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Datasheet for the decision of 9 November 2010

Case Number: T 0405/08 - 3.3.09

Application Number: 01903845.4

Publication Number: 1251745

IPC: A23G 3/30

Language of the proceedings: EN

Title of invention:
A process for hard panning of chewable cores and cores produced by the process

Patentee:
Danisco Sweeteners Oy

Opponents:
WM. Wrigley Jr. Company
Südzucker Aktiengesellschaft

Headword:
-

Relevant legal provisions:
EPC Art. 83, 100b), 54, 100a), 123(3)

Keyword:
"Disclosure - sufficiency (yes)"
"Availability of document (yes)"
"Novelty - main request (no)"
"Amendments - added subject-matter - auxiliary requests (yes)"

Decisions cited:
-

Catchword:
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Case Number: T 0405/08 **-** 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 9 November 2010

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Decision under appeal:
Decision of the Opposition Division of the European Patent Office announced orally on 26 September 2007 and issued in writing on 28 November 2007 revoking European patent No. 1251745 pursuant to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: W. Sieber
Members: M. O. Müller
K. Garnett

Summary of Facts and Submissions

I. This is an appeal by the proprietor of European patent No. 1 251 745 against the decision of the opposition division to revoke the patent.

The granted patent contained 24 claims, whereby the only independent Claim 1 read as follows:

"1. A process for the production of chewable coated cores by hard panning of chewable cores in a coating pan or drum wherein a syrup containing crystallisable polyol(s) and/or sugar(s) is intermittently sprayed over a rotating bed of the cores and the cores are dried between sprayings with a flow of air, characterized in that the drying of the cores between sprayings is controlled by controlling parameters of the drying air in such a way as to intentionally leave a substantial residual moisture in the drying coating layer at the start of a subsequent spraying phase and the substantial residual moisture is a moisture which is substantially higher than the moisture left in the coating layer in conventional panning procedures."

II. Opponent I (WM. Wrigley Jr. Company) and opponent II (Südzucker Aktiengesellschaft) had requested revocation of the patent in its entirety on the grounds that the claimed subject-matter was neither novel nor inventive and that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Articles 100(a) and (b) EPC).

The documents submitted during the opposition proceedings included:

D14: Manual distributed at the ZDS conference "INTERNATIONALE SÜSSWAREN-DRAGEE-TAGUNG 6.-8. Dezember 1976", pages 1 to 16.

III. By its decision, which was announced orally on 26 September 2007 and issued in writing on 28 November 2007, the opposition division revoked the patent because none of the requests on file (main request, four auxiliary requests) met the requirements of the EPC. As regards Claim 1 of the main request, the opposition division held that the characterising portion of Claim 1 could not be taken into account when assessing novelty as it referred to procedures for which no unequivocal generally accepted meaning existed and the remaining features of Claim 1 were known from *inter alia* D14.

IV. On 7 February 2008, the appellant (proprietor) filed a notice of appeal against the above decision and paid the prescribed fee on the same day. A statement setting out the grounds of appeal was filed on 28 March 2008 together with a main request and auxiliary requests 1-3.

The claims of the main request are identical to the claims as granted. Claim 1 of all auxiliary requests differs from Claim 1 of the main request inter alia by the incorporation of the wording "providing a relative humidity in the outlet air from the pan or drum, which is 1 to 10 percentages higher than the basic level at which the relative humidity gradient has flattened to a plateau".

V. With letters of 4 July 2008 and 1 October 2008, respondents I and II (opponents I and II) filed replies to the appeal. Following a communication of the board, additional arguments were submitted by respondent II in its letter of 6 September 2010.

VI. With letter of 9 September 2010, the appellant announced that it would not attend oral proceedings.

VII. On 9 November 2010, oral proceedings were held before the board at which the appellant, as announced, was not present.

VIII. The appellant's arguments, in as far as they are relevant to the present decision, can be summarized as follows:

D14 should be excluded from the appeal procedure as it did not form prior art. In particular, D14 could not be found in any public library or the internet. Furthermore, the document had been distributed to the participants of a specific seminar only and the document itself stated that it was limited to the strict circle of the participants of this seminar.

With regard to novelty, the characterising portion of Claim 1 of the main request was clear. More particularly, the term "intentionally" distinguished the claimed invention from accidental mistakes made in the prior art. Furthermore, the conventional moisture was defined in the opposed patent as the moisture where the relative humidity gradient of the outlet air had reached a plateau. Moreover, it had been established in

the opposed patent as well as by the prior art that leaving some small amount of moisture, eg 1-3%, in the drying layer was conventional. Finally, the term "substantially higher" in the characterising portion of Claim 1 was defined in the opposed patent as the point where the relative humidity of the outlet air was 1 to 10 percent higher than the basic level. Consequently, the opposition division's approach of disregarding the characterising portion of Claim 1 when assessing novelty was not correct. Therefore, the opposition division's finding on lack of novelty was wrong. Specifically, there was no suggestion in D14 of controlling the panning by parameters of the drying air so as to start a subsequent spraying sequence before the drying of the previous layer was substantially complete, ie before the humidity of the outlet air had reached its basic level. The subject-matter of the main request thus was novel.

IX. The respondents' arguments as raised during the written and oral proceedings, in as far as they are relevant to the present decision, can be summarized as follows:

Concerning the interpretation of Claim 1 of the main request, the term "intentionally" was directed to the human mind but did not constitute any technical teaching. Therefore, this term had to be disregarded when interpreting Claim 1. The conventional moisture was a moisture of 0% as the opposed patent repeatedly stated that conventional panning led to fully dried coating layers. Finally, the term "substantially" had no limiting effect on the requirement in Claim 1 that the residual moisture had to be substantially higher than conventional. The characterising portion of

Claim 1 of the main request therefore simply required the residual moisture at the start of a subsequent spraying phase to be higher than 0%.

On the basis of this claim interpretation, the opposed patent would be sufficiently disclosed (respondent I). Otherwise, sufficiency of disclosure would have to be denied as the skilled person could not determine with any degree of certainty whether a drying procedure led to a residual moisture as required by Claim 1. More particularly, the skilled person would not know what the conventional moisture was nor could the skilled person tell when a certain residual moisture was substantially higher and not simply higher than the conventional moisture.

With regard to D14, this document was already in the proceedings and therefore exclusion of D14 from the proceedings was not possible. Furthermore, it was only the copying of the document D14 itself that was prohibited; the content of D14 was publicly available. The allegation that D14 could not be found in any public library or on the internet could not prejudice public availability. In particular, it was not usual for seminar handouts to be available in public libraries and, since the document dated from 1976, it was not surprising that it was unavailable in the internet since the internet as such was not invented at that time. D14 thus formed prior art.

D14 disclosed all features of Claim 1 of the main request. More particularly, the alternating spraying and drying sequence and the rotating centres in a coating pan of Claim 1 were disclosed on pages 9 and 10

of D14, the drying in a flow of air was described on page 11 of D14 and a constant residual moisture of the coating layers was disclosed on page 16 of D14. The subject-matter of Claim 1 of the main request therefore lacked novelty in view of D14.

In its letter dated 9 September 2010, respondent II pointed out that in Claim 1 of all auxiliary requests, the feature of "providing a relative humidity in the outlet air from the pan or drum, which is 1 to 10 percentages higher than the basic level at which the relative humidity gradient has flattened to a plateau" had been incorporated. Since however this feature was disclosed in the application as filed only in a more restricted context and this context was omitted in the amended claims, Claim 1 of all auxiliary requests violated the requirements of Article 123(2) EPC.

X. The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained as granted, alternatively on the basis of the first, second or third auxiliary requests filed with the grounds of appeal dated 28 March 2008.

XI. The respondents (opponents) requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. *Interpretation of Claim 1*

2.1 Claim 1 contains the requirement that "the drying of the cores between sprayings is controlled by controlling parameters of the drying air in such a way as to intentionally leave a substantial residual moisture in the drying coating layer at the start of a subsequent spraying phase and the substantial residual moisture is a moisture which is substantially higher than the moisture left in the coating layer in conventional panning procedures".

In the board's view, the rather vague expressions "intentionally" and "moisture left in the coating layer in conventional panning procedures" (hereinafter referred to as "conventional moisture") and the requirement that the residual moisture to be achieved according to the process of Claim 1 must be "substantially higher" than the conventional moisture need further interpretation.

2.2 Whether or not a technical feature would be implemented by the skilled person intentionally does not affect the technical feature itself but merely reflects what would be in the skilled person's mind. The term "intentionally" therefore imposes no limitation on the technical feature to which it relates. Consequently, this term must be disregarded when interpreting Claim 1.

Claim 1 does not define which moisture is to be considered conventional. The claim therefore must be interpreted in the broadest possible way in this

respect. As the conventional moisture in fact constitutes a lower limit above which the residual moisture to be achieved according to Claim 1 must lie, the broadest possible interpretation implies that the conventional moisture is a moisture of 0%. This is in line with the overall teaching of the opposed patent which defines the state obtained in conventional panning as "fully dry" (page 2, line 56, page 3, line 29, page 4, line 32, page 5, lines 25 and 36 and page 9, line 50), and which, contrary to the appellant's allegation, nowhere discloses any moisture values above 0% for conventional panning.

Concerning the requirement in Claim 1 that the residual moisture must be **substantially** higher than the conventional moisture, there is no indication in the claim of what is meant by "substantial". In particular, the skilled person is provided with no teaching as to when the residual moisture is simply higher than or substantially higher than conventional. The wording in Claim 1, namely "a residual moisture which is substantially higher than", is therefore unclear. In this situation, the term must be given its broadest possible meaning implying that the residual moisture needs simply to be higher than the conventional moisture.

2.3 From the above, it follows that Claim 1 requires controlling the drying of the cores between sprayings by controlling the parameters of the drying air in such a way as to leave **a residual moisture above 0%** in the drying coating layer at the start of a subsequent spraying phase.

3. *Sufficiency of disclosure - Article 100(b) EPC*

Respondent I argued that the skilled person could not determine with any degree of certainty whether a drying procedure led to a residual moisture as required by Claim 1 because the definition of this residual moisture was unclear. However, as has been set out above, the residual moisture to be achieved according to Claim 1 can be interpreted in a meaningful, admittedly broad, manner, namely more than 0%. No evidence has been provided that the skilled person would not be able to achieve such a residual moisture. The main request therefore is sufficiently disclosed. Even respondent I itself admitted during oral proceedings that the requirement of sufficiency of disclosure would be met if Claim 1 were to be interpreted as simply requiring a residual moisture above 0%.

4. *Novelty - Article 100(a) EPC*

4.1 Public availability of D14

4.1.1 The appellant has requested that D14 be excluded from the appeal procedure as it was not publicly available. However, D14 was filed by opponent II on 2 December 2006 during the opposition procedure and it was considered in the opposition division's decision. Hence, this document is clearly already in the proceedings. Therefore, as a matter of law, regardless of whether or not it is a publicly available document, it is in the proceedings and cannot be excluded. Thus, the appellant's request cannot be allowed.

4.1.2 It is, of course, still possible for the appellant to argue that D14 was not publicly available, and consequently not a document which should be taken into account when considering novelty. However, D14 is state of the art within the meaning of Article 54(2) EPC for the following reasons:

The cover page of D14 indicates that it was a manual handed out at a seminar on 6-8 December 1976, well before the priority date of 3 February 2000 of the opposed patent. The front page also indicates that the manual was only intended for the participants of the seminar and that its reproduction was not allowed. However, just as with ordinary books, the indication in D14 that reproduction is not allowed only implies that the manual D14 must not be reproduced for copyright reasons. This does not limit the accessibility of the **content** of D14. There is in particular no evidence that the presenters of the manual and the attendants of the seminar were both explicitly or implicitly bound to confidentiality. Moreover, it can be assumed that any interested specialist was entitled to participate in the seminar. Therefore the participants were potentially the public at large.

In summary, only the reproduction of the manual was prohibited, while the content of the manual was made available to the public and hence forms part of the state of the art.

4.1.3 The appellant argued that the manual could not be found in any public library and was also not available on the internet. As indicated above, D14 dates from 1976 and is a document handed out at a particular seminar. It is

not usual for seminar handouts to be available in public libraries. Similarly, since the document dates from 1976, it is also not surprising that it is unavailable on the internet since the internet as such was not yet generally used and/or available at that time. The fact that the appellant has been unable to locate D14 in either of these places more than 30 years after the date of D14 therefore cannot be taken as evidence that D14 was never publicly available at all.

4.2 Novelty in view of D14

4.2.1 D14 is directed to sugar coated chewing gums. In particular, it refers to

(a) hard panning of chewing gum cores with sugar syrup ("Hartzuckerdragierung ... die bei Kaugummi-Kissen angewendet wird, bedeutet eine Auftragung der Masse durch Sprühsirup", page 14, lines 26-28) by

(b) spraying the coating substance ("Auftragsmasse"), ie the sugar syrup, on the chewing gum cores in a coating pan (page 10, lines 1-3) and blowing drying air into the coating pan after each spraying step (page 11, lines 7-9) while

(c) the residual moisture of each coating layer is monitored by controlling the moisture content of the outlet air (page 11, lines 18-25), thereby guaranteeing that

(d) each subsequent spraying step starts exactly at a point in time that corresponds to a certain

moisture content of the coating layer (page 12, lines 5-7), thereby

(e) avoiding overdrying such that each coating layer has a constant residual moisture (page 12, line 15 and point 4 of the summary on page 16).

4.2.2 The hard panning of chewing gum cores with sugar syrup in D14 (disclosure (a) above) corresponds to the "process for the production of chewable coated cores by hard panning of chewable cores" as referred to in Claim 1.

The spraying of the sugar syrup on the rotating centres in a coating pan and the blowing of drying air into the coating pan after each spraying step in D14 (disclosure (b) above) corresponds to the features of Claim 1 "in a coating pan or drum" and "wherein a syrup containing crystallizable polyol(s) and/or sugar(s) is intermittently sprayed over a rotating bed of the cores and the cores are dried between sprayings with a flow of air".

The monitoring of the residual moisture of each coating layer by controlling the moisture content of the outlet air in D14 (disclosure (c) above) corresponds to the feature of Claim 1 that "the drying of the cores between sprayings is controlled by controlling parameters of the drying air".

The measure in D14 that each subsequent spraying step starts exactly at a point in time that corresponds to a certain moisture content of the coating layer (disclosure (d) above) corresponds to the feature of

Claim 1 of leaving "moisture in the drying coating layer at the start of a subsequent spraying phase".

The measure in D14 of avoiding overdrying such that each coating layer has a constant residual moisture (disclosure (e) above) implies that the moisture left in each coating layer is above 0%. This disclosure corresponds to the requirement in Claim 1 that a residual moisture is left in the coating layer, which is higher than 0% (see point 2 above).

4.2.3 D14 thus discloses all features of Claim 1. The subject-matter of Claim 1 therefore lacks novelty in view of D14. The main request consequently is not allowable.

Auxiliary requests 1 - 3

5. *Amendments - Article 123(2) EPC*

5.1 Claim 1 of each of these requests has been amended by adding the feature of "providing a relative humidity in the outlet air from the pan or drum, which is 1 to 10 percentages higher than the basic level at which the relative humidity gradient has flattened to a plateau".

5.2 This feature is disclosed in the application as filed in the following text passages:

– "The spraying starts immediately **after the drying air flow has stopped** ... The relative humidity should be at least **1%** higher than conventional ... In a preferred embodiment of the invention the relative humidity at the start of the next

spraying phase is more than 3% and preferably 5-**10%** higher than the conventional value" (last sentence of the third paragraph and last three sentences of the fifth paragraph on page 4);

– "According to the invention the **drying is stopped** and the next spraying is started when the relative humidity of the outlet air is **1 to 10 percentages** higher, preferably 4 to 8 percentages higher than that of the basic level" (first sentence of the second paragraph on page 7);

– "According to the invention **the drying phase is stopped** before the drying is completed. When a suitable humidity is reached the drying is interrupted ... The differential between the basic RH and the trigger point for syrup application is preferably between **1-10 percentages**" (last sentence on page 8 and first two sentences on page 9);

– "A process according to claim 3, wherein the **flow of drying air to said bed is stopped** before the drying is completed and the relative humidity of the outlet air is **1-10 percentages**, preferably more than 3 percentages, most preferably 4-8 percentages higher than its basic level" (Claim 7).

(Emphasis in all passages added by the board).

5.3 From the above-cited passages it follows that it is a prerequisite in the application as filed that drying is stopped when a relative humidity of 1-10% above basic level is reached.

Example 8, the only example where such a relative humidity is disclosed, does not explicitly mention that drying is stopped on reaching a relative humidity of 1-10% above basic level. However, it is explicitly stated in the third paragraph on page 11 that this example illustrates a coating according to the invention. Thus, it must be assumed that Example 8 was carried out according to the invention as presented in the application as filed, implying that drying was stopped when the relative humidity of 1-10% above basic level was reached.

The relative humidity of 1-10% above basic level has however been incorporated into Claim 1 of all auxiliary requests without additionally incorporating into the claim the requirement that drying is stopped when the desired relative humidity is reached. Contrary to the application as filed, Claim 1 thus covers embodiments where drying (in the form of a flow of air) is continued after the start of the next spraying phase at a relative humidity of 1-10% above the basic level. In other words, the feature "relative humidity of 1-10%" has been taken out of its originally disclosed context. The subject-matter of Claim 1 of all auxiliary requests therefore is not based on the application as filed (Article 123(2) EPC).

Consequently, none of the auxiliary request is allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

C. Eickhoff W. Sieber