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**Datasheet for the decision
of 17 July 2020**

Case Number: T 1504/16 - 3.3.09

Application Number: 05772325.6

Publication Number: 1786270

IPC: A23G9/14, A23G9/16, A23G9/20,
A23C3/00

Language of the proceedings: EN

Title of invention:

SYSTEM AND METHOD FOR MANUFACTURING FROZEN EDIBLE PRODUCTS

Patent Proprietor:

Gram Equipment of America, Inc.

Opponent:

Tetra Laval Holdings & Finance SA

Headword:

System for manufacturing frozen edible products/GRAM

Relevant legal provisions:

EPC Art. 100(a), 56
RPBA Art. 12(1), 12(2), 12(4)

Keyword:

Inventive step - main request (no)
Auxiliary requests - admission (no)

Decisions cited:

T 0217/10

Catchword:



Beschwerdekammern

Boards of Appeal

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Case Number: T 1504/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 17 July 2020

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 May 2016
rejecting the opposition filed against European
patent No. 1786270 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
D. Rogers

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the opponent ("the appellant") against the opposition division's decision rejecting the opposition.

II. With its notice of opposition, the opponent had requested revocation of the patent in its entirety on the ground for opposition under Article 100(a) EPC (lack of inventive step).

III. The documents submitted during the opposition proceedings included:

D4: Brochure "HOYER AERATOR"

D5: Brochure "Continuous Ice-Cream Freezers"

IV. Independent claim 17 as granted reads as follows:

"A system for manufacturing a frozen edible product comprising: a continuous mixer (409) for receiving a mix of ingredients for the product and compressed air from a source (401, 403) via a first conduit (423) for the mix and a source (407) for the compressed air, and for creating an emulsion of the mix and compressed air; a freezer (411) for partially freezing the emulsion wherein the continuous mixer (409) is connected by a second conduit to the freezer (411); and at least one pump (419) for continuously and simultaneously pumping both a first portion of the partially frozen emulsion from the freezer (411) back into the first conduit (423) wherein the first portion combines with the mix and compressed air which is continuously received within the continuous mixer to develop an increasingly even mixture, and a second portion of the

partially frozen emulsion to a further manufacturing station of the system."

- V. The opposition division decided, *inter alia*, that the subject-matter of the claims as granted involved an inventive step in view of D4 as the closest prior art.
- VI. A reply to the statement setting out the grounds of appeal was filed by the proprietor ("the respondent") referring to a main request (claims as granted) and auxiliary requests 1 to 15.
- VII. A communication pursuant to Article 15(1) RPBA 2020 was issued in which the board indicated, *inter alia*, that the subject-matter of claim 17 of the main request does not appear to involve an inventive step in view of a combination of D4 and D5. In addition, the board indicated that contrary to Article 12(3) RPBA 2020, the auxiliary requests were not filed in the appeal, and no reasoning was provided for auxiliary requests 1 to 15.
- VIII. The respondent informed the board that it would not be attending the oral proceedings. Consequently, the oral proceedings were cancelled.
- IX. The appellant's arguments, in so far as relevant for the present decision, are as follows:
- The claimed subject-matter of the main request does not involve an inventive step in view of D4 in combination with D5.

X. The respondent's arguments, in so far as relevant for the present decision, are as follows:

- The claimed subject-matter of the main request involves an inventive step in view of D4 in combination with D5.

XI. Requests

The appellant requested that the decision be set aside and that the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed (main request) or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1 to 15 submitted during the proceedings before the opposition division.

Reasons for the Decision

MAIN REQUEST

1. Inventive step

1.1 There was common ground among the parties that D4 is an appropriate closest prior art in this case.

1.2 The appellant argued that, *inter alia*, the subject-matter of claim 17 of the main request does not involve an inventive step in view of D4 as the closest prior art in combination with D5. In the respondent's view, the subject-matter of claim 17 of the main request involves an inventive step in view of this attack.

1.3 D4 relates to a brochure disclosing a system for manufacturing ice cream, comprising an aerator (Hoyer aerator), a conduit, a continuous freezer and a pump.

1.4 There was agreement among the parties that the subject-matter of claim 17 only differs from D4 in that the system of D4 does not disclose the feature:

"at least one pump (419) for continuously and simultaneously pumping both a first portion of the partially frozen emulsion from the freezer (411) back into the first conduit (423) wherein the first portion combines with the mix and compressed air which is continuously received within the continuous mixer to develop an increasingly even mixture, and a second portion of the partially frozen emulsion to a further manufacturing station of the system."

(Referred to in the following as the distinguishing feature or "recirculation arrangement".)

1.5 There is also agreement among the parties that the effect resulting from the distinguishing feature is an improved texture of frozen edible products produced by the claimed system (see also paragraph [0012] of the patent).

1.6 Thus, the objective technical problem in view of D4 is to provide a system for producing a frozen edible product with improved texture.

1.7 Not only the closest prior art document D4 but also D5 relates to a system for manufacturing ice cream, containing a continuous freezer for producing ice cream. Thus, the skilled person would take both

documents into account when trying to find a solution to the objective technical problem.

D5 explicitly mentions that by means of an extra pump, available for all X-models (a specific type of freezer), approximately 30% of the ice cream is returned from the outlet pipe of the cylinder back to the inlet pipe where it is mixed into the fresh mix (see page 10, middle column, lines 1 to 6, of D5). Thus, D5 discloses a system for manufacturing ice cream, implementing the above identified distinguishing feature (i.e. the recirculation arrangement). Moreover, D5 teaches (see the aforementioned passage thereof) that the purpose of the recirculation is to "obtain a more uniform, fine-graded structure of the ice cream", i.e. to improve the texture of the ice cream.

1.8 In this context, the respondent essentially argued the following.

- There is no motivation or prompting to combine D4 and D5 ("argument 1").
- The aerator system of D4 and the recirculation of D5 are incompatible due to the aeration location and the aerator speed ("argument 2").
- The systems in D4 and D5 are merely alternative solutions, and the skilled person would not have combined these two alternatives ("argument 3").
- It is unlikely that the skilled person would have "cherry picked" the recirculation of D5, seeing that there are multiple other features included in model X of D5 ("argument 4").

1.9 For the following reasons, the board does not share the respondent's view.

1.9.1 Argument 1

As set out at point 1.7 above, D5 clearly would have taught the skilled person to include the distinguishing feature in the system according to D4 to solve the objective problem.

1.9.2 Argument 2

There is no statement in D4 indicating that a recirculation arrangement might not be feasible. It is true that D4 mentions that the Hoyer aerator is designed to carry out the aeration of ice cream prior to freezing. However, there is no indication on file that the aerator can only be operated with an unfrozen mix and not with, for instance, a partially frozen material.

Moreover, there is no indication on file that the aerator system of D4 and the recirculation arrangement of D5 are necessarily incompatible. The board does not see a technical obstacle which would have prevented the skilled person from implementing a recirculation arrangement into the system of D4. Thus, the skilled person would have contemplated implementing the recirculation arrangement of D5 into the system of D4 without difficulty while maintaining the position of the aerator of D4.

The respondent's arguments addressing the incompatibility due to the aerator speed are based on an internet screenshot (see page 25 of the reply to the statement setting out the grounds of appeal). However,

no evidence was provided by the respondent to prove its publication date. In addition, as admitted by the respondent, the aerator shown in the internet screenshot is not identical to the one shown in D4. Thus, as correctly concluded by the opposition division, the arguments concerning the aerator speed based on the internet screenshot cannot be taken into consideration. Thus, the board does not accept the respondent's argument 2.

1.9.3 Arguments 3 and 4

The respondent argued that the systems according to D5 (model X) and D4 are separate alternative solutions that the skilled person would not have combined to create a "hybrid system" having elements of both systems. In this context, the respondent mentioned that it is unlikely that the skilled person would have "cherry picked" the recirculation of D5, seeing that there are multiple other features included in model X of D5.

The board is unable to find a teaching in D4 or D5 that would have led the skilled person away from combining both systems, given that the skilled person would have expected such a hybrid system to be suitable as a system for manufacturing ice cream having improved texture. Moreover, due to the open formulation of claim 17 ("comprising"), other elements of the system of D5 could be implemented into the system of D4 while still leading to a system falling within the scope of claim 17. Thus, the board cannot accept the respondent's arguments 3 and 4 either.

1.10 In view of the above, the skilled person starting from the system of D4 would have contemplated the

recirculation arrangement of D5, optionally in combination with other elements of the system of D5, and implemented it into the system of D4 while expecting that the objective technical problem could be solved by such a system. Thus, the claimed system would have been obvious in view of the prior art. Against this backdrop, any alleged commercial success of the claimed system cannot render the latter non-obvious.

Thus, the subject-matter of claim 17 of the main request does not involve an inventive step in view of D4 as the closest prior art in combination with D5. Accordingly, the main request is not allowable.

AUXILIARY REQUESTS 1 - 15

2. Admission

2.1 In the reply to the statement setting out the grounds of appeal, the respondent merely referred to auxiliary requests 1 to 15 as filed during the proceedings before the opposition division as a possible fall-back position. The respondent provided arguments with respect to the main request but failed to provide any substantiated comments with respect to the auxiliary requests. Instead, it mentioned that the auxiliary requests would be adjusted if this became necessary during the appeal proceedings, i.e. depending on the board's assessment. Accordingly, the respondent considered the auxiliary requests merely a reservoir for later amendments depending on the board's conclusions. However, no proper substantiation was given in the reply to the statement setting out the grounds of appeal.

2.2 Even after the board indicated in its communication that the main request was considered not allowable (in particular due to a lack of inventive step of the subject-matter of claim 17 of the main request) and that the admission of the auxiliary requests 1 to 15 might be problematic, the respondent still did not provide any comments, i.e. reasoning addressing the appellant's objection and the board's negative assessment. Even at this stage of the appeal proceedings, no reasoning was submitted on why the auxiliary requests might overcome the objections raised. Instead, the respondent indicated that it would not attend the oral proceedings. As a consequence, auxiliary requests 1 to 15 remained unsubstantiated throughout the entire appeal proceedings.

2.3 According to Article 12(4) RPBA 2007, everything presented by the parties under Article 12(1) RPBA 2007 shall be taken into account by the board if and to the extent it relates to the case under appeal and meets the requirements in Article 12(2) RPBA 2007. In other words, if the submissions of a party do not meet the requirement of Article 12(2) RPBA 2007, they do not need to be taken into account by the board. As a corollary, if Article 12(2) RPBA 2007 is not fulfilled for a particular request, the board does not need to take it into consideration.

For the reasons given under points 2.1 and 2.2 above, the respondent did not comply with this requirement since the auxiliary requests were never substantiated in the appeal proceedings.

2.4 In this context, reference is made to T 217/10 supporting the position that unsubstantiated claim requests should in general not be admitted into the

appeal proceedings. In T 217/10 (Reasons 5), the board observed that it was not only for the appellant to substantiate its appeal but equally for the respondent to show at an early stage why it considered that the objections raised in the grounds of appeal did not withstand scrutiny. If auxiliary requests were submitted, reasons usually had to be given to explain how they overcame the objections. In T 217/10, the auxiliary requests had not been accompanied by any reasons, so it was not immediately apparent to the board how they could overcome the objections raised. The board therefore refused to consider them.

In view of the above, the board does not admit auxiliary requests 1 to 15 into the proceedings.

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:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated