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DECISION
of 29 October 2004

Case Number: T 0809/03 - 3.3.2
Application Number: 96928390.2
Publication Number: 0845946
IPC: A21D 13/08
Language of the proceedings: EN

Title of invention:
Process for the manufacture of a filled wafer

Patentee:
UNILEVER PLC, et al

Opponent:
NESTEC S.A.

Headword:
Manufacture of filled Wafers/UNILEVER PLC, ET AL

Relevant legal provisions:
EPC Art. 56

Keyword:
"Inventive step - no obvious extension of a known process to other known filling materials"

Decisions cited:
-

Catchword:
-



Case Number: T 0809/03 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 29 October 2004

Appellant:
(Opponent)

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Representative:

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Respondent:
(Proprietor of the patent)

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Representative:

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 30 May 2003
rejecting the opposition filed against European
patent No. 0845946 pursuant to Article 102(2)
EPC.

Composition of the Board:

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

Summary of Facts and Submissions

- I. European patent No. 0 845 946 concerning "a process for the manufacture of a filled wafer" based on application No. 969028390.2 was granted on the basis of 8 claims.

Claim 1 as granted reads as follows:

"A process for the manufacture of a food product comprising a wafer filled with a food core, said process including the steps of:

- (i) shaping the food core;
- (ii) heating at least part of the wafer in order to provide sufficient plastic properties to the wafer to shape; and
- (iii) shaping the wafer around the pre-shaped food core, the food core acting as a former."

- II. 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 document, cited during the proceedings before the Opposition Division, remains relevant for the present decision:

- (1) GB-A-2168233

- III. The decision of the Opposition Division, pronounced on 8 April 2003, established that the subject-matter of the patent in suit as granted met the requirements of the EPC and that the opposition had to be rejected under Article 102(2) EPC.

The Opposition Division considered that the skilled person could carry out the claimed process without any difficulty just by reproducing the examples of the description and/or by using the teaching of the description. In fact, in its view, the patent provided enough information to obtain a wafer having sufficient plastic properties to shape when heated.

As to novelty, it was of the opinion that document (1) did not anticipate the claimed process as it did not disclose that filling materials must constitute a former around which the wafer can be shaped. It submitted that in this document, contrary to the teaching of the contested patent, the edible material, namely marmalade and hazelnut cream, is introduced during the folding operation of the wafer into the cavity which is formed by the folding operation, so that it cannot act as a former.

It moreover considered that, starting from document (1) as closest prior art, the use of a pre-shaped edible food core as former for the wafer could not be regarded as an obvious alternative as none of the available prior art document contained any information to that end.

- IV. The appellant (opponent) lodged an appeal against the said decision.

- V. By a letter dated 27 October 2004, the respondent (patentee) informed the Board that it would not be represented at the oral proceedings.

VI. Oral proceedings were held before the Board on 29 October 2004.

VII. At the oral proceedings, the appellant dropped its objections as to novelty over document (1) and insufficiency of disclosure.

For the assessment of inventive step, the appellant maintained that the subject-matter of the patent-in-suit did not define an invention over document (1).

In its opinion, there was no objective problem posed by the prior art to which the subject-matter of the contested patent was a solution.

In that respect, it added that, in as much as some of the filling according to the process of document (1) tended to be lost from the sides of the wafer, the skilled person would simply apply the method of document (1) in such a manner that this does not happen, ie by using a stiffer filling so that none of the filling can be lost from the sides of the folded wafer, as is precisely the case in the patent in suit which uses a filling which can be "shaped", ie a stiff filling.

VIII. The respondent contested these arguments in its written submissions.

It considered that the patent provided a solution to the problem of filling a wafer which does not define an enclosed space without the loss of some of the filling.

In its view the subject-matter of the patent in suit involved an inventive step because the disclosure in document (1) did not concern the filling of wafers with a filling which can be shaped, ie a solid filling, so that the process described in this document (1) could not solve the problem of placing a solid filling inside the partially enclosed shell cleanly, accurately and completely.

IX. The appellant requested that the decision under appeal be set aside and that patent No. 0 845 946 be revoked.

The respondent requested in writing that the appeal be dismissed and that the patent be maintained.

Reasons for the Decision

1. The appeal is admissible.
2. The claim under consideration is the same as Claim 1 as originally filed. There are accordingly no objections on the basis of Article 123(2) EPC.
3. As the respondent did not maintain its objections as to novelty and insufficiency of disclosure and since the Board has no reason to differ from the positive conclusions of the Opposition Division's decision in this respect, the only question to be considered in the present decision is whether or not the subject-matter of Claim 1 involves an inventive step within the meaning of Articles 52(1) and 56 EPC.

3.1.1 The patent in suit relates to a process for the manufacture of food products comprising a wafer and at least one filling (food core) wherein said process includes the steps of:

- (i) shaping the food core;
- (ii) heating at least part of the wafer in order to provide sufficient plastic properties to the wafer to shape; and
- (iii) shaping the wafer around the pre-shaped food core, the food core acting as a former (page 2, column 1, lines 5 to 7 and lines 34 to 46).

According to the description, the filling may be any ingredients such as ice cream, fish, meat, vegetables, fruit, nuts, chocolate pieces and the like, and the wafer may be shaped around the filling to achieve any desired shape such as shell, core, hollow tube, cup or envelope (page 2, column 2, lines 18 to 21 and lines 39 to 41).

Document (1) concerns a process for the manufacture of a food product comprising a wafer filled with a food core, said process including the steps of:

- using a wafer in a warm state in order to provide sufficient plastic properties to the wafer to shape (page 1, right column, lines 74 to 81 and 86 to 91); and
- introducing a filling material (food core) into the cavity which is formed by the wafer cake as it is folded and subsequently closing the cavity in

that the edges of the wafer cake are forced against each other, ie shaping the wafer around the food core (page 2, left column, lines 17 to 23.

The filling materials explicitly mentioned in document (1) are marmalade and hazelnut cream (page 2, left column, lines 9 to 16).

Neither the description of the patent in suit, nor the broad wording of step (iii) of claim 1 of the set of claims as granted contain any information which could distinguish the shaping step of the wafer from the steps of folding and closing the wafer around the filling material performed in the process of document (1).

Indeed, the patent in suit teaches that the wafer may be shaped around the filling to achieve any desired shape (see above under 3.1.1, paragraph 2).

Accordingly, the only remaining difference over document (1) resides in the fact that the filling material used to fill the wafers must be shaped first. This is not the case for the two filling materials mentioned in document (1), namely marmalade and hazelnut cream, since they are *a priori* non-solid filling materials.

- 3.1.2 In the opinion of the Board, document (1) represents the closest state of the art. This has not been contested by the parties.

In the light of document (1), the problem to be solved vis-à-vis the said document appears to be merely the extension of the process to other filling materials.

The problem is solved by the use of a filling material which is shaped, ie a filling material being sufficiently solid to that end.

In the light of the working examples disclosed in the patent in suit, the Board is satisfied that the problem has been plausibly solved.

The question to be answered is thus whether the proposed solution is obvious for the skilled person faced with the problem defined above in the light of the prior art.

The Board notes that, although marmalade and hazelnut cream are the only filling materials explicitly mentioned as filling material used in the known process for filling the wafers, its teaching is not restricted to any particular filling materials at all since it is clear from the description of the invention that the only requirement for the filling materials is that they must be edible (page 1, right column, line 92).

The Board also observes that, according to the description in document (1), filling materials which can be shaped, ie solid filling materials, were already known and used to fill wafers (eg chocolates, ice cream; see page 1, left column, lines 55 to 59).

Under these circumstances, the Board is convinced that the person skilled in the art would have contemplated

using the solid edible materials known in the prior art as filling for wafers in order to extend the process disclosed in document (1) to other filling materials, without any inventive activity and just by implementing the teaching of document (1).

In view of the above, it is concluded that the subject-matter of claim 1 does not involve an inventive step.

3.2.1 The Board cannot share the respondent's written arguments that the patent provides a solution to the problem of filling a wafer which does not define an enclosed space without the loss of some of the filling and that, since document (1) did not concern the filling of wafers with a filling which can be shaped, ie a solid filling, this document could not solve the problem of placing a solid filling inside the partially enclosed shell cleanly, accurately and completely.

In fact, as to the first point, the Board notes that the problem of loss of some of the filling obviously does not occur in the case of a solid filling material such as the ones mentioned in the contested patent (eg a piece of meat, vegetable, fish etc.), so that this problem cannot be taken into account for the assessment of inventive step.

As to the second point, the Board observes that neither the claims of the contested patent nor its description contain any distinguishing technical feature over the process disclosed in document (1) which could be regarded a solution to the problem of placing a solid filling inside the partially enclosed shell cleanly, accurately and completely.

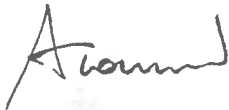
Accordingly, it is considered that this problem is already solved by the process steps as disclosed in document (1) and, as a consequence, this argument cannot be taken into account.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:



A. Townend

The Chairman:



U. Oswald



