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**Datasheet for the decision
of 13 February 2020**

Case Number: T 1877/16 - 3.3.09

Application Number: 10773642.3

Publication Number: 2482678

IPC: A23L1/304, A23C19/02,
A23C19/05, A23C19/068,
A23C19/09

Language of the proceedings: EN

Title of invention:

CHEESE AND METHOD FOR ITS MANUFACTURING

Patent Proprietor:

Valio Ltd.

Opponent:

FrieslandCampina Nederland B.V.

Headword:

Cheese and method for its manufacturing/VALIO

Relevant legal provisions:

EPC Art. 83, 111(1)
RPBA Art. 12(2), 13(1)
RPBA 2020 Art. 11, 13(1)

Keyword:

Late-filed document - admitted (no)

Late-filed facts - admitted (no)

Sufficiency of disclosure - (yes)



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Case Number: T 1877/16 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 13 February 2020

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Decision under appeal: **Decision of the Opposition Division of the
Office posted on 14 June 2016 revoking European
patent No. 2482678 pursuant to Article 101(3) (b)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
D. Rogers

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the patent proprietor against the decision of the opposition division to revoke European patent No. EP 2 482 678.
- II. In the opposition proceedings, the opponent had requested revocation of the patent based on Article 100(b) EPC and 100(a) EPC (lack of novelty and lack of inventive step).
- III. The opposition division decided that the invention as claimed in the main request filed during the oral proceedings on 26 May 2016 did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art. Claims 1, 9 and 15 of this request read as follows:

"1. A method for improving organoleptic properties of a ripened cheese having a sodium content of at most 0.3% (w/w) and a fat content of at most 30% (w/w), comprising a step of adding milk- and/or whey-based minerals to a milk raw material."

"7. A ripened cheese which contains milk- and/or whey-based minerals as a table salt replacement and which has a sodium content of at most 0.3% (w/w), preferably at most 0.12%, and a fat content of at most 30% (w/w)."

"9. A method for manufacturing a ripened cheese having a sodium content of at most 0.3% (w/w) and a fat content of at most 30% (w/w), the method comprising the following steps of:

- renneting a milk raw material
- providing a cheese curd
- discharging the cheese curd to obtain a cheese mass
- if necessary, pre-pressing or alternatively removing at least part of the whey from the cheese mass
- optionally cheddaring, stacking and milling
- optionally salting the pre-pressed or cheddared cheese mass
- optionally cutting the cheese mass into pieces and milling
- moulding and pressing the cheese mass to cheese
- optionally brine salting the cheese
- cooling the cheese
- if desired, packing the cheese into a ripening bag and ripening
- bringing the ripened cheese into a desired size and shape,

wherein the cheese is salted with milk- and/or whey-based minerals."

"15. Use of milk- and/or whey-based minerals for preventing quality defects of organoleptic properties of a ripened cheese having a sodium content of at most 0.3% (w/w) and a fat content of at most 30% (w/w)."

IV. With its statement setting out the grounds of appeal, the patent proprietor (appellant) filed a main request, identical to the main request filed during the oral proceedings before the opposition division, and a first auxiliary request.

V. In its reply dated 28 December 2016, the opponent requested that the appeal be dismissed. As regards the substance of the case, the respondent made no declaration other than:

"The grounds for the decision by the Opposition Division are sound. Appellant's arguments as to why the decision is wrong fall short."

VI. On 15 November 2019 the parties were summoned to oral proceedings. On 16 December 2019, the board issued a communication under Article 15(1) RPBA.

VII. Under cover of a letter dated 13 December 2019, the respondent raised objections of lack of clarity and sufficiency of disclosure. Further, it filed the following documents:

D20: "Cheese; Chemistry, Physics and Microbiology",
edited by P.F. Fox et al., 3rd edn., London,
2004, 125-126

D21: "Experiment station record", vol. V 1893-1894,
Washington, 1895, 247-248

The board received these submissions after it had finalised its communication.

VIII. On 13 February 2020 oral proceedings were held before the board, during which the respondent withdrew its objections regarding lack of clarity.

IX. The appellant's arguments relevant to the present decision may be summarised as follows.

- The appellant objected to the admission of documents D20 and D21 into the proceedings and to two of the respondent's observations (no example showed the step of adding milk- and/or whey-based minerals to a milk raw material; patent did not describe when a cheese is ripe).

- The invention was enabled. The patent in suit addressed the technical problem of how to provide low-sodium, low-fat ripened cheese with appealing organoleptic properties. The solution was that table salt is replaced by milk- and/or whey-based minerals in a conventional cheesemaking process. The skilled person would know how to establish the sodium and fat content of a ripened cheese. The benchmark for assessing improved organoleptic properties of a ripened cheese was a low-salt and low-fat cheese produced without the addition of milk- and/or whey-based minerals.

X. The respondent's arguments relevant to the present decision may be summarised as follows.

- The submissions made in December 2019 should be admitted into the proceedings because they were made shortly after the summons to oral proceedings had reached the respondent.
- The invention was not enabled. The examples in the patent did not support the invention as described in the claims, in particular the step of adding milk- and/or whey-based minerals to a milk raw material. The skilled person would not know how to determine the sodium and fat content of a cheese, or when it is ripe. Moreover, information was missing on how to establish whether the organoleptic properties of a cheese were improved.

XI. Requests

The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or, alternatively, on the basis of

the first auxiliary request, both filed with the written statement of grounds of appeal.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. *Admission of amendment to the respondent's case*
 - 1.1 Until two months before the oral proceedings, the respondent had not filed any evidence or made any submissions dealing with the opposition division's reasoning and the case as presented in the statement setting out the grounds of appeal. Moreover, when the respondent's submissions reached the board, it had already finalised its communication under Article 15(1) RPBA.
 - 1.2 At the oral proceedings, the appellant objected to the admission of D20 and D21. It also specified that it objected to the admission of the respondent's observations that no example showed the step of adding milk- and/or whey-based minerals to a milk raw material and that the patent did not describe when a cheese is ripe.
 - 1.3 The respondent's submissions (documents and observations) represent an amendment to its case and are uncontestedly filed late in the proceedings. They are based on new evidence (documents D20 and D21) and new alleged facts (examples allegedly not according to the claims; alleged lack of disclosure as to when a cheese is considered ripe). Thus, the board had the

discretion for admitting these submissions
(Article 13(1) RPBA 2007; Article 13(1) RPBA 2020).

1.3.1 Admission of D20

D20 was filed to demonstrate that the water content of a cheese decreases due to evaporation during ripening. This allegedly influenced the claimed sodium content of the cheese. However, the fact that the salt content of a cheese changes over time during ripening is not relevant for assessing whether the skilled person would be able to prepare a ripened cheese having a sodium content of at most 0.3% (w/w). Instead, what is relevant is the sodium content of the ripened cheese, i.e. the final cheese product ready to be consumed. Thus, the board decided not to admit D20 into the proceedings.

1.3.2 Admission of D21

D21 was filed to demonstrate that the fat content of a cheese varies over time. D21 relates to white cheese unusually poor in fat and the increase of fat levels due to the activity of fungi. However, its disclosure is not relevant for assessing whether the skilled person would be able to prepare a ripened cheese having a fat content of at most 30% (w/w). Therefore, there is no need to consider whether this document represents common general knowledge, as the respondent argued. Thus, the board decided not to admit D21 into the proceedings.

1.3.3 Admission of the objection that none of the examples showed the step of adding milk- and/or whey-based minerals to a milk raw material

The examples of the patent in suit are discussed in the decision under appeal and in the statement setting out the grounds of appeal only in the context of the subject-matter of claim 9. This claim relates to a process in which cheese is salted with milk- and/or whey-based minerals. In the decision under appeal, there is no indication that the step of adding milk- and/or whey-based minerals to a milk raw material recited in claim 1 lacked essential information. Nor was such an issue discussed in the statement setting out the grounds of appeal. Thus, this objection was raised only in the respondent's late-filed submissions.

However, this objection does not constitute a reaction to new developments in the proceedings. Thus, the board decided not to admit this amendment to the respondent's case.

1.3.4 The respondent's objection that the skilled person would not know when the cheese is ripe is not convincing, as will be shown below. Thus, it is not necessary to decide on the admission into the proceedings of this amendment to the respondent's case.

1.4 With regard to the late-filed submissions, the following further comments are made.

1.4.1 The respondent argued that having filed its submissions in December 2019, while solely Article 13(1) RPBA 2007 was in force, made it more likely for them to be admitted into the proceedings than filing them in January 2020, after Article 13(1) RPBA 2020 entered into force.

However, the conclusions of the board as to the admission of the respondent's late-filed submissions

(documents and objections) are the same, irrespective of whether the facts of this case are assessed under Article 13(1) RPBA 2007 or RPBA 2020.

- 1.4.2 The respondent also argued that its reply had been filed in 2016, i.e. at a point in time when the boards were more "lenient"; therefore, the late-filed submissions should be admitted into the proceedings.

However, the respondent's perception of how the boards allegedly operate is not relevant. The provisions of Article 12(2) RPBA 2007 in this respect are unequivocal and require the respondent to set out its complete case in its reply to the statement setting out the grounds of appeal, i.e. to specify expressly all facts, arguments and evidence relied on. This was not done.

- 1.4.3 Finally, the respondent submitted that there had been a change in representative, which justified the amendment to its case. However, according to established jurisprudence, a change of representative does not generally justify an amendment to a party's case (Case Law of the Boards of Appeal, 9th edition 2019, V.A.4.8.2).

2. *Sufficiency of disclosure*

- 2.1 In the decision under appeal, the opposition division had decided that the patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art. In particular, the skilled person would not know what parameters to select to arrive at the ripened cheese having the required sodium and fat content, when the sodium content of the cheese is to be measured, or

how to establish whether the organoleptic properties of a cheese were improved.

2.2 The patent in suit addresses the technical problem of improving the organoleptic properties of a ripened cheese which has a low-sodium and low-fat content. Instead of using special additives or ingredients, natural products similar to mineral salt and suitable cheesemaking methods for ripened cheeses should be employed (paragraphs [0001] and [0009]). The patent teaches making such a cheese by a conventional cheesemaking process that results in a low-sodium and/or low-fat content, but, in the process, table salt is replaced by milk- and/or whey-based minerals (paragraph [0023]). Furthermore, the patent explains that the milk- and/or whey-based minerals eliminate or cover the taste defects and off-tastes caused by the reduction of table salt and fat (paragraph [0032]).

Thus, the instructions in the claims of the main request (in particular claims 1, 9 and 15) together with these sections of the patent's description provide the skilled person with the necessary information for them to carry out the invention. The examples described in the patent may be useful to illustrate some preferred embodiments or options that the skilled person has in the cheesemaking process of the invention. However, the skilled person would not need them to reproduce the invention as set out in the claims.

2.3 The appellant observed that the skilled person would not know at which moment the sodium and fat content of the ripened cheese has to be measured.

To decide whether the invention is sufficiently disclosed, it is not relevant whether the salt and fat content changes over time during ripening. What matters is the salt and fat content in the ripened cheese.

As discussed above, the skilled person would know conventional cheesemaking processes for preparing a cheese having the required sodium and fat content (paragraphs [0015] and [0056] to [0060]). Moreover, they would be able to carry out the cheesemaking processes according to the claims, select suitable ripening conditions for preparing that cheese (such as those described in the patent in suit, column 5, lines 48 to 52) and provide the ripened cheese. It stands to reason that the sodium and fat content is measured from a cheese product which is delivered to retail stores and ready to be consumed, as the appellant argued.

Thus, the board agrees with the appellant that the skilled person would know at which moment the sodium and fat content of the ripened cheese is to be measured.

- 2.4 The appellant observed that the skilled person would not know how to provide improved organoleptic properties in a ripened cheese.

The patent in suit describes the organoleptic defects that low-salt and low-fat ripened cheeses have. These include weak taste, sticky and soft texture, bitter taste and gummy structure (paragraphs [0010] and [0023]).

As already discussed above, the patent explains how to achieve a low-sodium and low-fat ripened cheese with

improved organoleptic properties. It is conclusive that the benchmark for assessing an improvement are low-salt and low-fat cheeses without added milk- and/or whey-based minerals, and the properties to test include taste and texture, as the appellant explained. This may be done by setting up an organoleptic panel which evaluates the appearance, texture, taste and general impression of the ripened cheese, as described in paragraph [0048]. However, the board does not agree with the respondent's allegations that further details regarding the setting up of the test panel and their training or the scoring scale are required for the invention to be enabled.

2.5 Thus, the main request complies with the requirements set out in Article 83 EPC.

3. *Remittal*

In the decision under appeal, the opposition division had not dealt with issues of patentability (novelty and inventive step). This constitutes a special reason for remitting the case (Article 11 RPBA 2020 and Article 111(1) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



K. Exner

A. Haderlein

Decision electronically authenticated