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**Datasheet for the decision  
of 8 April 2008**

**Case Number:** T 0262/06 - 3.3.09

**Application Number:** 00965932.7

**Publication Number:** 1211950

**IPC:** A23G 3/28

**Language of the proceedings:** EN

**Title of invention:**  
Dispensing pack and machine

**Patentee:**  
UNILEVER PLC, et al

**Opponent:**  
NESTEC S.A.

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54, 123  
EPC R. 139  
RPBoA Article 12(1),(3)

**Relevant legal provisions (EPC 1973):**  
EPC R. 88

**Keyword:**  
"Novelty - no"

**Decisions cited:**  
G 0003/89

**Catchword:**  
-



Case Number: T 0262/06 - 3.3.09

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.09  
of 8 April 2008

**Appellant:** NESTEC S.A.  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
10 January 2006 concerning maintenance of  
European patent No. 1211950 in amended form.

**Composition of the Board:**

**Chairman:** P. Kitzmantel  
**Members:** J. Jardón Álvarez  
M.-B. Tardo-Dino

## Summary of Facts and Submissions

I. The grant of European patent No. 1 211 950 in respect of European patent application No. 00965932.7 in the name of UNILEVER PLC and UNILEVER N.V. which had been filed on 7 September 2000 as International application PCT/EP00/08730 (WO - 01/19205), was announced on 17 December 2003 (Bulletin 2003/51) on the basis of 14 claims. Independent Claims 1 and 6 read as follows:

"1. An ice-cream container pack that forms a replaceable cartridge in an associated dispensing machine, said pack comprising a cylindrical body fitted with a nozzle and a plunger which, when operated by a piston of said machine, dispenses the ice cream from the pack via said nozzle, said pack being **characterised in that** a bottom edge (8) of the cylindrical body wall (1) is directly attached to an end wall (5), said end wall being in the form of a truncated cone, a smaller and free base (6) of which houses the extrusion nozzle (7), whereby a part of the end wall (5) constitutes a support base for the pack on a support (4') with which said dispensing machine is provided.

6. A machine for the extrusion dispensing of an ice-cream product contained in a pack designed to transfer the ice-cream product (2) from said pack (1) to a consumption receptacle (20), said machine comprising a frame (4) equipped with means to allow the machine to stand on a horizontal platform or to be wall mounted, said frame bearing a holder (15) for the ice-cream container pack (1) and a means for driving a ram (19) which operates the plunger in said pack in order to extrude the ice cream, said machine being **characterised**

**in that** it is designed to operate in combination with a pack according to any one of claims 1 to 5 and that the pack housing (15) comprises a support (4') on which the truncated conical end wall of said pack can be directly seated."

Claims 2 to 5 and 7 to 14 were dependent claims.

- II. A Notice of Opposition, requesting revocation of the patent in its entirety on the grounds of Article 100(a) EPC, was filed against the patent by Nestec S.A. on 17 December 2003.

During the opposition proceedings *inter alia* the following documents were cited:

D1: US - 5 020 698

D2: AU - B - 89435/98

D5: US - 3 884 396

- III. By its interlocutory decision announced orally on 5 December 2005 and issued in writing on 10 January 2006 the Opposition Division maintained the patent in amended form.

The set of claims as maintained by the Opposition Division included two independent claims: Claim 1, which was identical to granted Claim 1, and an amended Claim 6. This amended Claim 6 was a combination of granted Claims 6 and 7 wherein additionally the reference to the "pack housing (15)" was amended to read "holder (15)". It read as follows:

"6. A machine for the extrusion dispensing of an ice-cream product contained in a pack designed to transfer the ice-cream product (2) from said pack (1) to a consumption receptacle (20), said machine comprising a frame (4) equipped with means to allow the machine to stand on a horizontal platform or to be wall mounted, said frame bearing a holder (15) for the ice-cream container pack (1) and a means for driving a ram (19) which operates the plunger in said pack in order to extrude the ice cream, said machine being **characterised in that** it is designed to operate in combination with a pack according to any of one of claims 1 to 5 and that the holder (15) comprises a support (4') on which the truncated conical end wall of said pack can be directly seated and in which the support (4') for the ice-cream pack (1) is provided with inner radial mounts (10), said mounts having surfaces at an angle that matches that of the truncated cone end-wall (5) of the pack (1), thereby providing direct support to said end-wall."

The Opposition Division allowed the correction of "pack housing (15)" to read "holder (15)" in Claim 6 under Rule 88 EPC 1973 because the error in the original claim was obvious and the proposed correction was in line with the preamble of the claim, dependent Claims 12 and 13 of the granted patent, the description and drawings.

The Opposition Division held that the pack disclosed in D5 was different from the pack according to Claim 1 of the patent in suit because the end wall of the pack disclosed in D5 was composed of two cones (32, 21) having different pitches while in the claimed pack the

end wall was "in the form of a truncated cone, a smaller and free base of which houses the extrusion nozzle" (emphasis by the Opposition Division). Additionally, the Division Opposition was of the opinion that the assembly of the parts of the pack by means of a tape (36) disclosed in Figures 3 and 4 of D5, and also the functioning of the nozzle, were only suitable for pressing out mayonnaise or products having a mayonnaise-like viscosity.

The Opposition Division also acknowledged the novelty of the subject-matter of Claim 6 over the disclosure of D1 because D1 did not disclose the specific feature that "the support for the ice-cream pack is provided with inner radial mounts, said mounts having surfaces at an angle that matches that of the truncated cone end-wall of the pack, thereby providing direct support to said end-wall".

Concerning inventive step the Opposition Division considered that the feature the "end wall being in the form of a truncated cone, a smaller and free base of which houses the extrusion nozzle" of the packs of Claim 1 was not rendered obvious either from D2 or from D1. In its opinion "the skilled person has no indication to modify the end walls of the packs disclosed in D1 and/or D2 in any way as they sufficiently fulfill their requirements of holding ice cream and being able to be placed on the support of an ice-cream dispensing machine as disclosed in D1 and/or D2". Also the subject-matter of Claim 6 was not suggested by any combination of the cited documents, especially because the specific features of the support were not derivable from any of the available documents.

- IV. On 21 February 2006 the Opponent (Appellant) lodged an appeal against the decision of the Opposition Division and paid the appeal fee on the same day.

With the Statement of Grounds of Appeal filed on 19 May 2006, the Appellant requested the revocation of the patent in its entirety on the grounds of lack of novelty and inventive step (Article 100(a) EPC). Additionally, it submitted that the amendment to Claim 6 made during the opposition proceedings involved an inadmissible extension of the granted scope of protection.

- V. The Patent Proprietors have abstained from replying to the Statement of Grounds of Appeal. They have not filed any request or substantive reply during the appeal proceedings.

- VI. The arguments presented by the Appellant in its written submissions insofar as they are relevant for the present decision may be summarized as follows:

The Appellant argued that the subject-matter of Claim 1 lacked novelty over document D5, which disclosed a disposable package comprising a filled, temporarily sealed cartridge for use in a dispensing gun. The Appellant arrived at that conclusion because in its opinion Claim 1 was not limited to a container pack where the extrusion nozzle was simply an orifice in the flat surface of the free base of the truncated cone; rather the word "nozzle" as used in the patent in suit was to be interpreted in a broader sense encompassing the design option that the smaller base of the

truncated cone was formed from the entire dispensing head as shown in D5. Following this interpretation, the nozzle arrangement described as "dispensing head" and surrounded by a conical end wall in D5 housed a nozzle in the sense of Claim 1.

The Appellant further argued that the subject-matter of Claim 6 lacked novelty over document D1. In its opinion the dispensing machine of figure 1 of D1 anticipated the subject-matter of Claim 6, essentially because the word "mounts" used in Claim 6 of the patent in suit included any shape of the holder for the replaceable cartridge.

The Appellant also contended that the amendment to Claim 6 during the opposition proceedings extended the scope of protection as granted. In its view the correction proposed of the admittedly obvious mistake in Claim 6 as granted, i.e. replacing the term "pack housing" by "holder", was not obvious and entailed an alteration of the claimed subject-matter.

VII. The Appellant (Opponent) requested that the decision under appeal be set aside and that the European patent No. 1 211 950 be revoked.

The only request from the Patent Proprietors was for an extension of two months time limit to expire on 9 December 2006.

## **Reasons for the Decision**

1. The appeal is admissible.



2. *Preliminary procedural remarks.*

Pursuant to Article 12(1)(a) and (b) of the Rules of Procedure before the Boards of Appeal, appeal proceedings shall be based on the notice and statement of grounds of appeal and in cases where there is more than one party, any written reply of the other party to be filed within four months of notification of the grounds of appeal. This article further provided in its paragraph (3) that subject to Articles 113 and 116 EPC, the Board may decide the case at any time after filing the statement of grounds or as in the present case where there is a Respondent, after expiry of the time limit in (1)(b).

The Respondents never filed a submission and the extended time limited allocated to them expired on December 2006.

The Appellant did not request oral proceedings and the Board could not see any reason justifying holding one, the facts of the case being sufficiently established on the basis of the only current request to be decided without delay.

3. *Amendments (Article 123 EPC).*

- 3.1 Claim 6 as allowed by the Opposition Division is a combination of granted Claims 6 and 7. Additionally the expression "pack housing (15)" was amended to read "holder (15)".

3.2 The Appellant argues that the substitution of the wording "pack housing" by "holder" extends the scope of protection as granted (Article 123(3) EPC).

3.3 The Board however agrees with the finding in the decision under appeal that this amendment satisfies the requirements of Rule 139 EPC (cf. old Rule 88 EPC 1973).

3.3.1 According to the Enlarged Board's decision G 3/89 (OJ 1993, 117) and the ensuing jurisprudence of the boards of appeal, for a correction under Rule 139 EPC (Rule 88 EPC 1973) to be allowable the following two criteria must be met:

(i) that an obvious error is present; and

(ii) that it is immediately evident - on the basis of the application as filed taking into account general common knowledge - that nothing else would have been intended than what is offered as the correction.

3.3.2 In the present case it is immediately evident, and not disputed, that an error has occurred in Claim 6 as granted (and as filed), since two different terms ('holder' and 'pack housing') are used in the claim for the reference numeral (15).

Moreover the proposed correction is obvious because the reference number (15) is consistently used in the description, drawings and even in the first part of Claim 1 for designing the (pack) holder.

3.3.3 As both requirements are fulfilled, the argument of the Appellant that the expression "pack housing" could also

mean something else is irrelevant. The question here is if it would have been immediately evident that nothing else must have been intended than what is offered as a correction. This is the case here for the reasons above.

3.3.4 The Board is therefore satisfied that the correction can be allowed under Rule 139 EPC and that the requirements of Article 123(2),(3) EPC are not contravened.

4. *Novelty (Article 54 EPC).*

4.1 The Appellant has contested the novelty of the subject-matter of independent Claims 1 and 6 having regard to the disclosure of documents D5 and D1 respectively. In what follows, novelty of the subject-matter of Claim 6 will be discussed with regard to the disclosure of D1.

4.2 Claim 6 as allowed by the Opposition Division is directed to a machine for the extrusion dispensing of an ice-cream product contained in a pack comprising:

- (a) a frame (4) equipped with means to allow the machine to stand on a horizontal platform or to be wall mounted,
- (b) said frame bearing a holder (15) for the ice cream container pack and
- (c) a means for driving a ram (19) which operates the plunger in the pack in order to extrude the ice cream,

said machine being **characterized in that:**

- (d) it is designed to operate in combination with a pack according to any one of Claims 1 to 5;

- (e) the holder (15) comprises a support (4') on which the truncated conical end wall of the pack can be directly seated, and
- (f) the support (4') is provided with inner radial mounts (10) having surfaces at an angle that matches that of the truncated cone end-wall (5) of the pack (1), thereby providing direct support to said end wall.

4.3 Document D1 discloses an ice cream ejector presenting all the features of Claim 6.

4.3.1 It cannot be disputed that the ice-cream ejector of D1, comprising a frame (34) holding a cup support (36) (see Figure 1 and column 3, lines 48 - 52) and a hand lever which presses the piston (50) downwardly from the cup outlet (column 3, lines 66 - 68), has the features (a), (b) and (c) of the preamble of Claim 6 of the patent in suit.

4.3.2 D1 also discloses the features of the characterizing part of the claim:

- It is an implicit feature of every ice-cream machine of this type that it is designated to operate in combination with the corresponding pack/cup in order to eject the ice-cream of the pack/cup. Insofar as Claim 6 refers back to the pack "according to any one of claims 1 to 5" it is noted by the Board that the specific features of the pack are not a limiting feature of the machine itself, as the packs are not a part of the machine. The only restriction imported by this reference is that the machine must (theoretically) be operable with packs according to

Claims 1 to 5, this being the case. Consequently, feature (d) is not a distinguishing feature of the claimed machine.

- The cup of D1, like the pack of Claim 6, has a frustro-conical section (216), which "nests snugly in a lower opening portion" of the support (36) (see column 5, lines 34 - 36 and 46 - 49). This feature entails that the lower opening portion of the support (36) must also be frustro-conically shaped. The engagement of the cup and the support achieved in this way, together with the engagement of the upper cylindrical wall portion (221) and the correspondingly cylindrical upper cup section (222), ensure that the cup is correctly positioned (see Figures 1 and 3; column 3, lines 54 - 57). The requirements of features (e) and (f) are therefore fulfilled by the machine of D1.

4.4 The Opposition Division acknowledged the novelty of the subject-matter of Claim 6 because in its opinion the wording "nests snugly" in D1 was of a general nature and it did not disclose the specific features of the support now claimed (cf. feature (f) of Claim 6).

4.5 The Board disagrees with this finding. The only possibility for the cup support (36) in Figure 1 of D1 is for it to be adapted to the form of the cup in order to ensure that the cup is correctly positioned and nests snugly in the support opening. As the cup has a truncated conical wall, the support must also have such form.

4.6 For these reasons the subject-matter of Claim 6 of the patent as maintained by the Opposition Division lacks novelty having regard to the disclosure of document D1. Under these circumstances there is no need to go into Appellant's lack of novelty objections with regard to Claim 1.

## **Order**

### **For these reasons it is decided that:**

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

The Registrar

The Chairman

D. Sauter

P. Kitzmantel