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**Datasheet for the decision
of 19 February 2020**

Case Number: T 2639/16 - 3.2.04

Application Number: 12151548.0

Publication Number: 2478802

IPC: A47J31/00, A47J31/40

Language of the proceedings: EN

Title of invention:

Chocolate beverage

Patent Proprietor:

Koninklijke Douwe Egberts B.V.

Opponents:

Koninklijke Douwe Egberts BV
Krüger GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 83, 84, 54(2), 54(3), 56

Keyword:

Sufficiency of disclosure - (yes)

Claims - lack of clarity no ground for opposition

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

Catchword:



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Case Number: T 2639/16 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 19 February 2020

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
4 October 2016 concerning maintenance of the
European Patent No. 2478802 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
T. Bokor

Summary of Facts and Submissions

- I. The Opponent 2 (Appellant-Opponent) lodged an appeal, received on 9 December 2016, against the interlocutory decision of the Opposition Division posted on 4 October 2016 concerning maintenance of the European Patent No. 2478802 in amended form, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 1 February 2017.
- II. Two oppositions were filed under Article 100(a) EPC for lack of novelty and lack of inventive step, under Article 100(b) EPC for insufficiency of disclosure and under Article 100(c) EPC for subject-matter extending beyond the content of the application as filed.

The Opponent 1 withdrew its opposition on 16 March 2016.

The Opposition Division held that the patent as amended met the requirements of the EPC having regard *inter alia* to the following documents:

- (D3) EP 1 985 213 A1
- (D6) WO 2011/063322 A1

- III. The Appellant-Opponent requests that the decision be set aside and the patent revoked.

The Respondent-Proprietor requests that the appeal be dismissed and the patent be maintained as upheld by the opposition division, or, auxiliarily, according to one of auxiliary requests 1-8 filed with the reply to the appeal of 7 June 2017.

- IV. In preparation for oral proceedings the Board issued a communication setting out its provisional opinion on

the relevant issues. Oral proceedings before the Board were held on 19 February 2020.

- V. Independent claim 1 according to the main request reads as follows:

"A kit for preparing a chocolate beverage, the kit comprising a non-machine insertable first container (51) in the form of a sachet containing a dry powder blend comprising at least a chocolate beverage ingredient for transferring into a beverage receptacle and a second separate container (52) in the form of a cartridge, capsule, pod or pad for use in a beverage preparation machine (53) and containing at least milk solids, wherein the first container further contains milk creamer and/or milk powder."

- VI. The Appellant-Opponent argued as follows:

The claimed invention, as defined by the claims of the main request, is not clear and not sufficiently disclosed. Moreover, the priority claim is not valid for claim 1 of the main request. Consequently, document D6 is relevant for novelty. The subject-matter of claim 1 is not new over D6. It also lacks an inventive step in the light of D3 and common general knowledge.

- VII. The Respondent-Proprietor argued as follows:

The board is barred from examining the clarity objection raised by the Appellant-Opponent since it relates to subject-matter of the granted claims. The invention is sufficiently disclosed. The subject-matter of claim 1 of the main request is new and involves an inventive step over the cited prior art.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The invention is related to a beverage kit, method and dispensing system, for preparing a chocolate beverage with an attractive appearance in a single step using a low pressure beverage preparation machine, see specification paragraphs [0001] and [0011]. The kit comprises a first container, containing at least a chocolate ingredient provided as a dry powder blend, in the form of a sachet so that it can be readily opened and emptied into a receptacle, see paragraph [0013]. The kit further comprises a second container with milk solids and suitable for use in a beverage preparation machine. In use, an aqueous medium is passed through the second container in the machine so as to form a milk beverage medium that is dispensed into the receptacle, see paragraph [0021]. The separation of chocolate ingredients from the milk solids results in the fat in the cocoa butter or powder not interfering with the foam that is produced and hence in a foam having greater stability and longevity, see paragraph [0030]. Additionally, mixing a chocolate dry powder medium (of the first sachet) with the liquid medium in the drinking receptacle can provide a chocolate sprinkled appearance and thereby a beverage that more closely simulates the "café experience", see paragraph [0017].

3. Clarity and sufficiency of disclosure - Main request

The Appellant-Opponent raised clarity and sufficiency objections against claim 1 of the main request in the statement setting out the grounds of appeal. They merely referred to these written submissions during the oral proceedings before the Board.

3.1 As noted in the Board's written communication, section 3, clarity is not a ground for opposition under Article 100 EPC so that in accordance with established case law as confirmed by G3/14 the Board is barred from examining clarity insofar as it relates to the claims as granted. The Appellant-Opponent raises an issue of clarity regarding the term "milk creamer" already present in a dependent claim as granted, now incorporated into new claim 1. The board is thus barred from examining this objection.

3.2 In respect of sufficiency the Board noted in the written communication, section 4, that dry powder milk creamers, as required by the claim, are well known in the art and that thus the skilled person, in the Board's view, does not need further guidance to carry out this feature. The invention is thus sufficiently disclosed.

3.3 Absent any further submissions from the Appellant-Opponent, the Board sees no reason to change its point of view set out in its preliminary opinion. It thus holds that the claimed invention is clear and sufficiently disclosed.

4. Priority and novelty - Main request

The Appellant-Opponent submits in the statement setting out the grounds of appeal that D6 forms part of the state of the art because the priority claim for claim 1 of the main request is invalid. They further submit that the subject-matter of claim 1 is not new over D6. During the oral proceedings before the Board they merely referred to their written submissions for these issues.

As noted by the Board in its written communication, section 5, the Board considers that D6 does not disclose the combination of features of claim 1 of the main request. D6 is directed to a dry instant mix composition having creamer and cocoa solids for preparing beverages. The embodiment of page 12, line 23 to page 13, line 7, allegedly anticipating claim 1, discloses a first container in the form of a sachet having the composition for dissolving it in a receptacle. It further discloses an optional (only in this embodiment) second container for preparing a topping up beverage by brewing it in a machine, the top-up beverage being "hot coffee, (hot) chocolate or tea (or other hot beverage)", see step (iv), page 12, line 29. There is no suggestion that the second container also includes milk solids. The passages cited by the Appellant-Opponent, namely page 11, line 20 to page 12 line 3, refer to another embodiment with a single container, in the form of a cartridge for preparation of the beverage in a machine and containing a dry mix (creamer and cocoa solids). There appears to be no direct and unambiguous disclosure combining the two embodiments, i.e. providing the cartridge of the embodiment bridging pages 12 and 13, as a cartridge

described at the bottom of page 11 containing a dry mix of creamer and cocoa.

Thus without prejudice to the issue of the validity of the priority claim, the subject-matter of the contested claim 1 appears to be new over D6.

Absent any further submissions from the Appellant-Opponent the Board sees no reason for assessing this issue differently. It thus holds the claimed subject-matter to be novel over D6, irrespective of whether D6 is considered a prior art document under Article 54(2) EPC or Article 54(3) EPC.

5. Inventive step - Main request

5.1 D3 is considered by both parties as an appropriate starting point for the assessment of inventive step. It is not in dispute that one embodiment of D3 (paragraph [0006]) discloses a kit comprising two capsules to be sequentially used in a machine, both capsules containing at least milk solids, for preparing a cold milk based beverage with a flavour component (chocolate powder) by dissolving under pressure the contents of the capsules in cold water without mechanically stirring, see paragraphs [0004]-[0008] and paragraph [0037]. One capsule contains chocolate powder and milk powder, the other milk solids.

5.2 It is undisputed that the claimed kit differs from this known kit in that the chocolate powder and milk powder are provided in a sachet rather than a capsule. In the prescribed method of preparation (claim 7) the contents of the sachet are first poured into a receptacle to which the milky beverage medium produced in the machine from the other (second) container is then added. As a result some of the powder may be entrained and carried

to the beverage surface, forming a more attractive (café style) beverage, see patent specification paragraph [0017], using a single preparation step; see patent specification paragraph [0017]. Thus the kit composed of sachet and machine container facilitates the preparation of such a product. The objective technical problem can therefore be formulated as how to facilitate for the user to produce a chocolate beverage with attractive appearance and with optimal simplicity of preparation, see paragraph [0012].

5.3 The Appellant-Opponent submits that the skilled person would as a matter of obviousness, replace the first (milk and sugar containing) capsule in D3 with a sachet, since sachets are a well known alternative to capsules.

5.4 The Board is not convinced by this argument. In the present case the teaching of D3 is predicated on machine preparation of a cold milk based instant drink using capsules. The method is based on dissolving the contents of the capsules in cold water under pressure without mechanical stirring, see D3 paragraphs [0003]-[0005]. Full solubility and miscibility of the drink is so achieved, see paragraphs [0007] and [0008]. This is valid for both capsules of the two capsule embodiment, see paragraphs [0006]-[0008].

In the Board's view, given the centrality of the idea of injecting water under pressure in either capsule to D3's teaching, the skilled person would not as a matter of obviousness consider departing from this central teaching of D3 by replacing either capsule, let alone the capsule that contains the chocolate drink ingredients, by a sachet. This is all the more so for the capsule containing the main flavour component, cf.

paragraph [0013], which they would consider the "main" capsule. The two capsule embodiment is moreover associated with the benefit of full solubility and miscibility, paragraphs [0007] and [0008], which is particularly important for the capsule containing the mixture of main flavour component and milk powder. It would therefore not occur to the skilled person as a matter of obviousness to provide the contents of precisely this capsule in a sachet so that they would need to be dissolved and mixed by the rather different method of pouring in liquid and stirring at normal pressure.

- 5.5 The Appellant-Opponent further argues that if the skilled person would wish to find an alternative, they would essentially be in a one-way street. Referring to paragraph [0002]-[0003] of D3, they submit that D3 seeks to solve the same problem as the contested patent, to simplify the process. However, so the argument goes, the skilled person would realise that this objective is not ideally achieved with two capsules. That embodiment of D3 could be truly simplified by replacing either capsule by the simplest alternative, a sachet. Therefore, they conclude, either possibility would be obvious.

In this respect, the Board notes that paragraph [0002] of D3 refers to a known process that has the drawback of requiring two water introduction steps into a single capsule. D3 teaches to use a single water jet insertion step into the capsule to simplify this process, see paragraphs [0003]-[0004], or into each capsule in the two capsule variant of the following paragraphs. Indeed, providing two machine insertable capsules is described in D3 as an advantageous embodiment achieving sufficient dairy and creamy taste while ensuring full

solubility of the drink, see paragraph [0007] of D3. The board is thus not convinced that the skilled person, when trying to further develop the kit of D3 based on the teachings in that document, would seek as a matter of obviousness to avoid the insertion of any of the capsules in a machine, abandoning dilution under pressure.

- 5.6 In respect of the further argument that the claimed combination is obvious in the light of common general knowledge, it is true that providing powder soluble components in a sachet or soluble components in a machine insertable capsule is generally known. Thus, it may well be known to provide a mixture of chocolate and milk powder in a sachet. However, the claim is directed at a *combination* of such a sachet, even if known, with a cartridge (capsule) containing milk powder, also known *per se*, see D3. Without further substantiating evidence, the Board is unable to conclude that this specific claimed *combination* of a sachet containing a dry powder blend with a chocolate beverage ingredient with a cartridge, capsule, pod or pad for use in a beverage preparation machine and containing milk solids to form a kit is trivial *per se* and would belong to the common general knowledge of the skilled person. With this combination, the preparation of a beverage with an attractive appearance - i.e. having optimum milk foam and chocolate sprinkled appearance - , with optimal simplicity of preparation in a single machine step is facilitated, see paragraphs [0011], [0017] and [0030] of the published patent specification.

- 5.7 Finally, whether the effects mentioned above are only fully achieved if the kit is used in accordance with the method of claim 7, is not considered by the Board to be decisive in itself. The board is satisfied that the combination of these elements in the kit is critical to achieving those effects. Thus, that combination is not an arbitrary juxtaposition of existing elements, but is purposive and motivated by those effects.
- 5.8 In conclusion, the Board is unable to conclude that claim 1 of the main request lacks an inventive step on the basis of the evidence and arguments put forward by the appellant opponent.
6. As all the objections raised by the appellant opponent fail, the Board confirms the findings of the Opposition Division.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated