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D E C I S I O N
of 7 June 2002

Case Number: T 1065/00 - 3.3.2

Application Number: 87907207.2

Publication Number: 0332623

IPC: A23D 7/00

Language of the proceedings: EN

Title of invention:
Physical process for simultaneous deodorization and cholesterol reduction of fats and oils

Patentee:
GENERAL MILLS, INC.

Opponent:
UNILEVER N.V.

Headword:
Re-establishment of rights/GENERAL MILLS

Relevant legal provisions:
EPC Art. 107, 122(1)

Keyword:
"Application for re-establishment of right (no) - no relevant evidence"
"Admissibility (no) - late-filed appeal"

Decisions cited:
J 0022/88

Catchword:
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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1065/00 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 7 June 2002

Appellant: (Proprietor of the patent)
GENERAL MILLS, INC.
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Representative:
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Respondent: (Opponent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 31 August 1999 revoking European patent No. 0 332 623 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. A. M. Lançon
Members: J. Riolo
C. Rennie-Smith

Summary of Facts and Submissions

I. European patent No. 0 332 623 ("the Patent") was granted to General Mills, Inc. on the basis of 14 claims.

II. Opposition had been filed by Unilever NV alleging that the Patent's subject matter did not involve an inventive step and that it extended beyond the application as filed (Articles 100(a) and (c), 52(1)and 56, and 123(2) EPC).

III. The decision under appeal held that, despite amendments made during the opposition proceedings, the subject matter extended beyond the application as filed.

The decision of the Opposition Division was posted on 31 August 1999 and thus deemed to be received by the parties on 10 September 1999. Accordingly the time limit for filing a Notice of Appeal and paying the appeal fee expired on 10 November 1999 and that for filing Grounds of Appeal on 10 January 2000. On 7 December 1999, no Notice of Appeal having by then been filed, the Opposition Division sent a communication to the parties announcing that the opposition proceedings were finally terminated.

IV. A letter from the representative of the Appellant (patent proprietor), both dated and received on 28 July 2000, contained the Notice of Appeal, the Grounds of Appeal and an application for re-establishment of rights into the time for filing an appeal. On the same date the fees for both an appeal and a re-establishment application were paid.

V. As regards the appeal itself, the Appellant's arguments in its Grounds of Appeal rely largely on previous submissions made to the Opposition Division to which reference was made.

As regards the request for re-establishment, the Appellant's arguments concern exclusively the financial difficulties of a company called Source Food Technology, Inc. ("SFT") which is described in the re-establishment section of the 28 July 2000 letter as "...having purchased the patent from the previous owner General Mills and therefore being the entity who has full control of the patent...".

It was said that SFT experienced severe financial difficulties at the time of the decision under appeal which lasted until shortly before the appeal was actually filed in July 2000. A letter of 1 September 1998 from SFT's then president to shareholders, announcing a decision to cease operations, was produced as evidence of these difficulties. It was then said that increasing concern in the United States about trans-fatty acids (evidenced by two newspaper articles of 13 and 22 November 1999) lead to further funding and "sufficient financing to support the intellectual property of the company was finally obtained in late May 2000". A declaration dated 16 June 2000 by a Mr W. C. Wilsey, the president of SFT, is produced as supporting evidence.

That declaration describes SFT in paragraph 1 as "Applicant of European Patent O332623". In paragraph 4, Mr Wilsey says "I have reviewed the Company's records and determined that in 1995, SFT acquired the exclusive worldwide rights to the patent by means of an agreement

to license that patent for a period of 20 years". Otherwise the declaration says substantially the same as the letter of 28 July 2000 although it also observes that SFT obtained "some modest investment" in late 1999.

The Appellant relied on decision J22/88 (OJ EPO 1990, 244) as showing that re-establishment should be allowed in a case where, through no fault of its own, a patent proprietor lacks financial resources and makes substantial efforts to raise funds.

VI. The Respondent (opponent), in written submissions of 12 March 2001 and 3 May 2002, argued as follows.

The financial difficulties of SFT are irrelevant in determining whether the proprietor, General Mills, Inc., took all due care to avoid missing the time limit for filing an appeal.

Even if SFT's position were to be relevant, some funds were available in late 1999 and, if a decision was made to spend those funds on other matters than an appeal, that shows all due care was not taken.

If the re-establishment request should be allowed, the Respondent's previous arguments as to lack of inventive step and extension beyond the application as filed were maintained.

VII. Both parties made auxiliary requests for oral proceedings if their main requests should not otherwise be granted and oral proceedings were duly appointed for 7 June 2002. The requests for oral proceedings were withdrawn, in the case of the Respondent by its letter

of 3 May 2002 and in the case of the Appellant by its letter of 21 May 2002.

Oral proceedings were held on 7 June 2002. Neither party appeared before the Baord.

VIII. The Appellant requests in writing re-establishment of its right to appeal, that the decision under appeal be set aside and that the Patent be maintained.

The Respondent requests, also in writing, that re-establishment be refused but, if not, that the appeal be dismissed.

Reasons for the Decision

1. The appeal was filed on 28 July 2000 and is accordingly *prima facie* inadmissible as being too late, the time limit having expired on 10 November 1999. Dismissal of the appeal must therefore follow unless the request for re-establishment of rights can succeed. This request is considered in the following paragraphs.

2. The Register of European Patents shows that the patent's applicant and proprietor was and is General Mills, Inc. The re-establishment application, Notice of Appeal and Grounds of Appeal were all contained in the one written submission of 28 July 2000. Both the letter as a whole and the section headed "Notice of Appeal" make clear that the Appellant, and therefore the applicant for re-establishment, is General Mills, Inc.

3. However, the entire case for re-establishment is based on the financial difficulties of another company,

namely SFT. While in the first, formal paragraph of his declaration Mr Wilsey describes SFT as the "applicant" for the Patent he then, in paragraph 4, says that in 1995 SFT acquired the "exclusive worldwide rights to the patent by means of an agreement to license that patent for a period of 20 years". Since Mr Wilsey is the President of SFT and since he says he has consulted SFT's records before making the statement just quoted, and since there is no change of ownership shown on the Register, the Board concludes that this statement is correct and the position is that General Mills, Inc. is and always has been the proprietor and that SFT is an exclusive licensee. It may have conducted and paid for the opposition proceedings (which began in 1997, after the agreement with General Mills referred to by Mr Wilsey) but that does not alter the position in law.

4. It follows that only General Mills, Inc., being the only party aggrieved, could appeal against the first instance decision (see Article 107 EPC) and only General Mills, Inc., not having observed the time limit for appealing, could apply for re-establishment (see Article 122(1) EPC). The financial misfortunes of its licensee are irrelevant. If it had wanted to appeal, it could and should have filed an appeal in time and paid the appeal fee in time. No explanation is offered and no evidence produced as to why it did not take those steps, as to what it claims to be the cause of non-compliance with the time limit, as to when that cause of non-compliance was removed and as to due care having been taken by it to avoid missing the time limit.

5. As regards decision J 22/88, this has no application to the present case as it had quite different facts. It dealt with an impecunious individual who did everything

apart from paying the required fees and was thus found to have exercised due care. Furthermore, that decision related to the financial position of the actual appellant which was known to the Board; as already observed, no evidence of the present appellant's position, financial or otherwise, has been produced.

6. It follows that the re-establishment application must fail. It therefore also follows that, in the absence of re-establishment, the appeal itself is inadmissible and must be rejected as such.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible

The Registrar: The Chairman:

A. Townend P. A. M. Lançon