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D E C I S I O N
of 26 October 2004

Case Number: T 0137/00 - 3.3.2

Application Number: 94200697.4

Publication Number: 0619947

IPC: A21D 2/00

Language of the proceedings: EN

Title of invention:

Yeast formulation for production of baked products

Patentee:

DSM IP Assets B.V.

Opponent:

Lesaffre International
Burns Philp Research and Development Pty Ltd.

Headword:

Yeast formulation/DSM IP

Relevant legal provisions:

EPC Art. 106, 107, 108
EPC R. 64, 65

Keyword:

"Appeal not admissible because of wrong, contradictory and partially missing information in the notice of appeal; correction under Rule 65(2) EPC - not successful"

Decisions cited:

T 0097/98, T 0786/00

Catchword:

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Case Number: T 0137/00 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 26 October 2004

Appellant: DSM IP Assets B.V.
(Proprietor of the patent) Het Overloon 1
NL-6411 TE Heerlen (NL)

Representative: Misset, Onno
DSM Intellectual Property
Office Delft
PP 600-0240
P.O. Box 1
NL-2600 MA Delft (NL)

Respondents:
(Opponent) Lesaffre International
137 rue Gabriel Péri
F-59700 Marcq-en-Baroeul (FR)

Representative: De Vleeschauwer, Natalie
Lesaffre International
147, rue Gabriel Péri
B.P. 6027
F-59706 Marcq-en-Baroeul Cedex (FR)

(Opponent) Burns Philp Research and Development Pty Ltd.
7 Bridge Street
Sydney, New South Wales 2000 (AU)

Representative: Hucker, Charlotte Jane
Gill Jennings & Every
Broadgate House
7 Eldon Street
London EC2M 7LH (GB)

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 29 November 1999
revoking European patent No. 0619947 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: U. Oswald
Members: H. Kellner
J. H. P. Willems

Summary of Facts and Submissions

I. European patent No. 0 619 947, based on application No. 94 200 697.4 of Gist-Brocades N.V., Delft (NL) was granted with seven claims.

This patent was revoked by decision of the opposition division announced at oral proceedings on 9 November 1999, with the written reasons being posted on 29 November 1999, on the grounds that none of the requests put forward was found to meet the requirements of the European Patent Convention.

II. The parties notified of the decision were:

- (1) the then patent proprietor on record at the EPO, DSM N.V., te Heerlen (NL);
- (2) the then opponent 01, G.I.E. Lesaffre Développement, Marcq en Baroeul (FR) and
- (3) opponent 02, the Burns Philp Research and Development Pty Ltd., Sydney (AU).

III. The representative on record for the then patent proprietor DSM N.V. filed, on 28 January 2000, a letter entitled "Notice of Appeal".

There, under the reference

"Re: European patent application no. 94.200697.4
(0 619 947)

Name: Gist-Brocades N.V.

Due date: 29-01-2000"

the following text was set out:

"A Notice of Appeal is herewith filed against the interlocutory decision of the Examining Division dated November 29, 1999.

A Voucher for the payment of the appeal fee is herewith enclosed."

Grounds of appeal were filed on 29 March 2000.

- IV. On 18 May 2004, the board issued a communication stating its opinion that the notice of appeal, dated 28 January 2000, did not comply with Rule 64(a) EPC and that the appellant was invited on the basis of Rule 65(2) EPC to correct the deficiencies within one month.

The representative of the patentee answered in due time, requesting "under Rule 65(2) EPC correction of the name of the appellant in the Notice of Appeal dated January 28, 2000 in order to comply with Rule 64(a) EPC". The former name of the applicant "Gist-Brocades N.V." had been used by mistake in the notice of appeal and in the subsequent grounds of appeal, dated 29 March 2000, the correct name had been "DSM N.V."

- V. The board issued communications, dated 4 October 2004 and 5 October 2004, informing the parties that there were serious doubts regarding the admissibility of the appeal (Rules 64 and 65 EPC), especially taking into account the requirements of legal certainty and that, therefore, the matter of the admissibility of the

appeal would be the only point at issue at the oral proceedings on 26 October 2004. If necessary the parties would be summoned to further oral proceedings relating to substantive examination of the appeal.

VI. On 26 October 2004, oral proceedings took place before the board in the presence of the representatives of the proprietor (appellant) and the representative of opponent 01 (respondent); duly summoned, opponent 02 had informed the board in advance that it did not wish to attend the hearings.

VII. The appellant's arguments in written form and during the oral proceedings may be summarised as follows:

At least after its request for correction of the appellant's name in the notice of appeal, the appeal should be considered admissible since the impugned decision could be identified by the application number and the publication number of the patent in suit, together with the date of notification of the decision; all three data were contained in the original notice of appeal. Thus, before expiry of the time limit under Article 108 EPC it was evident from the file that the true and correct party filing the appeal was DSM N.V.

Additionally, the notice of appeal contained another essential and correct item of information, namely the name and address of the representative of the patent proprietor. Based on all these data, neither the Office nor the respondents seemed to have had any problem identifying the case in suit. The Office had even answered the appellant that "The appeal filed in your communication dated 28.01.00 against the Decision of

the Opposition Division of the European Patent Office dated 29.11.99 has been assigned to Technical Board of Appeal 332" and it had thus obviously corrected and added the necessary data.

Even third parties should have no problem identifying the case in suit because they would only get knowledge of the existence of the notice of appeal while looking into the file, bearing the correct application number as set out in the notice of appeal. Any doubts about the name of the patentee or the nature of the impugned decision could have been ruled out because

- a search for Gist-Brocades N.V. as applicant or patentee or a search for some other client of the undersigned representative or
- a search for some other decision than that of the opposition division dated 29 November 1999

would have generated no results.

Thus, there would have been no uncertainty with respect to rights because a third party, like the Office, would have found all relevant data without undue difficulty.

From all these facts and arguments, it could also be inferred that it was the true intention of the representative of the patent proprietor to file the appeal in the name of DSM N.V. and not in the name of Gist-Brocades N.V.

There were numerous decisions in the field of admissibility of appeals, but the most similar to the

present case was T 0786/00 (decision of 19.12.01 unpublished). In the corresponding notice of appeal, there was no statement identifying the extent to which amendment or cancellation of the impugned decision was requested. Additionally, the wrong or no name at all or address of the appellant were given. Nevertheless the appeal was accepted as admissible, essentially since the correct application number and publication number were set out together with the name and address of the representative, in form of reference to its general authorisation.

VIII. The respondents argued inter alia that, with respect to legal certainty, Rule 64 EPC required an admissible appeal to set out four essential data and that none of these data was filed with the submission of the patentee, dated 28 January 2000, in a correct and unambiguous manner.

Since, within the relevant time limit laid down in Article 108 EPC, there was no reliable information about the data, especially required with respect to Rule 64(b) EPC together with Rule 65(1) EPC and since, even after the period specified by the board in the communication of 18 May 2004, the address of the appellant had still not been explicitly filed (violation of Rule 64(a) EPC together with Rule 65(2)) EPC, the board had no choice but to reject the appeal as inadmissible.

As far as decision T 0786/00 was concerned, there were two major differences to the case in suit. On the one hand, in T 0786/00 the impugned decision announced by the "Opposition Division" was correctly indicated, and

on the other, implicitly, the correct name and address of the appellant was clearly indicated in the notice of appeal setting out the number of the general authorisation of the patentee's representative.

Neither of these data were given in the submission entitled "Notice of Appeal" filed by the representative of the proprietor of the patent in suit. Therefore, in the case in suit the appeal was inadmissible.

IX. The appellant (patentee) requested that the appeal be considered admissible.

The respondent (opponent) requested that the appeal be rejected as inadmissible.

Reasons for the Decision

1. Rule 64 EPC requires a notice of appeal to contain:

- the name and
- address of the appellant (Rule 64(a)) EPC
- identification of the decision which is impugned and
- the extent to which amendment or cancellation of that decision is requested (Rule 64(b)) EPC

2. In the case at issue none of these data are provided in a correct and non-contradictory way:

- a. The name of an appellant is not provided as such. The only name mentioned in the "Notice of Appeal" without any qualification is not that of a party in the file relating to the application whose number is mentioned.
 - b. The address of an appellant is not mentioned at all, not even after the requested correction on the basis of Rule 65(2) EPC.
 - c. The decision impugned is given as "the interlocutory decision of the Examining Division dated November 29, 1999". Even if it is assumed that by "dated" is meant "date of notification", there is no such decision in the file relating to the application whose number is mentioned.
 - d. There is no indication at all of the extent of the requested amendment or cancellation, which makes it impossible to draw conclusions from this item about the nature of the impugned decision.
3. There is no way in which a reader of the "Notice of Appeal" can know which of the few items of data provided is correct and which was indicated in error. In particular it would be impossible for the same reader to determine that the number of the application (not required as such by Rule 64) EPC was the only correct piece of information in the "Notice of Appeal". He is therefore not in a position to conclude without reasonable doubt which file or which decision should be the object of the appeal. That the registry of the

boards has, for administrative reasons, connected the "Notice of Appeal" with the file relating to the application number mentioned (and that in hindsight this was probably what the representative intended) is in this respect of no relevance. What is decisive is that the reader of the "Notice of Appeal" cannot derive legal certainty from it as to whether a given decision has been appealed. Therefore the "Notice of Appeal" in this case cannot fulfil its objective of providing legal certainty as to whether an appeal has been filed against a given decision.

4. Where the only purpose of a notice of appeal, filed in advance of the grounds of appeal, has to be to provide such legal certainty, a notice of appeal that cannot fulfil this function, as in the present case, has to be regarded as not validly filed, thereby making the appeal inadmissible.

5. This holds true even if the board takes into account the fact that in the past the jurisprudence of the boards often allowed some of the required data to be missing or corrupt provided it was possible to derive the missing data from other data provided, as for example in the case of decision T 0786/00, cited by the appellant as being closest to the present case. In that case data was missing but it was nevertheless possible to identify the impugned decision by means of other data. Thus, it was possible to identify the appellant because the representative had mentioned the number of his general authorisation. Since the Office had this authorisation on file, it could unambiguously derive the name and address of the appellant from that because - and that is the second important difference vis-à-vis

- the present case - there were no data that contradicted each other.
6. Nor does it help the appellant that he provided the name of the appellant at a later stage on the basis of Rule 65(2) EPC. A correction on the basis of Rule 65(2) EPC means that the board does not have to reject the appeal merely on the formal ground that the name and address of the appellant are missing. It cannot however change the factual position at the end of the two-month period mentioned in Article 108 EPC. It is this factual situation - of which the absence of an appellant's name and address is just one element - that makes the "Notice of Appeal" invalid and the appeal inadmissible.
 7. For the reasons set out in T 97/98 of 21 May 2001, cited in T 0786/00 (page 13, paragraph 1.6), it follows that "Rules 64(a) and 65(2) EPC cannot be construed as forming an exception to the basic principle that - the requirements for an admissible appeal having to be met on expiry of the time limit for filing the appeal - the appellant must be identifiable at that point in time. It must then be possible to determine whether or not the appeal was filed by a person entitled to appeal in accordance with Article 107 EPC" (see T 97/98, page 11, beginning of last paragraph of point 1.3).
 8. Neither can the argument of the appellant hold that a third party would only have to perform a few searches in order to become certain about the situation. A search of the application number would not disclose Gist-Brocades as applicant, any more than a decision of the examining division, and therefore lead to the conclusion that probably the application number was not

correct. A search for Gist-Brocades as applicant would - if such a search were to yield no result - lead to the conclusion that Gist-Brocades was not the appellant but would in the absence of other information still not make it clear that the application number was correct.

9. Therefore, the board can only conclude that the degree of legal uncertainty induced by the "Notice of Appeal" filed on 28 January 2000 goes beyond everything that was the object of earlier decisions of the boards of appeal in this field, that this "Notice of Appeal" does not meet the requirements of Rule 64 EPC in combination with Articles 106, 107 and 108 EPC and that therefore the appeal has to be rejected as inadmissible.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

A. Townend

U. Oswald