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**Datasheet for the decision  
of 7 October 2015**

**Case Number:** T 0432/12 - 3.2.07

**Application Number:** 04025099.5

**Publication Number:** 1526091

**IPC:** B65D81/00, B65D65/00,  
B65B31/00, A23B4/16, A23B4/00

**Language of the proceedings:** EN

**Title of invention:**  
Method for packaging crabmeat

**Patent Proprietor:**  
John Keeler &Co., Inc.

**Opponent:**  
Thai Union International. Inc.

**Headword:**

**Relevant legal provisions:**  
RPBA Art. 12(4)  
EPC Art. 104(1)

**Keyword:**  
Late-filed evidence - admitted (no)  
Apportionment of costs - (no)

**Decisions cited:**  
T 0169/12, T 1067/08, T 0083/93, T 0416/87

**Catchword:**



**Beschwerdekammern  
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Case Number: T 0432/12 - 3.2.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.07**  
**of 7 October 2015**

**Appellant:** Thai Union International. Inc.  
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**Respondent:** John Keeler &Co., Inc.  
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**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 16 December 2011 rejecting the opposition filed against European patent No. 1526091 pursuant to Article 101(2) EPC.**

**Composition of the Board:**

**Chairman** K. Poalas  
**Members:** G. Patton  
G. Weiss

## Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision to reject the opposition and maintain European patent No. 1 526 091 as granted, and requested that the decision under appeal be set aside and that the patent be revoked.

Opposition had been filed against the patent as a whole, on grounds according to Article 100(a) EPC (novelty and inventive step).

II. The patent proprietor (respondent) requested in its reply to the appeal that the appeal be dismissed and, if the decision was set aside, that the patent be maintained on the basis of one of auxiliary requests 1 to 3 filed with letter of 7 September 2012.

III. The following documents from the opposition proceedings were mentioned in a single sentence in the statement setting out the grounds of appeal:

E1: M.E. Peterson et al., "Heat-Pasteurisation Process for Inactivation of Nonproteolytic Types of *Clostridium botulinum* in Picked Dungeness Crabmeat", Journal of Food Protection, Volume 60, No 8, 1997, pages 928-934;

E2: Webster's third new international dictionary, Könnemann Verlagsgesellschaft mbH, Cologne, ISBN 3-8290-5292-8, 1993, page 2527;

E3: US-A-5 268 189;

E4: US-A-2 546 428;

E5: Derwent-Acc-No: 1983-836980, Basic-Abstract, RD 235012A, "Packaging and preserving fish and sea products - under atmosphere containing mainly carbon dioxide and sufficient oxygen to inhibit

anaerobic especially Clostridium spores", Air  
Liquide Canada Ltee, 10 November 1983, 2 pages;

- E6: US-A-4 840 805;
- E7: US-A-2002/0061412;
- E8: GB-A-2 343 611; and
- E9: US-A-3 852 486.

Only a brief reference to documents E3, E4 and D5 was made in the first paragraph of page 9 of said statement.

The following documents were filed for the first time with the statement of grounds of appeal:

- A1: R.R. Cockey, et al., "Survival Studies with Spores of *Clostridium botulinum* Type E in Pasteurized Meat of the Blue Crab *Callinectes sapidus*" Applied Microbiology, April 1974, pages 629-633;
- A2: D.R. Ward, et al., "Determination of Equivalent Processes for the Pasteurization of Crabmeat in Cans and Flexible Pouches", Journal of food science, Volume 49, 1984, pages 1003-1004;
- A3: R. Trenholm, "The development of a pasteurization process for ready to serve refrigerated rock crab (*Cancer irroratus*) meat", University of Newfoundland, Department of Biochemistry, 1998;
- A4: United States Department of Agriculture, "Complete Guide to Home Canning", Agriculture Information Bulletin No 539, 1994, pages i, 1-8, 1-9, 5-6, 5-7; and
- A5: K.W. Gates et al., "Evaluation of packaging alternatives for fresh and pasteurized crab meat", Seafood Science and Technology Society of the Americas, Proceedings of the 16th Tropical and Subtropical Fisheries Technological Conference of the Americas, Seafood Science and Technology

Society of the Americas, 1991, pages 148-159.

- IV. In its communication of 4 August 2015 annexed to the summons to oral proceedings, the Board informed the parties that the issues to be discussed at the oral proceedings would include the following: the admission into the proceedings of documents A1 to A5 under Article 12(4) RPBA and the novelty of the subject-matter of claims 1 and 8 over the disclosure of A2. The Board also introduced document A6 (Wikipedia website, "Tin can", url: [https://en.wikipedia.org/wiki/Tin\\_can](https://en.wikipedia.org/wiki/Tin_can), 8 pages) for interpreting the disclosure of document A2.
- V. With its submission of 26 August 2015 the appellant informed the Board that it would not be attending the oral proceedings and requested a decision according to the state of the file.
- VI. Oral proceedings before the Board took place on 7 October 2015.

As announced with its above-mentioned submission, the duly summoned appellant did not attend. Oral proceedings were continued without the appellant according to Rule 115(2) EPC and Article 15(3) RPBA.

In the written proceedings the appellant requested that the decision under appeal be set aside and that the patent be revoked, see point I above.

The respondent repeated its requests from the written proceedings that the appeal be dismissed and, if the decision was set aside, that the patent be maintained on the basis of one of auxiliary requests 1 to 3 filed

with letter of 7 September 2012, see point II above.

The respondent also requested apportionment of costs.

VII. In the statement setting out the grounds of appeal the appellant submitted documents A1 to A5 and argued that the subject-matter of the claims of the patent as granted were neither novel nor inventive over these documents. No reasons as to why documents A1 to A5 had been filed for the first time in the appeal proceedings was presented. Nor was any reasoning provided concerning lack of novelty and/or inventive step based on documents E1 to E9 on file before the opposition division and discussed in the decision under appeal.

VIII. The respondent commented on the admissibility of documents A1 to A5 for the first time in its response to the communication annexed to the summons dated 7 September 2015. At the oral proceedings it argued that these documents should not be admitted into the proceedings since the appellant had not provided any plausible and sound reasons for not presenting them during the first-instance proceedings.

For the respondent, the appeal was a fresh case since it was only based on new documents A1 to A5. Since these documents could have been filed and dealt with in a single operation during the first-instance proceedings, it had incurred undue costs as a result of the appellant's behaviour. This amounted to an abuse of the opposition-appeal proceedings.

At the oral proceedings, the respondent argued that the Board should therefore order a different apportionment of costs under Article 104(1) EPC.

## Reasons for the Decision

1. *Admissibility of documents A1 to A5, Article 12(4) RPBA*
- 1.1 Documents A1 to A5 were cited for the first time by the appellant with the statement setting out the grounds of appeal. Hence, their admission into the proceedings is subject to the discretionary power of the Board in accordance with Article 12(4) RPBA.
- 1.2 Article 12(4) RPBA states that "without prejudice to the power of the Board to hold inadmissible facts, evidence or requests which **could have been presented** or were not admitted in the first instance proceedings, everything presented by the parties under (1) 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 (2)" (emphasis added by the Board).
- 1.3 Therefore, the decisive issue in the present case is whether the documents could have been presented before the opposition division, i.e. whether there is a sound and plausible reason in this specific case for filing them only in the appeal proceedings, see point 5.3 of the Board's communication. In principle they could be admitted if this was a case of e.g. a normal reaction to a late turn of events in the opposition (oral) proceedings, an exceptional interpretation by the opposition division at a late stage or in the decision, or an evident non-allowability in view of the newly cited documents and/or objections, see T 169/12 of 20 August 2015 (not published in OJ EPO, reasons point 3.4). None of these exceptions is, however, applicable in the present case.



1.4 Moreover, the appellant has not provided any reason for filing these documents for the first time in the appeal proceedings, and the Board cannot see any either. As a matter of fact, the respondent's main request (that the patent be maintained as granted) has remained the same during the whole opposition proceedings and no passage of the impugned decision could be seen as a justification for the filing of these new documents.

1.5 The Board concurs with T 1067/08 of 10 February 2011 (not published in OJ EPO, reasons points 7.1 and 7.2), stating that "The purpose of the *inter partes* appeal procedure is mainly to give the losing party a possibility to challenge the decision of the opposition division on its merits and to obtain a judicial ruling on whether the decision of the opposition division is correct. ... The appeal proceedings are not about bringing an entirely fresh case; rather, the decision of the board of appeal will in principle be taken on the basis of the subject of the dispute in the first-instance proceedings. The appeal proceedings are thus largely determined by the factual and legal scope of the preceding opposition proceedings and the parties have only limited scope to amend the subject of the dispute in second-instance proceedings."

"This means that appeal proceedings are not just an alternative way of dealing with and deciding upon an opposition and that ... parties to first-instance proceedings are not at liberty to bring about the shifting of their case to the second instance as they please, and so compel the board of appeal either to give a first ruling on the critical issues or to remit the case to the department of first instance. Conceding such freedom to a party ... would run counter to orderly and efficient proceedings. In effect, it would

allow a kind of "forum shopping" which would jeopardise the proper distribution of functions between the departments of first instance and the boards of appeal and would be absolutely unacceptable for procedural economy generally. In order to forestall such abusive conduct, Article 12(4) RPBA provides that the Board has the power to hold inadmissible any facts and evidence which were not presented in the first-instance proceedings."

1.6 For these reasons, the Board has decided to exercise its power under Article 12(4) RPBA not to admit documents A1 to A5 into the appeal proceedings.

2. *Novelty and inventive step objections based on documents E1 to E9*

The Board notes that the grounds of appeal do not challenge at all the reasoning set out in the impugned decision rejecting the opposition and that documents E1 to E9 which were the basis for the opposition are no longer used by the appellant to support the appeal grounds. In the statement setting out the grounds of appeal, (see its page 9, first paragraph), documents E3 to E5 are regarded more as background art disclosing at most general principles. The appellant thus acknowledges in effect that documents E1 to E9, either alone or in combination, do not suggest the subject-matter of the patent in suit; this was also the conclusion of the impugned decision.

The Board concurs with that.

3. *Apportionment of costs, Article 104(1) EPC*

3.1 The respondent requested during the oral proceedings a different apportionment of costs in accordance with Article 104(1) EPC.

For the respondent, the appeal was a fresh case as it was based only on documents A1 to A5. Said documents could have been presented during the first-instance proceedings and, hence, dealt with in a single operation. Having to deal with them in the appeal proceedings had given extra undue costs. The appellant's behaviour of not providing any plausible and sound reasoning for filing documents A1 to A5 for the first time in the appeal proceedings, and also of not appearing at the oral proceedings, represented an abuse of the proceedings justifying an apportionment of costs.

3.2 The Board cannot follow the respondent's view for the following reasons.

There is no provision in the EPC or the RPBA forbidding an opponent having lost in first-instance proceedings from filing new pieces of prior art with its statement setting out the grounds of appeal. Article 12(4) RPBA makes clear only that this new evidence could possibly be held inadmissible in view of the course of the first-instance proceedings.

Hence, a discussion on the admissibility of said new evidence and an assessment of the patentability of the claimed subject-matters vis-à-vis said new evidence, if the Board were to admit it into the proceedings, would fall within the work that can be expected from a

respondent in order to complete its case in accordance with Article 12(2) RPBA.

In its communication annexed to the summons to the scheduled oral proceeding, the Board addressed the issue of the admissibility of documents A1 to A5 and noted *inter alia* that the respondent in its reply to the statement of grounds had not objected to their admission.

The appellant's reaction in its written submission dated 26 August 2015 was to inform the Board that it would not be attending the oral proceedings and to request a decision according to the state of the file.

The respondent's reaction in its written submission dated 7 September 2015 was to express a willingness to discuss the admissibility of documents A1 to A5 at the oral proceedings and to present further arguments on the patentability issue. During the oral proceedings it presented arguments on the admissibility of documents A1 to A5.

Therefore, the Board cannot see in the present case any unexpected extra work for the respondent which might have been caused by the appellant's behaviour.

As a result, the Board cannot see any abuse of the proceedings in the appellant's behaviour which would justify a departure from the normal rule that each party bears its own costs pursuant to Article 104(1) EPC.

- 3.3 In T 83/93 of 2 April 1997 (not published in OJ EPO), cited by the respondent during the oral proceedings, the opponent (appellant), in addition to filing new

documents, had also tried later in the appeal proceedings to revive a former objection from the opposition proceedings based on Article 100(c) EPC. As this situation does not correspond to the present case, the conclusion of the above-mentioned decision does not apply here.

In T 416/87 of 29 June 1989 (published in OJ EPO 1990, 415), also cited by the respondent during the oral proceedings, the opponent (appellant) raised in the statement setting out the grounds of appeal for the first time the issue of novelty on the basis of a document mentioned in the patent in suit, and the Board admitted said document into the appeal proceedings. As this situation does not correspond to the present case, the conclusion of the above-mentioned decision does not apply here either.

- 3.4 For the above-mentioned reasons, the request for an apportionment of costs is refused.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated