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**Datasheet for the decision
of 14 April 2021**

Case Number: T 0983/18 - 3.2.04

Application Number: 13162352.2

Publication Number: 2671454

IPC: A22C21/00

Language of the proceedings: EN

Title of invention:

Residual fat remover and method for removing residual fat of poultry fillets

Patent Proprietor:

Meyn Food Processing Technology B.V.

Opponent:

Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:

EPC Art. 100(b)
RPBA 2020 Art. 13(2)

Keyword:

Sufficiency of disclosure - (no)

Late submitted material - evidence admitted (no)

Decisions cited:

T 0383/14, T 0032/84, T 0038/11

Catchword:



Beschwerdekammern

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Case Number: T 0983/18 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 14 April 2021

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 on 12 March 2018
revoking European patent No. 2671454 pursuant to
Article 101(2) EPC.**

Composition of the Board:

Chairman J. Wright
Members: S. Hillebrand
T. Bokor

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (patent proprietor) against the decision of the opposition division to revoke the patent in suit. During the opposition proceedings, the opponent raised the ground for opposition under Article 100(b) EPC.
- II. The opposition division decided that the patent as granted did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.
- III. Oral proceedings were held before the Board.
- IV. The appellant-proprietor requested that the decision under appeal be set aside and that the case be remitted to the opposition division for further prosecution, as a main request. Auxiliarily, the appellant-proprietor requested that the patent be maintained as granted.

The respondent opponent requested that the appeal be dismissed, and that the video evidence submitted on 8 March 2021 be not admitted into the proceedings.

- V. Claim 1 of the main request (as granted) reads as follows:

"Residual fat remover for removal of residual fat that remains on tissue of a poultry carcass after the poultry carcass has passed a scraper for releasing tissue connections between a fillet or fillets (1', 1") and the poultry carcass, wherein the fillet or fillets (1', 1") still at least in part attach to the carcass when passing the residual fat remover, wherein the

residual fat remover is embodied with opposite pens (4, 5) that are positioned along the path (A) of the passing poultry carcass on opposite sides of the passing poultry carcass so as to detach the residual fat (2, 3) on the fillet or fillets (1', 1") during passing of the poultry carcass".

Claim 8 of the main request (as granted) reads as follows:

"Method for removal of residual fat that remains on tissue of a poultry carcass after the poultry carcass has passed a scraper for releasing tissue connections between a fillet or fillets and the poultry carcass, wherein the fillet or fillets still at least in part attach to the carcass when passing the residual fat remover, whereby opposite pens (4, 5) are positioned along the path (A) of the passing poultry carcass on opposite sides of the passing poultry carcass so as to detach during passing of the poultry carcass residual fat (2, 3) of the fillet or fillets".

VI. In the present decision, reference is made to the following evidence: USB stick carrying an MP4 Video showing in action a residual fat remover machine of the proprietor, filed with letter of 8 March 2021.

VII. The appellant-proprietor's arguments can be summarised as follows:

The video evidence filed with letter of 8 March 2021 should be admitted into the proceedings. The invention is sufficiently disclosed.

VIII. The respondent-opponent's arguments can be summarised as follows:

The video evidence filed with letter of 8 March 2021 should not be admitted into the proceedings. The invention is insufficiently disclosed.

Reasons for the Decision

1. The appeal is admissible.

2. Background

The invention (see published patent specification, paragraphs [0001] and [0009]) relates to a residual fat remover and a method for removing residual fat that remains on tissue of a poultry carcass after the poultry carcass has passed a scraper for releasing tissue connections between a fillet or fillets and the poultry carcass. The residual fat is located on the sides of the fillets (side fat) and/or at the back end of the fillets (point fat).

According to the invention (see published patent specification, paragraph [0009] and claims 1 and 8) the residual fat is detached by opposite pens that are positioned along the path of the passing poultry carcass on opposite sides of the carcass.

3. Admissibility of MP4 video filed 8 March 2021

3.1 The MP4 video was filed by the proprietor for the first time after the summons to attend oral proceedings was issued and shortly before oral proceedings before the Board. Therefore, its admittance is at the Board's discretion under Article 13(2) RPBA 2020.

- 3.2 According to that article, any amendment to a party's appeal case made at that stage in the proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 3.3 The appellant-proprietor has argued that the video should be admitted into the proceedings because, had the oral proceedings not been conducted by video conference, but face-to-face, the appellant would have presented the video for the first time at the proceedings, which would not have been in conflict with any provision of the rules of procedure (RPBA). Furthermore, to make the video, the processing line had to be modified to operate at a lower speed than normal, therefore making the video was difficult so it could not have been provided earlier. Lastly, the appellant-proprietor argued that the relevance of the video was self-evident so required no explanation.
- 3.4 The Board does not accept these arguments. If the video had been presented for the first time at oral proceedings (however conducted), it would have constituted a new piece of evidence representing an amendment to the appellant's case under Article 13 RPBA (2020). Therefore its admittance would have been subject to the Board's discretion in just the same way as is presently the case for the USB stick filed shortly before the oral proceedings. Moreover, the Board considers that neither any difficulties the appellant-proprietor might have encountered in making the video nor whether its relevance might require no explanation negate the appellant's obligation to present its complete case with its grounds of appeal in accordance with Article 12(2) RPBA 2007. This is all

the more true in the present case since the appellant-proprietor must already have had a similar video of its production line at the time of filing its grounds of appeal, since it reproduced still images from it with in its grounds of appeal (see page 6, point 15). In the Board's view, the appellant had various opportunities to provide in good time the evidence it now seeks to introduce, for example it could have provided that video, or a suitably slowed down version of it, with its appeal grounds, had it so wished.

- 3.5 It follows from the above, that the reasons given by the appellant-proprietor for admitting the video did not convince the Board that there were exceptional circumstances justifying its admittance into the proceedings. Consequently, the Board decided to exercise its discretion under Article 114(2) EPC with Article 13(2) RPBA 2020 by not admitting the video evidence filed with letter of 8 March 2021 into the proceedings.

- 4. Main request (as granted), claim 1, sufficiency of disclosure
 - 4.1 According to established jurisprudence, an invention is sufficiently disclosed if it can be performed by a person skilled in the art without undue burden in the whole range claimed, using common general knowledge and taking into account further information given in the description and drawings of the patent (see Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA) II.C.1 and II.C.3.1).

4.2 Range of the invention according to claim 1

In the present case, claim 1 is directed to a residual fat remover for removal of residual fat that remains on tissue of a poultry carcass after the poultry carcass has passed a scraper for releasing tissue connections between a fillet or fillets and the poultry carcass.

It is not in dispute that this residual fat (see published patent specification, paragraph [0009]) is the residual side fat on the sides of the fillets and/or the residual point fat which is located at the back end of the fillets.

Therefore, if the invention is to be carried out over the whole range claimed, the patent must sufficiently disclose how the skilled person is able to remove both side fat and point fat.

4.3 Sufficiency of disclosure with respect to removal of residual side fat

The skilled person knows side fat to be located on the sides of the fillets (cf. published patent specification paragraph [0009]), that is what might be called the rim of the fillets, and not between the carcass and the underside of the fillets, whether or not the lowest point of the side fat on this rim is accurately depicted in figures 2 and 3 of the respondent-opponent's reply to the appeal. Nor is it in dispute that the skilled person would be able to provide two pens positioned on opposite sides of a passing poultry.

However, it is disputed whether the patent, supplemented where necessary with the skilled person's general knowledge, provides sufficient information for detaching residual fat, as claim 1 requires, which must include the side fat.

4.4 In this regard, the Board agrees with the appellant-proprietor that it might not always be necessary to provide a theory as to why an invention works. Moreover, according to established jurisprudence (see CLBA II.C.6.6.1 and in particular, T 383/14, reasons, point 3.5) whereas a claim attempts to define [the invention] in ideal conditions, the skilled person understands that actual operating conditions will not be ideal and so there may be occasional failures. Furthermore, with respect to any gaps in the disclosure, it is also established jurisprudence (see CLBA II.C.3.1, in particular T 32/84) that where a patent claim does not make reference to certain elements of an invention essential to its operation, this does not necessarily mean that the invention is insufficiently disclosed.

4.5 That said, there must be sufficient information in the patent, supplemented with general knowledge where there are gaps, for the skilled person to be able to reproduce the invention, without undue burden (see for example T 38/11, reasons, point 2.1). If the gaps in information would require an undue number of experiments to be performed (necessitate a research programme) then the invention is insufficiently disclosed. In the Board's view, this is so in the present case.

- 4.6 The patent explains (see published specification, paragraph [0020] with figure 3) that pens 4, 5 are positioned on opposite sides of the breastbone of the passing poultry carcass at a suitable position at the outer side of the fillets 1', 1" to initiate the detachment of the residual fat 2. Moreover, the pens have rounded extremities 6, 7 that are operational for the removal of the side fat during the movement of the poultry carcass with the pens 4, 5 in the position shown in figure 3.
- 4.7 The opposition division found (see impugned decision, points 2.10 and 2.11) that the fat is attached to the fillets quite strongly and its surface is slippery and soft so that a pen engaging the side of the fillet and scraping against it is not enough to remove the residual fat. Therefore, the division found (see impugned decision, reasons, points 2.12 to 2.17), that, to remove this side fat, the skilled person would require additional information which is neither given in the description nor available from their general knowledge.
- 4.8 The appellant-proprietor argued in its grounds of appeal (see points 11 and 12) that the opposition division's reasoning was wrong because it erroneously held that the patent disclosed the pens to act on the sides of the fillets or to press against the sides of the fillets. Rather, it argued, the patent taught the contrary, namely that the pens move between the fillets and the carcass underneath the fillets and it is then that the scraping and removal of the side fat takes place.

4.9 It may be true that the patent discloses the pens 4 and 5 to move between the fillets and carcass underneath the fillet part where the side fat is located as the appellant-proprietor argues. Indeed, figure 4 (which shows no side fat, presumably because it has been removed) shows the pens well and truly underneath the fillets at a position approximately corresponding to the furthest left extent of the side fat 2 shown in figure 3.

In the Board's view, whatever scraping action the rounded extremities 6, 7 of the pens might carry out underneath the fillets, the Board is unable to see how it would remove side fat. Firstly, because the side fat is not located there but at the sides of the fillet. Secondly, whether or not this side fat was originally joined to the rest of the carcass underneath the fillet, this is no longer the case when the poultry passes the residual fat remover. This is because the residual fat remover is downstream of a scraper that releases most tissue connections between the fillets and carcass (see published patent specification, paragraph [0001]), which must at least include those at the outer edge of the fillet near where the side fat is located.

5. The appellant-proprietor also argued at oral proceedings before the Board that the pens *do* come into contact with the side fat, which is only loosely attached to the fillets. Moreover, because the processing line moves very quickly, friction between the fat and the pens rubs off the side fat.

5.1 The appellant-proprietor has not provided any evidence that might prove the side fat to be only loosely

attached to the fillets. Nor is the Board convinced that this is the case. The patent explains (see paragraphs [0003] and [0018]) that even special scrapers designed to remove fatty tissue to the largest possible extent tend to leave fatty tissue on the sides of the fillets. In the Board's view, if dedicated fat removing scrapers do not remove the residual side fat, it speaks against the fat being loosely attached to the fillets.

Moreover, the appellant-proprietor has not explained why the opposition division was wrong in considering that the fat, being slippery and soft, would merely deform when pressed by the pens. Although it might be that a higher friction force would be exerted by a higher relative speed of the carcass moving past the pens, the patent makes no mention of any processing speed, or other processing conditions necessary for removing side fat. Nor has the appellant-proprietor provided evidence to prove the skilled person might know from their general knowledge what this processing speed should be, or what other conditions would be necessary for rubbing off side fat by friction.

5.2 The appellant-proprietor also argued at oral proceedings before the Board that, before the pens move below the fillets in the slits between the fillets and the carcass, when the carcass has moved slightly to the right of its position shown in figure 3, the side fat impacts the rounded ends of the pens at high speed. According to the appellant-proprietor, this impact would impart sufficient momentum to the loosely attached fat to detach it from the fillets, just as a foot might kick a soft ball away, in spite of the softness.

As has already been mentioned, the Board is not convinced that the fat is only loosely attached to the fillet. Moreover, as seen in figure 3, the side fat is attached over a relatively long section of the fillets and the pen would, at most, only impact the tip of the side fat before it slid underneath the fillet, between the fillet and the carcass (see paragraph [0021] with figure 4). In view of this, the Board does not consider it plausible, from the information given in the patent, that such an impact in itself would be able to detach any side fat. Nor, indeed, does the Board think that the skilled person would know from their general knowledge how side fat could be detached from a fillet by an impact with the rounded extremities of the pens.

5.3 As explained above, the appellant-proprietor itself, which must be in the best position to understand the invention, has variously proposed that side fat removal could be achieved when the pens scrape underneath the fillets (without engaging the sides of the fillets), or when the pens rub along the side fat and remove it by frictional force or when the pens impact the side fat, knocking it off. To carry out this aspect of the invention, the skilled person must first arrive at one of these removal mechanisms from their general knowledge.

Moreover, if the skilled person were to get thus far, as the Board has already explained, none of these proposals appears to achieve the required effect (side fat removal) allowing for the occasional failure. Rather, the Board considers that none of them promises success solely from the information provided in the patent and the skilled person's general knowledge. Additional information would be needed. In the Board's

view, this additional information could only be arrived at by carrying out a programme of research and development.

5.4 In other words, the skilled person would not be able to carry out the invention according to claim 1 with regard to removing residual side fat, without undue burden. Thus, whether or not the invention according to claim 1 can be carried out with respect to the aspect of removing residual point fat, the invention according to claim 1 is not sufficiently disclosed over the whole range claimed and is therefore, as a whole, insufficiently disclosed.

5.5 Nor does the Board come to a different conclusion when considering the alleged commercial success of a residual fat remover said to be based on the patent and sold by the proprietor. To whatever extent such a device might correspond to the device disclosed in the patent, in deciding on matters of sufficiency of disclosure, the Board considers only what the patent discloses and the skilled person's general knowledge.

By the same token, the respondent's filing of the opposition against the patent does not prove that the invention is sufficiently disclosed because it was worth opposing. If this argument were to succeed, an opponent would never be able to successfully prove insufficiency of disclosure and the corresponding opposition ground (Article 100(b) EPC) would thus be meaningless.

- 5.6 For completeness, the Board notes that the above considerations equally apply to the invention according to claim 8, which is an independent method claim having features corresponding to those of claim 1, albeit expressed in terms of method steps. This was also undisputed by the parties.
6. For the above reasons, the appellant-proprietor's arguments have not proven that the opposition division was wrong to conclude that the opposition ground of lack of sufficient disclosure under Article 100(b) EPC prejudiced the maintenance of the patent and to decide to revoke the patent under Article 101(2) EPC. Therefore, the Board must dismiss the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

J. Wright

Decision electronically authenticated