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**Datasheet for the decision
of 4 December 2012**

Case Number: T 2103/11 - 3.2.04
Application Number: 06077213.4
Publication Number: 1769681
IPC: A22C 21/06, A22C 17/14
Language of the proceedings: EN

Title of invention:

Method and device for processing a cluster of organs from a
slaughtered animal

Patentee:

STORK PMT B.V.

Opponent:

Meyn Food Processing Technology B.V.

Headword:

-

Relevant legal provisions:

EPC Art. 100 a)

Keyword:

"Admissibility of late filed documents (no)"
"Inventive step (yes)"

Decisions cited:

-

Catchword:

-



Case Number: T 2103/11 - 3.2.04

DECISION
of the Technical Board of Appeal 3.2.04
of 4 December 2012

Appellant: Meyn Food Processing Technology B.V.
(Opponent) Noordeinde 68
NL-1511 AE Oostzaan (NL)

Representative: Van Breda, Jacobus
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Respondent: STORK PMT B.V.
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Representative: Mertens, Hans Victor
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 15 July 2011
rejecting the opposition filed against European
patent No. 1769681 pursuant to Article 101(2)
EPC.

Composition of the Board:

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

Summary of Facts and Submissions

I. By its decision dated 15 July 2011 the Opposition Division rejected the opposition. On 24 September 2011 the Appellant (opponent) filed an appeal and paid the appeal fee on 26 September 2011. The statement setting out the grounds of appeal was received on 3 November 2011.

II. The patent was opposed on the grounds based on Article 100(a) EPC (lack of inventive step).

III. The following documents played a role in the appeal proceedings

D2: US-A-4 057 875

D8: EP-A-0 439 904

D9: US-A-5 152 715

IV. Claims 1 and 11 as granted read as follows

"1. Method for mechanically processing a cluster (38; 161; 210) of organs consisting of a strong organ and other interconnected internal organs from the body of a slaughtered animal (80), in particular a slaughtered bird, the method being characterised in:

- taking the cluster, comprising heart, lungs and liver, out of the body of the slaughtered animal;
- fixing the strong organ at a point of fixing when said cluster has already been taken out of and separated from the body of the slaughtered animal, for bringing said cluster (38; 161; 210) in a spatial orientation which is determined by the way of fixing; and

- conveying said cluster along a predetermined path and breaking tissue connections in said cluster on the basis of the spatial orientation of said cluster in the maintained condition of fixing, wherein the tissue connections are broken by exerting a force in a direction away from the point of fixing on one or more organs of said cluster, the force engaging the one or more organs at a distance from the point of fixing for moving the heart, lungs and liver away from the point of fixing without separating the heart, lungs and liver completely from the remaining organs, and wherein said cluster is subsequently fed automatically to a device (238) for separating heart, lungs and liver from the cluster."

"11. Device for mechanically processing a cluster (38; 161; 210) of organs consisting of a strong organ and other interconnected internal organs taken out of and separated from the body of a slaughtered animal (80), in particular a slaughtered bird, the device being characterised by:
means for fixing (144, 146) the strong organ at a point of fixing, which means for fixing are part of a conveyor system (138, 140) to feed the cluster (161, 210), comprising heart, lungs and liver, along a predetermined path (200) in a certain spatial orientation which is determined by the way of fixing to a processing station (234) for breaking tissue connections in said cluster on the basis of the spatial orientation of said cluster in the maintained condition of fixing thereof,
wherein the processing station comprises one or more stripping means for exerting a force in a direction away from the point of fixing on one or more organs of

said cluster, the force engaging the one or more organs at a distance away from the point of fixing for moving the heart, lungs and liver away from the point of fixing without separating the heart, lungs and liver completely from the remaining organs, and wherein the fixing means are adapted to subsequently feed said cluster automatically to a device (238) for separating heart, lungs and liver from the cluster."

- V. Oral proceedings took place on 4 December 2012 before the Board of Appeal.

The Appellant requested that the decision under appeal be set aside and that the patent be revoked.

The Respondent requested that the appeal be dismissed, i.e. that the patent be maintained as granted.

- VI. The Appellant mainly argued as follows:

D8 was filed in response to the statement of the Patentee that a cluster of organs comprising the liver cannot be processed by an apparatus comprising a pair of rolls as disclosed in D2.

D9 has been filed because it is prima facie relevant and clearly shows that the claimed device lacks an inventive step.

It is known from D2 to process a cluster of organs comprising one strong organ and other interconnected internal organs. Thus, when confronted with the problem of processing a cluster of internal organs comprising heart, lungs and liver, the skilled person would obviously try to use the apparatus and method of D2. It would be a matter of customary practice for him to adapt the apparatus and method disclosed in D2 to the

specific organs to be processed and so to arrive at the claimed invention.

VII. The Respondent mainly submitted that:

Family members of document D8 and D9 were already considered at the pre-grant stage. The arguments presented by the Patentee have not changed since the first instance proceedings. Therefore the Opponent should have presented these documents already during these proceedings.

D2 specifically relies on processing a cluster of organs comprising gut, gullet, gizzard and stomach. There is no hint that the apparatus and method disclosed therein could be suitable for processing a cluster comprising heart, lungs and liver, in particular considering that the liver can easily be damaged during processing. D2 does not suggest which strong organ could be fixed and how heart, lungs and liver could then be moved away from the point of fixing as required by claims 1 and 11.

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of D8 and D9:*
 - 2.1 With letter dated 15 October 2012, thus almost one year after having produced the statement setting out the grounds of appeal, the Appellant has filed two new prior art documents D8 and D9.

Under Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA) the Board is afforded discretion in admitting and considering such amendments to a party's case. According to this article this 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 exercising this discretion the Boards must also take into consideration the provisions of Article 12(4) RPBA which refers to the "power of the Board to hold inadmissible facts, evidence or requests which could have been presented... in the first instance". This will be the case if no sound reason exists for filing them at a later stage. Where new documents are concerned, such a justification may be that they have been filed in response to an argument or point first raised in the appealed decision or by another party or by the Board in the course of the appeal proceedings.

- 2.2 In the present case the Appellant admitted that D8 has not been filed in reaction to the Board's communication sent together with the summons to the oral proceedings, but that D8 was filed to counter the statement of the Respondent that the apparatus disclosed in D2 would not be suitable for processing a cluster of organs comprising the liver. However, this statement was already made during the first instance proceedings and adopted by the opposition division in its decision and is in fact the main argument provided for rejecting the objection based on lack of inventive step (see point 2.2 of said decision).

Furthermore, the claims and the arguments on which the Respondent relies are still the same as before the first instance, so that the case has not changed. Moreover D8 is a family member of US-A-4 951 352 which is cited in the search report and thus, known since the examination procedure.

Therefore, the filing of this new prior art document at this stage of the proceedings can be considered neither as a response to an amendment of the claims or to new arguments nor as a reaction to the Opposition division's decision.

2.3 Concerning D9 the Appellant has argued that this document has been filed because it is prima facie relevant and clearly shows that the claimed device and method lack an inventive step.

This submission thus constitutes a new line of attack. However, D9 is a family member of EP-A-0 482 700 which is cited in the search report and thus, known since the examination procedure.

There is therefore no sound reason why this line of attack could not have been presented earlier, i.e. during the opposition phase.

2.4 The Board concludes that no clear justification exists for the late filing of D8 and D9. Indeed these documents could and should have been produced already during the opposition proceedings or at least with the grounds of appeal. Using its discretion under Article 114(2) EPC and Article 13(1) RPBA the Board therefore decided to disregard these documents.

3. *Inventive step*

3.1 The Appellant considered D2 as the most promising starting point for the invention.

3.2 Although D2 discloses a method and an apparatus for processing a cluster of internal organs of poultry, it is in fact a "Feed apparatus for poultry gizzard processing machine" (see title of D2). The organs to be processed are thus very specific and only comprise the gut, gullet, gizzard and stomach.

It is further noted that although the skilled person is completely free in choosing a starting point, he is of course bound afterwards by that choice. If, for instance, the skilled person prefers and decides to start from a specific method and apparatus for processing a cluster of organs comprising the gut, gullet, gizzard and stomach, he can further develop that method and apparatus, but at the end of this development the normal result would still be a method and apparatus for processing a cluster of organs comprising the gut, gullet, gizzard and stomach and thus not a method and apparatus for processing a cluster of organs comprising heart, lungs and liver.

3.3 The Appellant argued that confronted with the problem of processing a cluster of organs comprising gut, gullet, gizzard and stomach, the skilled person would consider D2, since D2 also relates to processing a cluster of organs.

However, the cluster of organs to be processed by D2 does not comprise heart, lungs and liver which at this stage of processing of the bird have been left in the

carcass; see column 2, lines 60 to 68. An operator then severs gut, gullet and stomach from the carcass. Only this separated assemblage of gut, gullet and stomach is fed to the apparatus of D2. The rolls then draw the gut and gullet towards the slot between the rolls. The slot is sufficiently wide to permit the gut, gullet and crop to descend through the slot, whereas gizzard and stomach, because of their size, will continue to ride on the upper surface of the rolls; see column 3, lines 4 to 11.

Thus, even assuming the skilled person had the idea to also feed the remaining cluster of internal organs comprising heart, lungs and liver, to the apparatus of D2, he would be unable to predict the result that will be obtained, i.e. whether one or more organs would be drawn through the slot or not and whether these organs would be damaged or not.

Accordingly, that the apparatus and method of D2 could be used to fix one strong organ and to exert a force for moving heart, lungs and liver so as to brake the tissue connections, goes beyond what the skilled person would have objectively inferred from D2, without the benefit of hindsight knowledge of the invention. Such an ex post facto analysis is of necessity at variance with a proper application of the problem-solution approach.

This is so because the notional "skilled person" is assumed to act not out of idle curiosity but rather with a specific technical purpose in mind. This implies that there are promptings in the prior art, which can lead him to expect to find a solution to the underlying technical problem of the invention (which in the

present case might be seen in feeding a cluster of organs comprising heart, lungs and liver in a predetermined way to the next processing station). There are no such promptings in D2.

- 3.4 Moreover, both claims 1 and 11 require: "exerting a force in a direction away from the point of fixing on one or more organs of said cluster, the force engaging the one or more organs at a distance from the point of fixing for moving the heart, lungs and liver away from the point of fixing".

The Appellant contended that it would be a matter of customary practice for the skilled person to adjust the slot between the rolls of apparatus according to D2 such that it can process a cluster of organs comprising solely the heart, lungs and liver.

However, even if assuming that the liver which is definitely the biggest of these organs is a so called "strong" organ (which is contested by the Respondent), and could be used to fix the cluster, then, when feeding the cluster to the apparatus of D2 at least the liver would remain riding on the rolls and at least one of the lungs and heart would be drawn through the slot. Consequently, the force engaging the one or more organs at a distance from the point of fixing would not move the heart, lungs and liver away from the point of fixing as required by the independent claims but at most two of these organs.

Consequently, even if the skilled person would consider modifying the apparatus of D2 he would not arrive at the method or apparatus as claimed.

3.5 Thus, owing to the fact that the Board is not convinced that D2 is a suitable starting point for the present invention; that there are no promptings in the prior art that "would" (and not simply "could") lead the skilled person to use the apparatus or device of D2 to process a cluster of organs as claimed and that, even if he tried to use the apparatus and method of D2, he would not arrive at the claimed invention, the subject-matter of claims 1 and 11 as granted is not rendered obvious starting from D2 and considering the normal capability of the skilled person.

Order

For these reasons it is decided that:

The appeal is dismissed.

The registrar:

The Chairman:

G. Magouliotis

A. de Vries