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Datasheet for the decision of 15 October 2007

Case Number: T 1224/04 - 3.3.02

Application Number: 97200679.5

Publication Number: 0794248

IPC: C12M 1/26

Language of the proceedings: EN

Title of invention:
Improved method of dosing cream yeast

Patentee:
LESAFFRE et Compagnie

Opponent:
-

Headword:
Method of dosing yeast/LESAFFRE et Cie

Relevant legal provisions:
-

Relevant legal provisions (EPC 1973):
EPC Art. 111

Keyword:
"Main and first auxiliary request - remittal - yes: fresh case"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1224/04 **-** 3.3.02

D E C I S I O N
of the Technical Board of Appeal 3.3.02
of 15 October 2007

Appellant: (Patent Proprietor)
LESAFFRE et Compagnie
41, rue Etienne Marcel
F-75001 Paris (FR)

Representative:
Hirsch & Associés
58, Avenue Marceau
F-75008 Paris (FR)

Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 18 August 2004 revoking European patent No. 0794248 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: U. Oswald
Members: J. Riolo
J. Van Moer

Summary of Facts and Submissions

I. European patent No. 0 794 248 based on application No. 97 200 679.5 was granted on the basis of 10 claims.

Independent claims 1, 9 and 10 as granted read as follows:

1. A method of dosing cream yeast employing a dosing unit wherein cream yeast is transported from a storage container via a connecting means to a dosage valve for release, characterised in that the cream yeast is kept under a pressure above atmospheric for at least a proportion of the time when in said connecting means, and the dosage valve, such that the accuracy of yeast dosing is not substantially affected by gas formation.

9. Dosing unit for cream yeast comprising
• a storage container for cream yeast
• a dosing means to dose the cream yeast
• a connecting means, connecting the storage container and the dosing means
• means to determine the amount of cream yeast to be dosed
• a pump, located between the storage container and the means to determine the amount of cream yeast to be dosed
whereby the cream yeast to be dosed is kept under a pressure above atmospheric at least in part of the connecting means whereby said part is directly connected to the dosing means.

10. Use of a dosing unit as described in claim 9 for dosing cream yeast according to the methods as described in claims 1-7.

II. Notice of opposition was filed against the granted patent by the former opponent.

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

The following documents were cited *inter alia* during the proceedings before the Opposition Division and during the written proceedings before the Board of Appeal:

(7) EP-A-792 930
(15) "Breadmaking, its principles and practice" (1967), pages 90 to 93,
(18) Declarations concerning alleged prior use of an installation for dosing yeast cream owned by DSM Bakery Ingredients
(24) Declaration by Prof. Dr. R. Verhoeven (received by fax on 15.07.04)dated 14.07.04.

III. Beside the set of claims as granted, five auxiliary requests were presented to the Opposition Division.

Claim 1 of auxiliary request 1 read:

1. A method of dosing cream yeast employing a dosing unit wherein cream yeast is transported from a storage container via a connecting means to a dosage valve for release, characterised in that the cream yeast is kept

under a pressure above atmospheric for at least a proportion of the time when in said connecting means, and the dosage valve, such that the accuracy of yeast dosing is not substantially affected by gas formation.

Claim 1 of auxiliary request 2 read:

1. A method of dosing cream yeast employing a dosing unit wherein cream yeast is transported from a storage container to a dosage valve for release, via a connecting means and a mass or volume meter which is located between the storage container and the dosage valve and which measures the amount of cream yeast to be dosed characterized in that the cream yeast is kept under a pressure above atmospheric from prior to entry to the mass or volume meter such that the accuracy of yeast dosing is not substantially affected by gas formation.

Claim 1 of auxiliary request 3 read:

1. A method of dosing cream yeast employing a dosing unit wherein cream yeast is transported from a storage container to a dosage valve for release, via a connecting means and a mass or volume meter which is located between the storage container and the dosage valve and which measures the amount of cream yeast to be dosed characterized in that a pump, situated between the storage container and the mass or volume meter, is employed to pump cream yeast through said connecting means and to maintain the cream yeast under a pressure above atmospheric during transport from the pump to the dosage valve such that the accuracy of yeast dosing is not substantially affected by gas formation.

Claim 1 of auxiliary request 4 read:

1. A method of dosing cream yeast employing a dosing unit wherein cream yeast is transported from a storage container to a dosage valve for release, via a connecting means and a mass or volume meter which is located between the storage container and the dosage valve and which measures the amount of cream yeast to be dosed characterized in that a pump, situated between the storage container and the mass or volume meter, is employed to pump cream yeast through said connecting means and to maintain the cream yeast at a pressure between 0.2 to 10 bar above atmospheric during transport from the pump to the dosage valve such that the accuracy of yeast dosing is not substantially affected by gas formation.

Claim 1 of auxiliary request 5 read:

1. A method of dosing cream yeast employing a dosing unit wherein cream yeast is transported from a storage container to a dosage valve for release, via a connecting means and a mass or volume meter which is located between the storage container and the dosage valve and which measures the amount of cream yeast to be dosed characterized in that a pump, situated between the storage container and the mass or volume meter, is employed to pump cream yeast through said connecting means and to maintain the cream yeast at a pressure between 0.5 to 6 bar above atmospheric during transport from the pump to the dosage valve such that the accuracy of yeast dosing is not substantially affected by gas formation.

In its reasons for the decision under appeal, the Opposition Division found that claims 2 and 9 of the set of claims as granted did not contravene the requirements of Article 123(2) EPC as they resulted from a limitation of the scope of the originally filed claim which was disclosed in the description as originally filed.

It however concluded that the subject-matter of claims 1, 9 and 10 were anticipated by the interfering document (7). This document also anticipated the subject-matter of claim 1 of auxiliary requests 1 to 3.

As to auxiliary requests 4 and 5, the Opposition Division considered that its subject-matter was not inventive vis-à-vis document (16) combined with general knowledge as illustrated by the technical expert's declaration in document (24).

In fact, in its view, document (16) disclosed all the features of the claimed method. The only missing information was the pressure range to be applied during processing of the method according to (16). In the light of document (24), which established that the claimed range was a common practice in the technical field, the Opposition Division concluded that the subject-matter of these requests did not fulfil the requirements of Article 56 EPC.

IV. The appellant (patent proprietor) lodged an appeal against the said decision.

V. In a communication faxed on 5 October 2007, the Board gave its preliminary view that it agreed with the Opposition Division's conclusion as to inventive step and that the appeal should be dismissed.

VI. With its letter dated 9 October 2007, the opponent withdrew its opposition.

VII. Oral proceedings were held before the Board on 15 October 2007. During the oral proceedings, the respondent filed a new main request and an auxiliary request.

Claim 1 of the main request reads:

1. A method of dosing **stabilized** cream yeast employing a dosing unit wherein cream yeast is transported from a storage container via a connecting means to a dosage valve for release, characterised in that the cream yeast is kept under a pressure above atmospheric for at least a proportion of the time when in said connecting means, and the dosage valve, such that the accuracy of yeast dosing is not substantially affected by gas formation and wherein **a pump**, situated between the storage container and the mass or volume meter, is employed to pump cream yeast through said connecting means and maintain the cream yeast under a pressure above atmospheric during transport from the pump to the dosage valve.

Claim 1 of the auxiliary request is identical to claim 1 of the main request with the additional feature that the pressure is raised by 0.2 to 10 bar above atmospheric.

VIII. During the Oral proceedings, the appellant argued that the choice of stabilized yeast cream and the use of a pump were not an arbitrary choice, but that they were the key features of the claims and were not examined as such.

IX. The appellant requested that the decision under appeal be set aside and the case be remitted to the first instance for further prosecution on the basis of the main request or in the alternative on the basis of the first auxiliary request both filed at the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.

2. Admissibility of the requests.

During the oral proceedings, the Board reiterated its view expressed in its communication that the basic principle of thermodynamic should be taken into account as general common knowledge for a skilled person when assessing inventive step and that the Opposition Division's conclusions appeared to be well-founded.

The respondent filed a new main request and an auxiliary request in order to establish inventive step vis-à-vis the available prior art.

The subject-matter of these requests differs from claim 1 of the sets of claims as granted and in

auxiliary requests 1 to 5 before the Opposition Division in that the cream yeast used in the claimed method is now restricted to a **stabilised** cream yeast and in that a pump is used to transport the stabilised cream yeast through the connecting means.

In addition, the subject-matter of claim 1 of these requests constitutes a limitation of the scope of the claims as granted, which is occasioned by the objection of lack of inventive step raised during the hearing before the Board based on general thermodynamic principals.

Accordingly, the Board considers that these sets of claims fulfil the requirements of Rule 57a EPC and cannot be regarded as late-filed.

3. Remittal to the department of first instance.

In the present case, the subject-matter examined during the grant proceedings and during the opposition proceedings related to a method of dosing cream yeast and was not restricted to stabilized cream yeast. The method did not moreover require a pump.

The new features introduced into claims 1 constitute a restriction of the claims since stabilized cream yeast is now the only type of yeast used in the method and since a pump is moreover required. As such, the amendments to the claims now fall to be considered as an essential substantive issue in the present case which needs to be assessed with respect to inventive step.

Moreover, during the oral proceedings, the appellant sought to demonstrate that the choice of stabilized cream yeast and the use of a pump were not an arbitrary choice, but that they were the key features of the claims.

In that respect, it pointed to the patent description, page 2, right-hand column, lines 27 to 50, and explained that in the case of stabilized cream yeast gas was trapped in the network created by the stabilizer and that, due to the pressure relief after the pump, this gas expands between the pump and the dosing valve which removed the benefits of the liquid stabilised cream yeast.

It further argued that this problem linked to the use of the stabiliser was not recognised in the prior art and that, with the exception of the interfering document (7), which could not be used for the assessment of inventive step, and the prior use, which was insufficiently documented by document (18), the available documents did not deal with stabilised cream yeast.

Although the EPC does not guarantee the parties an absolute right to have all the issues in the case considered by two instances, it is well-recognised that any party may be given an opportunity for two readings of the important elements of a case.

In the present case, the filing at a very late stage of the procedure of a new set of claims, wherein a combination of new features, which had not been considered *per se* before, might be decisive for the

assessment of inventive step, makes it necessary to remit the case to the Opposition Division for further prosecution (Article 111(1) EPC).

Order

For these reasons it is decided that:

The decision under appeal is set aside and the case is remitted to the first-instance for further prosecution on the basis of the main request or of the first auxiliary both filed at the oral proceedings.

The Registrar | The Chairman

A. Townend | U. Oswald