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**Datasheet for the decision
of 19 December 2006**

Case Number: T 0430/03 - 3.3.02

Application Number: 96907367.5

Publication Number: 0814664

IPC: A21D 13/08

Language of the proceedings: EN

Title of invention:

A structure for a food product with a wafer shell and a creamy filling, for example, for the production of semi-cold food products

Patentee:

SOREMARTEC S.A., et al

Opponent:

NESTEC S.A.

Headword:

Food product/SOREMARTEC S.A.

Relevant legal provisions:

EPC Art. 56

Keyword:

"Main request + inventive step - yes: remote prior art"

Decisions cited:

G 0006/95

Catchword:

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Case Number: T 0430/03 - 3.3.02

D E C I S I O N
of the Technical Board of Appeal 3.3.02
of 19 December 2006

Appellant:
(Opponent)

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Respondent:
(Patent Proprietor)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 30 January 2003
rejecting the opposition filed against European
patent No. 0814664 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: U. Oswald
Members: J. Riolo
P. Mühlens

Summary of Facts and Submissions

- I. European patent No. 0 814 664 based on application No. 96 907 367.5 was granted on the basis of a set of 10 claims.

Independent claim 1 as granted reads:

1. A structure for a semi-cold food product with a wafer shell (2) and a creamy filling (3), characterized in that:

- the filling (3) is constituted by a substantially hydrated mass in direct contact with the wafer shell (2),
 - a soft caramel core (4) is associated with the filling (3), and
- a continuous coating (5) is provided which covers the wafer shell (2) in a position opposite the filling (3).

- II. Notice of opposition was filed against the granted patent by the appellant.

The patent was opposed under Article 100(a) EPC for lack of novelty and inventive step and under Article 100(b) for insufficiency of disclosure.

The following documents were inter alia cited during the opposition and appeal proceedings and remain relevant for the present decision:

- (1) WO-A-8802990
- (4) EP-A-64 155
- (7) Declaration by Patrick John Couzens dated 23 May 2003

(8) Declaration by John R Mitchell dated 2 June 2003

III. The Opposition Division rejected the opposition under Article 102(2) EPC by its decision pronounced on 26 September 2002.

The Opposition Division took the view that the patent in suit met the requirements of Articles 52(1), 54, 56 and 100(b) EPC.

As regards sufficiency of disclosure, the Opposition Division was of the opinion that the opposed patent disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a skilled person.

It did not follow the arguments of the opponent, because in its opinion, the use of broad and descriptive terms were common in the present technical field and in the related prior art, so that these terms could at the most raise problems in relation with clarity and for the assessment of novelty but not for the question of sufficiency of disclosure. The fact that the theory of water activity was not in the patent was also not an obstacle for the skilled person since both parties agreed that said theory was well-known in the art.

Accordingly, the compliance of the contested patent with the requirements of Article 100b) EPC was acknowledged by the Opposition Division.

Concerning novelty, the Opposition Division observed that this objection was not maintained by the

respondent. It however examined this ground of opposition and concluded that the claims were novel over the available prior art documents.

The Opposition Division also concluded that document (1), representing the closest state of the art and disclosing the closest embodiment to the claimed subject-matter, contained no information on how to decrease the moisture migration from hydrated fillings towards wafer layers and did not disclose a continuous coating which covers the wafer shell in a position opposite the filling.

As to the alleged prior use, the Opposition Division noted that the embodiment of said prior art was irrelevant because it did not deal with a semi-cold food product and because it was structurally remote from the claimed subject-matter, so that, having regard to its late filing, it decided to disregard it.

- IV. The appellant (opponent) lodged an appeal against the said decision.
- V. Oral proceedings were held before the Board on 19 December 2006.
- VI. The appellant did not maintained its objections on the grounds of insufficiency.

It submitted that the experimental tests filed with the respondent's letter dated 18 October 2006 should not be introduced into the proceedings because they were late-filed.

It further submitted that the subject-matter of the contested patent did not involve an inventive step.

In summary, in its view, the subject-matter of the contested patent was not inventive because it did not solve the problem of providing a semi-cold food product with a wafer shell, wherein the wafer remained crispy.

VII. The respondent contested the admissibility of documents (7) and (8) into the proceedings as late-filed.

As to inventive step it argued that the skilled person had no incentive from the available documents to modify the prior art embodiments disclosed in document (4) in the way indicated in the patent in suit.

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

The respondent requested that the appeal be dismissed (main request) or that the patent be maintained in amended form on the basis of one of the first or second auxiliary requests, filed with letter dated 7 January 2004, or of the third or fourth auxiliary requests, filed with letter dated 18 October 2006.

Reasons for the decision

1. The appeal is admissible.

2. *Admissibility of documents (7) and (8)*

The Board notes that document (7), a report showing that the wafer in a product according to the claimed subject-matter does not remain crispy, and (8), a further report with theoretical calculation in order to demonstrate that the wafer in a product according to the claimed subject-matter does not remain crispy, were filed with the grounds of appeal dated 6 June 2003, in order to support the objection of lack of inventive step, which was not followed by the Opposition Division.

Under these circumstances, the Board does not consider that these documents were late-filed, as they constitute prima facie a direct reply to the decision of the Opposition Division which could not have been filed earlier.

3. *Admissibility of the experimental tests filed with the respondent's letter dated 18 October 2006*

As to these experimental data, the Board notes that they were filed more than three years after the submission of the grounds of appeal and two months before the oral proceedings.

Moreover, the Board observes that the appellant did not provide any explanation as to why they could not have been filed earlier.

As to the respondent's reference to Rule 71a(1) EPC, the Board points out that in the Decision of the Enlarged Board of Appeal G 0006/95 (OJ 1996, 649), the

Enlarged Board of Appeal held that Rule 71a(1) EPC is not applicable to the boards of appeal.

Accordingly, these experimental data are not admitted into the proceedings because they are late-filed.

4. *Main request*

Article 56 EPC

4.1 The patent provides for a structure for a semi-cold food product with a wafer shell and a creamy filling, characterized in that:

- the filling is constituted by a substantially hydrated mass in direct contact with the wafer shell,
- a soft caramel core is associated with the filling, and
- a continuous coating is provided which covers the wafer shell in a position opposite the filling (claim 1).

According to the description of the patent in suit, the simultaneous presence of the three components (wafer/hydrated filling/soft caramel) gives the entire product, when the moisture reaches equilibrium, the consistency and the ability to be swallowed sought and prevents moisture from having harmful effects on the wafer (col. 4, paragraph 22, first sentence).

Document (4) discloses in figure 3 a confectionery product with a shell formed by two wafers jointly enclosing a filling having a water content detrimental to the shell of the wafer, which is contained in an artificial water-impermeable capsule of edible material

(chocolate) (figure 3, claim 1, page 7, line 21, to page 8, line 28).

According to the description (page 1, line 25 to page 2, line 15), the wall of the capsule bonded to the wafer shell isolates the water containing filling from the wafer shell, whereby the wafer shell is not subjected to degradation due to the water contained in the filling.

During the oral proceedings both parties agreed with the Board that document (4), which was also concerned with the problem of avoiding the detrimental effect on the wafer caused by filling constituted by a hydrated mass, represents the closest prior art.

- 4.2 Accordingly, the problem to be solved as against document (4) can be seen as the provision of an alternative food product which also contains a filling constituted by a hydrated mass.
- 4.3 This problem is solved by the subject-matter of claim 1 and, in the light of description of the patent in suit, the Board is satisfied that the problem has been plausibly solved.
- 4.4 Thus, the question to be answered is whether the proposed solution, ie a structure wherein the hydrated filling is **in direct contact** with the wafer and which contains a soft caramel core , was obvious to the skilled person in the light of the prior art.

In that respect, document (4) specifically recommends avoiding a direct contact between the hydrated filling

and the wafer shell because such contact would be detrimental to the wafer shell (page 1, line 25, to page 2, line 15).

Moreover, as document (1) is the only available document suggesting the incorporation in a food product of a caramel core as flavouring agent and deals with frozen confection, ie a food product wherein the water is present in a solid state which does not raise the problem of water migration towards the wafer shell, the Board concludes that the skilled person would not combine the teachings of these documents.

In fact, the available prior art does not contain any information which could lead the skilled person to the idea that a soft caramel core could compensate for the absence of a separating layer between the hydrated filling and the wafer shell, so that the food product remains acceptable.

Therefore, the Board is satisfied that the skilled person faced with the problem as defined under 2.3 had no incentive from the available prior art to modify the embodiment disclosed in document (4) in order to arrive at the subject-matter of the contested patent.

- 4.5 The appellant's main argument against inventive step was that the claimed subject-matter was not inventive because, as shown by documents (7) and (8), the wafer shell does not remain crispy.

In that respect, the Board observes that neither the description of the contested patent nor the subject-matter of the claims are concerned with this goal.

In fact, the patent in suit merely addresses the problem of moisture migration from hydrate fillings towards wafer layers and specifically deals with the problem of providing a structure for a semi-cold food product having acceptable organoleptic properties wherein the hydrated filling is **in direct contact** with a wafer shell.

The solution is provided by the presence of a soft caramel core, which could not be derived in an obvious manner from the available documents as it appears from point 2.4 above.

It is indeed correct, as argued by the appellant, that the skilled person would expect, *a posteriori*, that some of the water contained in the filling would be absorbed by the soft caramel core.

There is however no hint at all that this effect would be sufficient to dispense with the interposition of a separating layer between the hydrated filling and the wafer shell as required in the prior art document (4).

In view of the foregoing, the Board judges that the subject-matter of claim 1 and of its dependent claims 2 to 10 of the set of claims as granted involves an inventive step as required by Article 56 EPC.

The relevance of the prior art according to the product "Polly Waffle" sold in Australia was not discussed anymore during the oral proceedings. For the sake of completeness, the Board wishes however to point out that it considers that this prior art is remote from

the claimed subject-matter and has no relevance since, as argued by the respondent and not contested by the appellant, it does not include a soft caramel core, it does not concern a semi-cold product and it includes a plastic-like foam filling which is not a "substantially hydrated mass", detrimental to the wafer shell, contrary to the filling according to the contested patent.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

A. Townend

U. Oswald