1, where the idea is to take firm hold of the fillet itself. The difference between the claimed invention and the gripping action in D1 is underscored by a complete reading of specification paragraph 16 cited by the respondent. This passage teaches to grip the fillet near or at the tendon "preferably as much as possible the tendon itself to avoid the meat of the inner fillet" (lines 24-25), which is the opposite of what is shown in D1, where the claws contact the meat over a substantial area of the fillet.

- 3.6 The respondent further argues that due to the length and position of the jaws as depicted in figure 2 of D1 in relation to the carcass when positioned against

contact pad 34 the jaws 28 grip the inner fillet along a large forward position of the fillet and therefore inevitably also grip the tendon, thereby falling under the wording of claim 1.

As stated above, however, even if relative dimensions and positions in D1 are such that the claws extend into an area near the tendon, and possibly even accidentally touch the tendon, this does not correspond to the intentional gripping of the tendon required by claim 1 as understood by the skilled person.

3.7 For the same reasons given above document D1 does not directly and unambiguously describe the corresponding gripping element of the apparatus claim 10. Although the jaws 28 of D1 are described as part of the gripper assembly 22, they are not disclosed for the explicit purpose of gripping the tendon. Nor would they be suitable for that purpose, considering their size and closed position as depicted in figure 4. In the closed position the jaws embrace a large part of the fillet diameter, enough for it to subsequently pull the partly severed whole fillet away from the carcass.

3.8 In the light of the above, the Board finds that the step whereby the tendon is gripped of claim 1 as granted and the corresponding feature of the gripping element of claim 10 as granted are not directly and unambiguously disclosed in D1. Accordingly, the subject-matter of these claims is novel over this prior art, contrary to the finding of the decision under appeal.

3.9 The Board is also satisfied that the other documents D2 and D5 brought forward in respect of novelty do not disclose at least these very same step and feature of

claims 1 and 10. The clamping jaws 48 of D2 grip the upper wing, therefore do not target the tendon (col 5, lines 44-48). In D5 the fillet is removed by pulling the wing away (col 8, 4-59) and no action on the tendon is disclosed. Indeed, the respondent in its submissions in appeal has not contested the positive findings of the contested decision in this regard. Accordingly, the subject-matter of claims 1 and 10 as granted is considered as novel within the meaning of Article 54 EPC.

4. Remittal

The Board has considered the opposition ground based on Art 100(a) together with 52(1), 54(1) decided by the opposition division in its decision and challenged in the appeal. However, the opposition division did not examine and decide the ground of inventive step also raised in opposition. The Board therefore considers it appropriate to exercise its discretion under Article 111(1) EPC to remit the case to the first instance, so that it may examine this remaining opposition ground for claims 1 and 10 of the main request. This is particularly so as a remittal is requested by the appellant and the respondent did not object thereto.

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated