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**Datasheet for the decision
of 16 June 2020**

Case Number: T 1503/17 - 3.2.04

Application Number: 11720984.1

Publication Number: 2560495

IPC: A22C7/00

Language of the proceedings: EN

Title of invention:

3D-FOOD PRODUCT FORMING APPARATUS AND PROCESS

Patent Proprietor:

GEA Food Solutions Bakel B.V.

Opponent:

Marel Townsend Further Processing B.V.

Headword:

Relevant legal provisions:

EPC Art. 56, 111(1)

EPC R. 103(1) (a)

RPBA Art. 13(1), 13(3)

Keyword:

Inventive step - (no)

Appeal decision - remittal to the department of first instance
(no)

Reimbursement of appeal fee - substantial procedural violation
(no)

Late-filed auxiliary requests - amendments after arrangement
of oral proceedings - justification for late filing (no) -
request clearly allowable (no)

Decisions cited:

Catchword:



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Case Number: T 1503/17 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 16 June 2020

Appellant: GEA Food Solutions Bakel B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
30 May 2017 concerning maintenance of the
European Patent No. 2560495 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: G. Martin Gonzalez
W. Van der Eijk

Summary of Facts and Submissions

I. The proprietor lodged an appeal, received on 19 June 2017, against the interlocutory decision of the Opposition Division posted on 30 May 2017 concerning maintenance of the European Patent No. 2 560 495 in amended form, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 9 October 2017.

The opponent also appealed the interlocutory decision by notice of appeal received on 19 July 2017 and paid the appeal fee on the same day. The statement setting out the grounds of appeal was received on 29 September 2017.

II. Opposition was filed under Article 100(a) EPC for lack of inventive step, under Article 100(b) EPC for insufficiency of disclosure and under Article 100(c) for added subject-matter.

The Opposition Division held that the patent as amended met the requirements of the Convention, having regard inter alia to the following evidence:

(O3) WO 00/30458 A1
(O5) WO 2004/002229 A2
(O6) WO 2005/107481 A2

III. The appellant-proprietor requests that the case be remitted to the Opposition Division with the order to issue a correct, unambiguous and appealable decision, or, if not remitted, that the decision under appeal be set aside and the patent be maintained in amended form according to auxiliary request 2 filed before the

Opposition Division (main request), or the appeal of the opponent be dismissed and the patent thus be maintained as upheld by the Opposition Division (auxiliary request 1), or maintained in amended form according to auxiliary requests 2 or 3, as filed with letter of 13 May 2020, or, in case these latter requests are not admitted into the appeal proceedings, to remit the case to the Opposition Division for further prosecution.

The appellant-opponent requests that the case be remitted to the Opposition Division with the order to issue a correct, unambiguous and appealable decision and to order the reimbursement of the appeal fee, or, if not remitted, that the decision under appeal be set aside and that the European patent No. 2 560 495 be revoked.

- 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 16 June 2020.

- V. The independent claim 1 according to the relevant requests reads as follows:

(a) Main request

"Food product forming apparatus (3) to produce patties (22) with a form member (1) which comprises a mould (11) in which the patties are formed, whereas the form member (1) is located adjacent to a pressure member (13) and is at least partially made from a porous material (11), whereas the pressure element is 3D-

shaped and the surface of the form member, which interacts with the pressure member, is 3D-shaped, so that a product is formed that does not comprise a constant thickness over its entire extension, the patties are removed from the moulds (11) by ejecting a gas and in that characterized in, that the member is a rotating drum."

(b) First auxiliary request

Claim 1 as in the main request amended as follows (emphasis is added by the Board to indicate added text)

"...partially made from a porous material (11), wherein each mould comprises a porous bottom and a porous sidewall and wherein the moulds are vented via the porous material (11) during filling of the moulds to remove entrapped air and whereas the pressure element is 3D-shaped..."

(c) Second auxiliary request

Claim 1 as in the first auxiliary request amended as follows (emphasis added by the Board to indicate added and removed text)

"Food product forming apparatus (3) to produce meat patties (22) ...
...of the moulds to remove entrapped air and
whereas the pressure ~~element~~ member (13) is a pressure plate that is 3D-shaped and the surface of the form member, which interacts with the pressure member, is 3D-shaped, so that ~~a product is~~ patties are formed that ~~does do~~ not comprise a constant thickness over ~~its~~ their entire extension, the patties are removed from the moulds (11) by ejecting a gas and in that

characterized in, that the form member is a rotating drum."

(d) Third auxiliary request

Claim 1 as in the second auxiliary request amended as follows (emphasis added by the Board to indicate added and removed text)

"...whereas the pressure member (13) is a pressure plate that is 3D-shaped and the surface of the form member, which interacts with the pressure member, is 3D-shaped, so that patties are formed that do not comprise a constant thickness over their entire extension, the patties are removed from the moulds (11) by ejecting a gas and in that characterized in, that the form member is a rotating drum, wherein the food product forming apparatus (3) further includes a base member (5) and lamellas located between the base member (5) and the pressure member (13), which transduce pressure from the base member (5) to the pressure member (13) and wherein the pressure member (13) is made of a flexible material so that it is always in contact with the surface of the drum."

VI. The appellant-opponent argues as follows:

The correction under Rule 140 EPC of the impugned decision clarifying the version of the claims in which the patent was upheld was issued on 21 September 2017, nineteen days before the deadline for submitting the grounds of appeal of 9 October 2017. The very long legal uncertainty violates the principle of legitimate expectations to the extent of a substantial procedural violation that justifies both remittal to the Opposition Division for the issuance of an unambiguous

appealable decision and reimbursement of the appeal fee. Claim 1 of the main and first auxiliary request lack an inventive step in the light of documents O3 and O6. The second and third auxiliary requests are late filed without justification.

VII. The appellant-proprietor argues as follows:

The case should be remitted to the department of first instance for the issuance of an unambiguous appealable decision. Claim 1 of the main and auxiliary request 1 involves an inventive step over the cited prior art. The second and third auxiliary requests are a legitimate response of the appellant-proprietor to the developments in the proceedings and they also successfully address the outstanding objections of a lack of inventive step. They should therefore be admitted. If not, remittal to the department of first instance is requested.

Reasons for the Decision

1. The appeals are admissible.
2. Background

The invention is concerned with a food forming apparatus to produce patties with a form member, comprising moulds, and a pressure member adjacent to it to close the mould cavity, see specification paragraph [0001]. The pressure member and the surface of the form member that interacts with the pressure member are 3D-shaped so that the produced patties do not comprise a constant thickness over their entire extension, see granted claim 1. The form member is a rotating drum and is at least partially made of a porous material. The

porous material has the advantage that the mould can be vented during filling of the mould to remove entrapped air and/or supplied with a pressurized medium such as air to eject the formed patties. The apparatus is thereby able to produce more complex shapes, see paragraphs [0004]-[0007].

3. Requests for remittal and for reimbursement of the appeal fee.
 - 3.1 Both parties requested to remit the case to the Opposition Division with the order to issue a correct, unambiguous and appealable decision, since the impugned decision contained in its annex two distinct versions of the upheld auxiliary request 3. The appellant opponent saw a substantial procedural violation in the division's tardy correction only 19 days before expiry of the appeal time limit and therefore also requested reimbursement of the appeal fee.
 - 3.2 As noted by the Board in its communication in preparation for oral proceedings in section 4:

"The annex to the Opposition Division's decision contained two different versions of auxiliary request 3 (the upheld version). Despite the early request for correction of the opponent of 7 June 2017, the Division issued the correction under Rule 140 EPC removing the wrong version of auxiliary request 3 on 21 September 2017, nineteen days before the deadline for submitting the grounds of appeal of 9 October 2017.

4.1. *The appellant-opponent submits that the very long legal uncertainty in respect of the valid text violates the principle of legitimate*

expectation to the extent of a substantial procedural violation that justifies both remittal to the Opposition Division (Article 11 RPBA) for the issuance of an unambiguous appealable decision and reimbursement of the appeal fee (Rule 103(1)(a) EPC).

4.2. Though it is certainly regrettable that the division took so long to issue a correction, the Board notes, that in the annexes to the minutes of the oral proceedings the incorrect auxiliary request 3 version was clearly marked as "abandoned". It would have thus been clear after consulting the minutes of the oral proceedings, and despite the error of transcription in the decision annex, what claims text the decision is based on already at its date of issuance. As otherwise, the decision is sufficiently reasoned to enable the appellants and the Board to review it or to ascertain whether they had been negatively affected by it, the Board does not consider that the delay in issuing the correction by the Opposition Division can constitute a substantial procedural violation or a fundamental deficiency that justifies remittal or reimbursement of the appeal fee for reasons of equity. Nor is the Board able to see a causal relationship between the error or delay and the opponent's desire or need to appeal. In substance the opponent's appeal is clearly directed against the correct version."

3.3 Both parties refrained from comment after issuance of the communication. Absent any further submissions the Board sees no reason to change its point of view. The Board thus decided not to remit the case to the Opposition Division for the above reasons, Article

111(1) EPC. By the same token it decided not to order reimbursement of the appeal fee under Rule 102(1)(a) EPC.

4. Main request - inventive step

4.1 Claim 1 requires a form member which is in the form of a rotating drum and comprises the mould cavities where the patties are formed. According to the appellant-proprietor, the claimed feature "the surface of the form member, which interacts with the pressure member" defines the outermost surface of the drum, and excludes the surface within the mould cavities. The Opposition Division, in contrast, considered the mould cavity surface as also falling under the scope of the surface so defined. The appellant-proprietor submits in this respect that the surface of the mould cavities does not interact with the pressure member in the sense of the contested claim, as would be derivable from figure 7 of the patent specification, where the pressure member 13 contacts the undulated outermost drum surface. Thus, the Board must consider how the feature "the surface of the form member, which interacts with the pressure member is 3D-shaped" is to be interpreted.

4.2 According to general principles of claim interpretation as developed by the Boards of Appeal, see CLBA II.A. 6.3.4, the description and drawings cannot be used to give a different meaning to a claim feature which in itself imparts a clear, credible technical teaching to the skilled reader.

In the Board's understanding, the term "interact" does not necessarily imply that the two surfaces must contact each other and have complementary 3D forms, as the undulated surfaces of figure 7 of the contested

patent. For instance, two facing concave surfaces that close each other and form a cavity, also interact, namely to form a cavity where a patty can be molded. This interpretation is thus a clear, credible technical teaching derivable from the wording of the claim, which is moreover also supported by the described embodiment. Indeed, in the cited embodiment of figure 7, the pressure member 13 also interacts with the internal surface of the mould 11 to form the cavity to form the patties.

4.3 As regards the feature "does not comprise a constant thickness over its entire extension", the appellant-proprietor submits that it calls for a continuous variation of thickness that excludes the form having any local area of constant thickness over its entire extension. The Board rather gives the feature a more straightforward reading as meaning nothing more than the absence of constant thickness across width or breadth. In other words, the resultant product may not have constant thickness across width or breadth, implying that its two main surfaces may not be parallel. Nor indeed is anything else suggested by the description and drawings (see for instance the formed patties 22 in figure 7 with a central section of constant thickness and local thickness decrease only at the sides). Therefore a product having for instance only one rib on its surface, and thus not being of constant thickness over the entire extension, also meets this limitation even if the rest of the product shows a constant thickness.

4.4 Turning to the issue of inventive step for the above discussed claim, it is not disputed that O3 is a suitable starting point. O3 describes a food product forming apparatus with a form member in the form of a

rotating drum 2 comprising mould cavities 4, see for example figure 8 and relevant parts of the description, page 24 onwards. Due to the mould cavities the surface of the drum 2 is considered to be three dimensional. O3 further discloses a pressure member in the form of a pressure belt 10, which interacts with the cavity surface to form a closed mould cavity. In a variant described on page 30, lines 4 to 7, the belt may be provided with a 3D-shaped surface (studded or ribbed) to form a complementary [3D] pattern on the outside of the product. Consequently, the belt and drum surface interact to form a product that has a ribbed surface and thus does not comprise a constant thickness over its entire extension. Finally, O3 also describes supplying pressurised air through the excess-pressure tray 22 for ejecting the formed product, see page 24, lines 37-39.

4.5 Therefore the claimed subject-matter differs from the known apparatus in that the form member is at least partly made from a porous material. The porous material has the advantage that the moulds can be vented over most of the interface of the mould during filling and also supplied with a pressurised medium for ejection of the moulded product, see paragraph [0007] of the patent specification. The associated technical problem can thus be formulated as how to improve the operations of filling the mould and removing patties.

4.6 Document O6 describes in figures 4a, 4b; page 6, lines 30-34; and page 7, lines 1-10, the use of porous material 22 for moulds in a mould drum 20 for forming patties, where the porosity of the material is used to benefit venting and patty removal. In the Board's view the skilled person seeking to improve the air venting and patties removing operations of the drum of O3,

would thus as a matter of obviousness apply the above teachings of O6 in respect of the mould porous material 22 to the known drum, arriving in an obvious manner at the subject-matter of claim 1.

4.7 The Board thus concludes that claim 1 of the main request does not involve an inventive step in the sense of Article 56 EPC.

5. First auxiliary request - Inventive step

5.1 Claim 1 of the auxiliary request is amended to add that each mould comprises a porous bottom and a porous sidewall, the moulds being vented via the porous material during filling of the moulds. The porous material 22 taught in O6 also has these features. They are moreover also taught by O6 in the context of venting and pressurising the cavities for filling and ejection, see figure 4b and page 7, lines 10,11 referring to forced venting by suction during filling and by application of compressed air during release. Consequently, the Board holds that the subject-matter of claim 1 of this request also lacks an inventive step in the light of the combination of O3 with O6, for the same reasons as mentioned for the main request.

5.2 The appellant-proprietor submits that O6 does not disclose porous side walls, as required by claim 1 of this request. They submit that air circulation and thus porosity through the side walls is not unambiguously disclosed by figure 4b of O6, since it only depicts air flow, see arrow, from the bottom of the mould cavity.

The Board is not convinced by this submission. Document O6 describes that the outer drum 22 in the example is made *completely* from a material with a porous

structure, see page 6, lines 35-39, "an outer drum 22, which is made at least in part (and in this example completely) from material with a porous structure". The following paragraph on page 7, also stresses the importance of the porosity of the material as an essential technical feature for venting and pressurising "through the porous walls of the mould cavities 21". For either venting or release to work properly it must affect all mould surfaces in contact with the patty. The first paragraph of page 8 in fact describes sealing only the outermost part (that is outermost surface) 22c, see figure 4b, of the outer drum (either by lubrication or by application of a coating layer), thus necessarily leaving all inner surfaces of the porous mould material exposed. In figure 4b, whereas the outer surface is shown free of texture, the walls and bottom of the mould are indeed shown as having the same texture. From these passages and figure 4b the skilled person immediately infers that all inner surfaces of the mould, its bottom and its side walls, are porous and that the air flow arrow in figure 4b generally represents air flow through the whole of the depicted porous structure, including the side walls also represented as part of it.

Any doubts that might subsist are removed by the specific reference in O6, page 3, lines 35-37: "*The production device 1 is described in detail in WO 2004/002229, the contents of which are hereby deemed to be incorporated in the present application*". O5 (WO 2004/002229) is specifically concerned with removal of adhesion forces at all interfaces between mould and product, page 3, lines 20-23, and suggests porous material, page 5, lines 19 to 31, as then detailed on page 27, lines 3 to 8, in combination with figure 6,

where air flow "through the pores" is shown passing through all sides of the mould cavity.

5.3 The Board thus concludes that the subject-matter of claim 1 of the first auxiliary request does not involve an inventive step, Article 56 EPC.

6. Second and third auxiliary requests - Admissibility.

6.1 Auxiliary requests 2 and 3 attempt to address the above objections of lack of inventive step. These requests were filed with a letter of 13 May 2020, after oral proceedings had been arranged. As the summons was issued prior to entry into force of the new rules of procedure, under Art 25(3) RPBA 2020, Article 13 in its 2007 version continues to apply. Admission of these requests is thus at the discretion of the Board, Article 13(1) and (3) RPBA 2007.

6.2 According to the approach frequently adopted by the boards when applying Art 13(3) RPBA 2007, unless there is a good reason for filing the amendment this far into the proceedings - for example as a result of developments in the proceedings - an auxiliary request will only be admitted if it does not extend the scope of discussion as determined by the grounds of appeal and the respondent's reply, and if the request is clearly or obviously allowable, i.e. it is immediately apparent to the board, with little investigative effort on its part, that the amendments successfully address the issue raised without raising new ones, see Case Law of the Boards of Appeal, 9th edition 2019 (CLBA), V.A. 4.5.1.a) and the case law cited therein.

6.3 In the present case the Board is not aware of any circumstances which would justify the late filing. The

outstanding objections of inventive step had already been raised by the appellant-opponent with the statement of grounds of appeal. The preliminary opinion of the Board of 6 February 20 November 2020 cannot be considered in the present case as a new or unexpected development that may justify the late filing, as it did not raise new issues or objections in this respect, but merely presented its provisional view regarding the parties' written submissions thus far.

At the oral proceedings before the Board the appellant-opponent also referred to an interpretation (of "endless belt") in an (unidentified) decision by this Board, in a related case, as justifying the late filing. Leaving aside the fact that the Board is in any case not bound by a decision in a different (even if related) case, Art 23(3) EPC, the Board is unable to see how claim interpretation in another case can have any bearing on the justification for a late filing in the present appeal, since they are distinct and independent proceedings.

6.4 Moreover, the independent claims are amended to include individual features taken in isolation from the specific embodiments of figures 7 and 8. Thus, for the second auxiliary request the feature is added that the pressure member is a pressure plate, from page 14, lines 25-28 and page 15, lines 5-9 of the original description; and for the third auxiliary request that of a system to provide pressure to the pressure member, from page 14, lines 28-31. It is not immediately apparent to the Board that the features incorporated into the claims are not linked by a structural or functional relationship with other, not included features of the particular embodiment of figures 7 and 8 described on pages 14 and 15, for instance the

particular shape of the pressure plate. Prima facie, this raises the new issue whether they represent an unallowable intermediate generalisation. They are therefore not clearly allowable.

6.5 In consideration of the above, the Board decided not to admit the second and third auxiliary requests into the proceedings.

7. Request for remittal if auxiliary requests not admitted

The appellant-proprietor requests to remit the case to the Opposition Division for further prosecution in case the second and third auxiliary requests are not admitted into the appeal proceedings.

However, as all requests have been dealt with, and are either held to be not allowable or are not admitted into the proceedings, there are no further substantive requests on file and the case can thus be finally decided in accordance with Art 15(6) RPBA 2020. Article 13(3) RPBA 2007 is indeed intended to avoid any unnecessary adjournment of the oral proceedings that might delay a final decision and so prolong legal uncertainty. The Board thus sees no reasons for remitting the case, nor have any been put forward. The Board thus decided not to remit the case to the department of first instance, Article 111(1) EPC.

8. For the above reasons the Board holds that, taking into consideration the amendments made by the appellant-proprietor, the patent and the invention to which it relates do not meet the requirements of the Convention. The Board thus revokes the patent pursuant to Article 101(3)(b) EPC.

Order

For these reasons it is decided that:

1. **The decision under appeal is set aside.**

2. **The European patent Nr. 2560495 is revoked.**

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated