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**Datasheet for the decision
of 13 April 2010**

Case Number: T 0421/09 - 3.2.04

Application Number: 03736926.1

Publication Number: 1528883

IPC: A47J 37/08

Language of the proceedings: EN

Title of invention:

High speed cooking device and method

Applicant:

Lincoln Foodservice Products, Inc.

Headword:

-

Relevant legal provisions:

RPBA Art. 13(1)
EPC Art. 113(2), 84, 123(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"Late filed requests: clearly allowable (no)"
"Basis of decisions: valid text (no)"
"Claims - clarity (no)"
"Amendments - added subject-matter (yes)"

Decisions cited:

T 0087/05

Catchword:

-



Case Number: T 0421/09 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 13 April 2010

Appellant: Lincoln Foodservice Products, Inc.
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 13 August 2008
refusing European application No. 03736926.1
pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: A. de Vries
Members: M. Poock
C. Heath

Summary of Facts and Submissions

I. The Appellant lodged an appeal, received 21 October 2008, against the decision of the Examining Division posted 13 August 2008, refusing the European patent application No. 03736926.1 and simultaneously paid the appeal fee. The grounds of appeal were received 23 December 2008.

In its decision the Examining Division held that the application did not meet the requirements of Articles 84 and 123(2) EPC among others.

In the communication of 19 June 2009 pursuant to Rule 100(2) EPC and in the annex to the summons to the oral proceedings pursuant to Article 11(1) RPBA dated 15 January 2010 the Board made preliminary observations regarding in particular clarity and added subject-matter.

II. Oral proceedings were duly held on 13 April 2010. At the proceedings the appellant filed a new main request and a new auxiliary request to replace all requests then on file.

III. The Appellant requests that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 9 of a main request, or, in the alternative, on the basis of claims 1 to 8 of an auxiliary request, both requests filed at the oral proceedings before the Board.

IV. The wording of claim 1 of the requests is as follows :

Main request

"A method of cooking food products (402, 404) of different heights by:
placing said food products in a cooking device having an array of jet apertures (410, 412,414), the jet apertures having a shape and the array having a spacing between apertures, there being a distance (L) between said jet apertures and said food products;
providing air at a fan speed/pressure that produces, for said jet aperture shape and said spacing between apertures, overlapping columns of impingement air so as to provide different BTU delivery rates at different heights;
and characterized by cooking said food products of different heights in substantially identical cooking times and without adjustment of said distance between said jet apertures and said food products."

Auxiliary Request

The wording of claim 1 is as in the main request but for the addition at the end of the following text:
", and wherein said aperture shape is selected from the group consisting of: circular, dog bone, jack and starburst (406,416,424,430)".

V. The Appellant argued as follows:

The new requests are filed in response to the discussion of the central effect discovered by the inventor and the manner in which this discovered effect was put to use. Claim 1 in either request no longer

focuses on the device, but rather on the way the invention is put to use.

Limiting protection to the specific shapes mentioned on pages 24 and 25 would be unfairly restrictive. The inventor was the first to recognize the effect and its application to cooking items of different height. Protection should thus extend to the general application of the effect. The description mentions a variety of parameters that alone or in combination produce the effect. The specific shapes are only one example.

Reasons for the Decision

1. The appeal is admissible.
2. *Background*

The invention concerns air impingement cooking using an array of jet apertures providing columns of impingement air towards the item to be cooked. The jets of air diffuse or plume, so that if spaced properly they overlap to provide a region of even cooking. The invention's core idea resides in the recognition of a particular effect involving overlapping jets of air forming a "blanket" of heated air with different BTU delivery rates at different heights, and its advantageous use in cooking different height items side by side, see description page 24, lines 4 to 12.

3. *Admissibility of late filed requests*

3.1 The main request and the auxiliary request offer new definitions of the main idea in terms of a method for cooking food products. They were first filed at the oral proceedings before the Board, that is after filing of the grounds of appeal. Consequently, they constitute amendments to the appellant's case in the sense of Article 13(1) of the Rules of Procedure of the Boards of Appeal. Under that article the Board is afforded discretion in admitting and considering such amendments. The article further stipulates that this discretion "shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy".

An approach frequently adopted by the Boards when exercising their discretion in admitting amendments filed shortly before or in the course of oral proceedings can be summarized as follows: unless good reasons exist for filing amendments so far into the procedure - this may be the case when amendments are occasioned by developments during the proceedings -, they are only admitted at such a late stage if they are *clearly or obviously allowable*, see the Case Law of the Boards of Appeal, 5th edition, 2006, sections VII.D.14.2.1 and 14.2.3 and the case law cited therein. This means that it must be immediately apparent to the Board, with little or no investigative effort on its part, that amendments successfully address the issues raised without giving rise to new ones, see for example T 0087/05, reasons 2.

3.2 The main and the auxiliary request filed at the oral proceedings before the Board represent the Appellant's 9th and 10th attempt respectively to address the observations made by the Board in its initial communication, and, overall its 14th and 15th amendment subsequent to the decision under appeal. All statutory possibilities to amend have long since been exhausted, while the issues raised by the Board and in the refusal have not changed notably. The Board can but conclude that the amendments proposed in these final two requests find no justification in developments during the proceedings itself.

3.3 The Board therefore need only consider whether or not these amendments are "clearly allowable". This criterion is to be tested against the issues of clarity and added subject-matter among others. These issues were identified in the preliminary observations made by the Board in its communication and the annex to the summons and then discussed at the oral proceedings.

Thus, in its communication of 19 June 2009, the Board expressed the provisional opinion that (section 1, second paragraph) "[the] present application's contribution to this prior art appears to reside in the discovery discussed on page 24 and explained on pages 25 to 27 in reference to figures 19 to 30. Basically, see page 24, lines 4 to 9, a particular type of jet aperture shape provides a heated air blanket which is such as to allow different thickness items to be cooked side-by-side. The basic shape is identified on page 24, lines 23 to 28, as including a *web-like member with at least one enlarged area along its length* ("web" read in the sense of thin strip). The discovery is illustrated

in the comparative examples of figures 19 to 30. These show how particular instances of this basic shape, namely *dog-bone*, *jack* and *starburst* (figures 25, 27, 29) produce sufficiently high BTU delivery rate differentials within the desired range of distances from the jet apertures for side-by-side cooking. The rate differential for circular, rectangular or cruciform shapes (figures 19,21,23) is much smaller and requires vertical adjustment for products of different heights."

Turning to clarity the Board opined (section 4): "In these requests the independent claims rely mainly on a result to be achieved in defining the invention, rather than indicating the *concrete* structural adaptations (namely the particular jet aperture cross-sectional shapes) that are necessary to achieve that result. That result itself is rather indeterminate, referring to *different* BTU delivery rates at *different* levels to cook food products of *different* heights."

As for added subject-matter, it stated in section 5: "There is no basis apparent in the original disclosure for shape, spacing and air pressure adjustment means figuring as *alternative* factors that produce the impingement air blanket with desired qualities ..."

These preliminary observations were reiterated in the annex to the summons : "The invention is argued to reside in a newly discovered phenomenon or effect - different BTU delivery rates at different levels - which can be used to advantage to cook different thickness items without having to adjust the height of the jets. That this effect is not disclosed in the

available prior art is undisputed. At issue ... is rather what structural adaptations of prior art cooking devices, if any, are necessary to bring about this effect, and, if so, whether such adaptations are clearly and fully defined in the claims."

....

"Where the present application teaches a new advantageous use of the newly discovered effect involving structural modifications it appears quite unequivocal. Description page 24, lines 11 to 21, mentions "*particular cross-sectional shapes*" (emphasis added). The following two paragraphs of page 24 continued onto page 25 identify which particular shapes are meant. Lines 17 to 21 of page 24, describes the associated benefit of these shapes, namely that BTU range can be adjusted for product height variations by adjusting air pressure, e.g. by mere adjustment of fan speed, without any need to change the distance or passage height L. In the next pages and in reference to figures 25 to 30 the specific shapes and their benefits are discussed individually. They are contrasted with the shapes of figures 19 to 24, clearly described on page 25, lines 8 to 28, as deficient in this regard, as they require complex modifications or adjustments (page 25, lines 14 to 17 : "combination vertical adjustment") and do not produce a blanket with the necessary BTU range (page 25, lines 24 to 28)."

....

"Finally, where an independent claim fails to define the particular shape giving rise to the desired effect,

it lacks essential features, and for this reason is unclear (Article 84 EPC)."

Furthermore, annex, point 2, "[where] a claim can be read to imply that the desired effect can be achieved in other ways (than by particular cross-section shapes) it adds to the original teaching and thus to the content as filed, contrary to Article 123(2) EPC."

3.4 Turning first to claim 1 of the main request this claims is directed at "a method of cooking ... food products of different heights". It includes a step of "providing air at a fan speed/pressure [to produce] for [the] jet aperture shape and ... spacing between apertures, overlapping columns of impingement air, so as to provide different BTU delivery rates at different heights". The method culminates in a final step in which the different height products are cooked "in substantially identical cooking times and without adjustment of [the] distance between jet apertures and said food products".

3.4.1 As amended the claim fails to specify any particular aperture shape, let alone those mentioned on pages 24 and 25 and identified by the Board in the communication and annex as essential in achieving the desired blanket effect. It thus lacks essential features, and is for this reason unclear, Article 84 EPC.

Moreover, in that claim 1's formulation allows for the effect to be produced for any shape and spacing by appropriate fan speed/pressure, it also goes beyond the application's teaching regarding particular shapes. Fan speed/pressure is in fact described only in a

subordinate role as allowing tuning of the range of different BTU delivery rates, description page 24, lines 17 to 21. Claim 1 thus adds subject-matter, contrary to Article 123(2) EPC.

The Board concludes that neither of these issues previously identified has been successfully addressed in the amended version of claim 1 according to the main request.

- 3.4.2 The Board adds that the application's teaching of a discovery relates only to that of "particular cross-section shapes" producing a blanket of heated air that allows different thickness items to be cooked side by side - page 24, lines 4-9 - not simply to that of a blanket effect per se. The skilled person reads the term "particular" in the context of the whole disclosure as referring to the specific shapes identified in the final two paragraphs of page 24, continued onto page 25 following paragraphs. These are the only shapes described in the application as producing the desired blanket that cooks items of different height without the need to adjust the distance between jets and the items.

This discovery links aperture shape inextricably to a heated air blanket with the desired qualities. Any definition of the invention, whether apparatus or method, must remain within these strict structural confines, that is must include the specific structural measures - the "particular" aperture shapes - necessary to obtain those desired blanket qualities.

Nor can "particular" be read in a broader sense, as any shape producing the effect. In the Board's view such a broad interpretation places an undue burden on the skilled person, given in particular the indeterminate nature of the effect - different BTU delivery rates at different heights, without specifying any measure or standard. It is also not commensurate with the application's actual technical contribution, which does not go beyond the specific shapes taught. In this respect the applicant's rights to protection are bound by the actual contribution made to the art.

3.5 Claim 1 of the auxiliary request adds to claim 1 of the main request the information that the aperture shape is selected from the group of "circular, dog bone, jack and starburst".

3.5.1 The inclusion of a *circular* aperture shape is however at odds with the sole teaching of the application. Indeed, as observed in the annex to the summons, section 2, the description - see page 25, lines 8 to 28 read in conjunction with page 25, line 30, to page 27, line 24, and the relevant figures - expressly contrasts the circular aperture shape with the particular shapes of dog bone, jack and starburst as bereft of the blanket effect's advantages : "vertical adjustment would be needed to cook thick pizza 402 and thin pizza 404", page 25, lines 16 to 17.

3.5.2 This conflict between claim 1 and the description results in a lack of clarity when claim 1 is read in the light of the description, Article 84 EPC. It however also adds new information with respect to the original disclosure, Article 123(2) EPC. The amendment

to the Appellant's case according to this auxiliary request thus also fails to address these previously raised issues.

- 3.6 As claim 1 according to the main or the auxiliary request fails to resolve the problems identified by the Board already in the written phase of the proceedings, it uses its discretion under Article 13(1) RPBA not to admit these late filed requests.

4. Article 113(2) EPC

By at the oral proceedings expressly replacing all requests then on file with the present main and auxiliary request, the Appellant has effectively withdrawn the previous requests. (This situation contrasts with one in which requests are filed as subsidiary to those already on file). As the Board does not admit the replacing requests, there is no longer a valid text of the claims submitted by the applicant as appellant upon which the European Patent Office can decide upon the European patent application, Article 113(2) EPC. Such a valid text is a fundamental procedural prerequisite for the Board to be able to review the decision under appeal. Absent a valid text the appeal must fail.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

G. Magouliotis

A. de Vries