

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [-] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [X] No distribution

**Datasheet for the decision
of 11 July 2018**

Case Number: T 1608/14 - 3.2.04

Application Number: 03761866.7

Publication Number: 1528858

IPC: A22C7/00, A23P1/10

Language of the proceedings: EN

Title of invention:

METHOD AND MOULDING DEVICES FOR MOULDING THREE-DIMENSIONAL
PRODUCTS

Patent Proprietor:

Marel Townsend Further Processing B.V.

Opponent:

GEA Food Solutions Bakel B.V.

Headword:

Relevant legal provisions:

EPC Art. 54(1), 100(c), 100(a), 111(1), 123(2)

Keyword:

Amendments - allowable (yes)

Novelty - main request (yes)

Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1608/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 11 July 2018

Appellant: Marel Townsend Further Processing B.V.
(Patent Proprietor) Handelstraat 3
5831 AV Boxmeer (NL)

Representative: EP&C
P.O. Box 3241
2280 GE Rijswijk (NL)

Respondent: GEA Food Solutions Bakel B.V.
(Opponent) Beekakker 11
5761 EN Bakel (NL)

Representative: Wolff, Felix
Kutzenberger Wolff & Partner
Theodor-Heuss-Ring 23
50668 Köln (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 June 2014
revoking European patent No. 1528858 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: S. Oechsner de Coninck
T. Bokor

Summary of Facts and Submissions

I. The appellant (proprietor) lodged an appeal received on 17 July 2014 against the decision of the Opposition Division dispatched on 11 June 2014 on the revocation of the patent EP 1528858, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 6 October 2014.

II. The opposition was based on Article 100(a) together with Articles 52(1), 54(1) and 56 EPC, Article 100(b), and Article 100(c) together with Article 123(2) EPC. The Opposition Division came to the conclusion that the subject-matter of the independent claim according to the main request (claims as granted) contained subject-matter extending beyond the content of the application as filed, and that the subject-matter of claim 1 according to the auxiliary request was not novel having regard to the following document:

D1: US 3,561,372

III. Oral proceedings were held on 11 July 2018.

IV. The appellant requested that the decision under appeal be set aside, and that the patent be maintained on the basis of the auxiliary request treated in the first instance opposition proceedings, filed with letter dated 23 July 2013, now as main request, or that the patent be maintained in an amended form on the basis of any of auxiliary requests 1 to 3, all filed with the grounds of appeal dated 6 October 2014.

Remittal is requested to deal with the question of inventive step if any other combination of documents than those mentioned in the respondent's reply to the

grounds of appeal (D3 and two further documents E1 or E2) needs to be discussed.

V. The Respondent requested that the appeal be dismissed.

Remittal to the department of first instance is requested unless the Board is willing to examine also other documents than those referred to in their reply to the grounds of appeal

VI. The wording of the independent claim 1 of the main request reads as follows:

"Device (10) for moulding three-dimensional products from a meat mass, comprising a moulding surface, wherein the moulding surface is the wall (252) of a drum (16) which can be rotated in a direction of rotation by associated drive means and is provided with at least one mould cavity (60) which is open on the outer circumference of the drum and has an associated boundary comprising walls (66) and base (68) a mass feed member (18), which is arranged at a mass feed position, for feeding the said mass to the mould cavities (60), wherein the mass feed member (18) comprises a housing (140) in which there is a through-passage (142) for mass to pass from an inlet (144) to an outlet (146) located on the drum side, wherein the drum side of the mass feed member (18) comprises means for closing a mould cavity and maintaining the mould cavity in a closed condition, which means comprise a flexible plate (158) which bears in a sealing manner against the outer circumference of the drum (16) under pressure as a result of pressure means, and being designed to adapt to irregularities in the outer circumference of the drum (16), and wherein the drum side of the mass feed member (18), as seen in the

circumferential direction of the drum, extends on either side of the outlet (146), over a distance which covers at least one mould cavity (60), wherein the device comprises means for applying a medium for eliminating adhesion forces between the boundary (66, 68) of a mould cavity (60) and a moulded product (78), wherein the boundary comprises a porous structure of intercommunicating pores and that said means for applying a medium for eliminating adhesion forces comprises excess-pressure means for supplying a pressurized fluid which are in fluid communication with the boundary of a mould cavity."

VII. The appellant's arguments are as follows:

- The function added in claim 1 of "maintaining the mould cavity in a closed condition" applies to sealing the cavity on the drum to prevent leakage. It is not necessary to specify any particular period of time for holding the cavity closed nor is such a specific time period derivable from the patent. The flexible plate is the particular means for maintaining the closed condition and was defined as such without cushion or lamellae in the original disclosure.
- D1 does not disclose a plate in the sense of claim 1 because the skilled person would not confuse a belt with a plate.
- It is only fair and proper to remit the case if other documents than those mentioned in the reply to the grounds are to be relied on when examining inventive step.

- VIII. The respondent's arguments are as follows:
- Maintaining a closed condition implies some predetermined finite time that cannot be realised by an extension that only covers the length of a cavity as claimed. This results in new information not originally disclosed.
 - The definition of a plate is merely "a thin two dimensional element". The belt 61 shown in D1 falls under that definition and performs the same function as the flexible plate. Furthermore the belt is disclosed on page 11 to be part of the housing and therefore also forms a portion thereof which can be equated with a wall-plate, so that this element also matches the wording of claim 1.
 - The case should be remitted for an examination of inventive step that considers also the various combinations of other documents cited in opposition, if this is not possible before the Board.

Reasons for the Decision

1. The appeal is admissible
2. Main Request - Added subject-matter
 - 2.1 Claim 1 of the amended main request defines a device as previously claimed in claim 4 of the granted patent, itself originally defined in claim 8 of the published application. The device is further limited by the features disclosed in the claims 9, 11, 18, 44, 45 and 47 as originally filed and also adds the function of means comprised on the drum side of the mass feed member as follows: "means for closing a mould cavity and maintaining [it] in a closed condition".

- 2.2 The respondent argues that these means in the form of a flexible plate defined later in the claim, that extends "over a distance which covers at least one mould cavity" would in its lower limit (at least one mould cavity) be unable to perform the function added in claim 1 of maintaining the mould cavity in a closed condition. The added features cannot therefore specify how the closed condition is maintained, and the functional definition of the means represent subject-matter extending beyond the content of the application as filed.
- 2.3 It is established jurisprudence regarding claim interpretation that the skilled person reads claims 1 contextually with his normal reading skills, i.e. with synthetical propensity, building up rather than tearing down, so as to arrive at an interpretation which is technically sensible and takes into account the whole of the disclosure of a patent (Case Law of the Boards of Appeal, 8th edition, 2016, (CLBA) II.A.6.1).
- 2.4 Reading the claim in this manner he will understand that the drum side of the mass feed member comprises means for closing a mould cavity and maintaining it closed, these means more specifically comprising the features originally disclosed in claims 44,45 and 47 in the form of a flexible plate which bears in a sealing manner against the outer circumference of the drum under pressure as a result of pressure means, and being designed to adapt to irregularities in the outer circumference of the drum, and wherein the drum side of the mass feed member, as seen in the circumferential direction of the drum, extends on either side of the outlet, over a distance which covers at least one mould cavity. In the Board's view therefore the skilled person immediately and unambiguously understands that

the definition of the means added as a feature of the drum side of the mass feed member, and defined to provide the general function of maintaining the cavity closed, itself includes the flexible plate defined hereafter. These means in the form of the flexible plate more specifically maintain the closed condition of the cavity by engaging in a sealing manner against the circumference of the drum under pressure to adapt to irregularities in the outer circumference.

- 2.5 Contextual reading of the claim wording therefore leads the skilled person to infer that the flexible plate constitutes the specific means for closing and maintaining the mould cavity in closed condition. With this understanding the Board cannot follow the respondent in his contention that the definition of the "means for maintaining the closed condition" would be - or would require - some additional means different from the flexible plate. The Board is thus also unable to see any unallowable intermediate generalization that might have resulted from the extraction of such a different additional means in isolation from the particular context of figure 11 in conjunction with page 30, lines 18 to 38 of the published description. From this passage the skilled reader does not recognise the means defined by its general function of maintaining the mould cavity in a closed condition as anything other than a flexible plate that bears in the sealing manner on the drum surface. He thus finds in this passage confirmation of what he already learns from original claim 45, where the flexible plate is disclosed with the same level of generality and (by reference to claim 44 and higher claims) in the context of the same features that appear in present claim 1.

2.6 In the framework of claim 1 the skilled person would also understand that the function of maintaining the closed condition is meant in a spatial sense, that is that the whole cavity is sealed on its entire circumference by the sealing plate. The interpretation submitted by the respondent that the feature would mean holding the cavity closed for some minimum amount of time is neither explicitly required by the claimed wording, nor can it be inferred from the purely spatial and structural definition of the flexible plate, with respect to the circumference of the drum and by its minimum extension on either side of the outlet. Nor can it be inferred from a reading from the originally filed application as a whole.

2.7 The Board is unconvinced by the argument that under certain circumstances (continuously rotating drum with a certain speed) the lower limit extent of the plate would not permit the mould to be closed for a very long time. Consequently, so the argument continues, it would not be able to maintain the closed condition of the cavity, which would require as essential other features than the plate, which are not defined in the claim but described for example in relation to figure 11.

The Board has no difficulty in understanding that the claim wording defines a lower limit of the plate extent that would still, if only just and for however short a period, result in a sealing of the mould cavity. It is therefore in particular unable to infer from this formulation that the means for maintaining the closed condition would be anything other than the flexible plate of the mass feed member. Therefore as long as a sealing is defined and obtainable on all the open surfaces of the cavity by the flexible plate of the mass feed member, then it must be seen to comprise the

means effectively suited for maintaining the claimed closed condition.

2.8 From the above the Board confirms the finding of the Opposition Division that the amendments to claim 1 of the main request do not add subject-matter extending beyond the original disclosure, Articles 100(c) and 123(2) EPC.

3. Main request - Novelty

3.1 Novelty has been challenged with respect to D1 and the Opposition Division followed the view of the opponent that the belt 61 of D1 is considered to be a thin flat element, and therefore a flexible plate.

3.2 By contrast the Board is of the opinion that using the same interpretation standard referred to in item 2.3 above, the skilled person reading the claim with synthetic propensity (Case Law of the Boards of Appeal, 8th edition, 2016 (CLBA), II.A.6.1 and A.6.3.1) understands that the formulation "flexible plate" should be construed using the normal technical meaning of the term "plate" of a "flat sheet or lamina" (OED, definition II), or "a smooth flat thin piece of material" (Merriam Webster, definition 1). Both meanings imply for the skilled person well defined dimensions and a certain rigidity. Thus, the skilled person will understand "flexible plate" in claim 1 as a piece or sheet of material of well defined dimensions which overall is relatively rigid but which is nonetheless still flexible, for example a sheet of metal or sufficiently thick plastic. This normal interpretation fits well within the rest of the claim and is consistent with the overall disclosure, cf. figure 13 and paragraph 71, plate 158."

3.3 The Board is of the firm opinion that the skilled person when comparing the claimed subject-matter with the disclosure of D1, will not identify the endless belt 61 that is entrained over a roller 62 and tensioned by bearing supports 67 (col. 4, ln. 13 to 31) as a flexible plate in his understanding of this term. Even if, as submitted by the respondent, D1 discloses the movable belt of D1 to be part of the housing and to form a wall thereof, this does not impart on the endless belt the qualities that are inherent in the term "flexible plate", see above: it is and remains an endless belt. Furthermore, it may be that belt 61 performs the same or similar function of sealing the mould cavities while adapting to the drum shape as the "flexible plate" of claim 1. However, functional equivalence is not the same as identity: different means, as is the case here, may fulfill the same function.

3.4 The Board therefore agrees with the appellant that the skilled person would not consider the belt shown in figure 2 of D1 as falling within the normal definition of the term "flexible plate" in its normal usual sense. For that sole reason the subject-matter of claim 1 must be considered novel with respect to D1.

4. Remittal

4.1 The Board has considered the opposition grounds based on Article 100(c) together with Article 123(2) EPC, and Article 100(a) together with Articles 52(1) and 54(1) EPC for the main request, and has reached the conclusion that claim 1 of that request is thus allowable in this respect.

4.2 However, the Opposition Division did not examine and decide the ground of inventive step. Though in appeal the respondent challenged inventive step starting from D1, in opposition they had contested inventive step in view of various other combinations of prior art not considered in the decision under appeal (D4 with D6 or D7 with D6 or D1). Both parties request remittal if inventive step is to be fully examined in the light of these combinations. Indeed the Board has not had opportunity to consider these other combinations. Remittal also appears equitable under the circumstances of the present case so that both parties can be in a position to argue on inventive step at the least in view of all attacks presented in opposition.

4.3 In view of the above, the Board decided to exercise its discretionary power under Article 111(1) EPC to remit the case to the department of first instance, especially as both parties also agree on remittal for a full examination of the question of inventive step, where this examination should also be based on other documents.

Order

For these reasons it is decided that:

1. **The decision under appeal is set aside.**
2. **The case is remitted to the department of first instance for further prosecution.**

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated