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Datasheet for the decision of 27 September 2017

Case Number: T 2095/12 - 3.2.04

Application Number: 04756500.7

Publication Number: 1729617

IPC: A47J31/41, B67D1/10

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR DISPENSING A LIQUID BEVERAGE CONTAINING REAL MILK SOLIDS

Patent Proprietor:
Moo Technologies, LLC

Opponent:
NESTEC S.A.

Headword:

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - allowable (no) - intermediate generalisation

Decisions cited:
T 0331/87, T 1852/13, T 2311/10

Catchword:

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Case Number: T 2095/12 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 27 September 2017

Appellant: (Opponent)	NESTEC S.A. Avenue Nestlé 55 1800 Vevey (CH)
Representative:	Ducreux, Marie Nestec S.A. Centre de Recherche Nestlé Vers-chez-les-Blanc Case Postale 44 1000 Lausanne 26 (CH)
Respondent: (Patent Proprietor)	Moo Technologies, LLC 950 Kent Road Batavia, OH 45103 (US)
Representative:	Findlay, Alice Rosemary Reddie & Grose LLP The White Chapel Building 10 Whitechapel High Street London E1 8QS (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 31 July 2012 concerning maintenance of the European Patent No. 1729617 in amended form.**

Composition of the Board:

Chairman	A. de Vries
Members:	E. Frank
	C. Schmidt

Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the opposition division, dated 26 June 2012 and posted on 31 July 2012, to maintain the European patent No. 1 729 617 in amended form pursuant to Article 101(3)(a) EPC. The appellant (opponent) filed a notice of appeal on 26 September 2012, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 29 November 2012.

II. The opposition was filed on 28 July 2009 against the patent as a whole and based on Article 100(a) in conjunction with Article 56 EPC. During the oral proceedings on 26 June 2012, the ground of Article 100(c) EPC was admitted into the proceedings by the opposition division.

The opposition division held that the patent as amended based on claims 1 and 16 of the second auxiliary request as filed during the oral proceedings met the requirements of the EPC.

III. After a summons to attend oral proceedings, a communication pursuant to Article 15(1) RPBA was issued. The Board indicated in its communication, among other things, that it would appear that the subject-matter of amended method claim 1 as upheld by the opposition division comprised a generalised method step. Such a generalisation did not seem to be directly and unambiguously derivable from the original application, contrary to the requirements of Article 123(2) EPC. In response, both parties stated that they would not attend the oral proceedings.

IV. Thus oral proceedings were duly held in the absence of the parties on 27 September 2017.

V. The appellant requested in writing that the decision under appeal be set aside and that the patent be revoked.

The respondent (proprietor) requested in writing that the appeal be dismissed and that the patent be maintained in the form allowed by the opposition division in the contested decision.

VI. The wording of independent claim 1 as upheld reads as follows:

"A method for dispensing a liquid beverage from an aseptic beverage concentrate dispensing container (10) in a housing (11) of a dispenser under an ambient temperature and pressure where a water source is provided for mixing water with the beverage concentrate in a mixing chamber (16) of the dispenser and a portion of the concentrate is aseptically pumped from the container (10) to dispense a formulated beverage, characterised in that the container (10) holds an aseptic ultrahigh temperature (UHT) liquid beverage concentrate containing real milk solids and a stablizer [*sic*] in an effective amount to provide (a) and [*sic*] extended shelf stability of said concentrate of at least about 30 days without granulation and/or separation of the milk solids, and (b) milk solids which do not separate upon dilution with water, aseptically pumping (15) by drawing a portion of said aseptic beverage concentrate containing real milk solids from said container (10) and mixing with the water in the dispenser mixing chamber (16) in

preselected portions to formulate the beverage containing real milk solids,
maintaining the remaining amount of aseptic beverage concentrate containing real milk solids in said container (10) under aseptic conditions,
dispensing said formulated beverage containing real milk solids from the dispenser mixing chamber (16), and automatically flushing and sanitizing the dispenser by dispensing 180-212°F (82.22-100°C) water into the mixing chamber (16) when no product is dispensed for one hour."

VII. The appellant argued as follows:

When reading claim 1 it is not "logical" that flushing and sanitizing happens only once as has been found by the opposition division. Moreover, on page 18 as published, first two lines, two method steps are described in combination only. Thus, the omission of the described second method step "and will not happen again until another beverage has been dispensed" from the wording of claim 1 infringes Article 123(2) EPC.

VIII. The respondent argued as follows:

Claim 1 requires that the dispenser is automatically flushed and sanitised when no product has been dispensed for one hour. The basis for this wording is explicitly found in the application as filed. The further wording "and will not happen again until another beverage has been dispensed" is implied, and is therefore not defined in claim 1.

Reasons for the Decision

1. The appeal is admissible.

2. Amendments claim 1 (as upheld)

2.1 With respect to claim 1 as filed, *inter alia* the following clause has been newly added at the end of claim 1 as upheld:

"... automatically flushing and sanitizing the dispenser by dispensing 180-212°F (82.22-100°C) water into the mixing chamber (16) when no product is dispensed for one hour."

2.2 It is common ground that this newly added end clause of claim 1 has been based on the original description, cf. page 17, line 21 to page 18, line 2 (as published). However, the passage bridging pages 17 and 18 of the published application, which describes how the procedure is automatically performed by the dispenser to flush and sanitize itself, reads as follows:

> "This procedure is performed automatically by the dispenser if no product has been dispensed for one hour and will not happen again until another beverage has been dispensed."

That is, the second method step of the second half sentence on top of page 18 "and will not happen again until another beverage has been dispensed" has been omitted from the wording of present claim 1.

2.3 According to established case law (see case law of the boards of appeal, 8th Edition, 2016, II.E.1.7) it will normally not be allowable to base an amended claim on the extraction of isolated features from a set of

features originally disclosed only in combination, e.g. in a specific embodiment in the description.

Such a generalisation is justified only in the absence of any clearly recognisable functional or structural relationship among the features of the specific combination or if the extracted feature is not inextricably linked with those features.

2.4 Hence, in the present case the Board firstly has to decide whether or not the skilled person would recognize any functional relationship between the two consecutive method steps in the sentence on top of description page 18 (as published).

2.4.1 The Board concurs with the appellant that the additional information included in the second method step, viz., "... and will not happen again until another beverage has been dispensed", instructs the skilled person that regular cleaning should not take place every hour, i.e. once is enough, until or unless another beverage is dispensed.

In other words, due to the second method step the following specific disclosure is directly and unambiguously derivable from the content of the application as filed: unless another beverage is dispensed, avoid cleaning of the dispenser if it has already been cleaned once. Naturally, this does not exclude that the machine might become dirty for other reasons than dispensing.

2.4.2 Consequently, the second method step of the second half sentence on top of page 18 (as published) is clearly functionally linked to the first method step "if no

product has been dispensed for one hour" of the first half sentence.

2.5 Moreover, as argued by the appellant, the Board finds that the skilled person would also not "logically" understand from present claim 1, merely based on the first method step on top of page 18 alone, that automatic flushing and sanitizing necessarily happens only once unless a further beverage has been dispensed, cf. decision of the opposition division, point 5.

Rather, based on the present wording of claim 1, indeed automatic flushing and sanitizing after another, subsequent, hour can take (or takes) place again when no product has been dispensed, irrespective of whether or not a further beverage has been dispensed in the meantime.

2.6 In the light of the above, therefore, the Board concludes that the omission of the second method step "and will not happen again until another beverage has been dispensed" on page 18 (as published) from the context of the described automatically flushing and sanitizing method is not originally disclosed. In particular, the second method step is also not implicitly defined by the first method step on page 18 (as published) alone.

Therefore, the subject-matter of method claim 1 constitutes an "intermediate generalisation" with respect to the application as filed, contrary to the requirements of Article 123(2) EPC.

2.7 Finally, having regard to the "essentiality test" (cf. T 331/87) as applied by the opposition division under

point 5 of its decision, for the sake of completeness the following is observed:

The Board concurs with the findings in recent decisions, cf. for example T 1852/13 of 31 January 2017, that the "essentiality test" of T 331/87 may not always be suitably applicable. This in particular holds true in case of intermediate generalisations, cf. T 2311/10. Generally, the "essentiality test" is an aid that can in certain circumstances be used to assess the allowability of amendments. However, it cannot replace the need to answer the question what a skilled person derives directly and unambiguously from description, claims and drawings of an European patent application on the date of filing, the so-called "Gold Standard" (directly and unambiguously derivable), cf. Case Law of the Boards of Appeal, 8th edition 2016, II.E.1.2.4, opening paragraph.

2.8 In summary, the Board holds that, contrary to the impugned decision, at least one ground of opposition prejudices the maintenance of the patent. Since no auxiliary requests have been filed by the respondent, the patent must be revoked.

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:

L. Malécot-Grob A. de Vries

Decision electronically authenticated