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**Datasheet for the decision
of 18 November 2019**

Case Number: T 0053/16 - 3.3.01

Application Number: 07748070.5

Publication Number: 2012601

IPC: A24B15/18, A24B15/16, A24D1/18

Language of the proceedings: EN

Title of invention:
A MOIST SNUFF NON-TOBACCO COMPOSITION AND A METHOD FOR
PRODUCTION THEREOF.

Patent Proprietor:
Swedish Match North Europe AB

Opponent:
JTI Snus AB

Headword:
Non-tobacco moist snuff/SWEDISH MATCH

Relevant legal provisions:
EPC Art. 123(2), 83, 54, 56
RPBA Art. 13

Keyword:

Amendments - added subject-matter (no)

Sufficiency of disclosure - (yes)

Novelty - (yes)

Inventive step - (yes)

Late-filed facts - admitted (no)



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Case Number: T 0053/16 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 18 November 2019

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
19 October 2015 concerning maintenance of the
European Patent No. 2012601 in amended form.

Composition of the Board:

Chairman A. Lindner
Members: J. Molina de Alba
R. Romandini

Summary of Facts and Submissions

I. The present appeal by the opponent (appellant) lies from the decision of the opposition division that European patent No. 2 012 601, in the version of the main request pending before it, and the invention to which it relates, met the requirements of the EPC. The claim set of the main request contained the following independent claims 1 and 11:

"1. A non-tobacco moist snuff composition having a water content of 30 to 50 weight percent based on the total weight of the final composition, comprising one or more type of plant fibers selected from maize fibers, oat fibers, tomato fibers, barley fibers, rye fibers, sugar beet fibers, buckwheat fibers, potato fibers, cellulose fibers, apple fibers, cocoa fibers, or a combination thereof, one or more humectants, NaCl and optionally other ingredients, wherein the non-tobacco moist snuff composition is obtainable by a method comprising:

a) providing of one or more type of plant fibers selected from maize fibers, oat fibers, tomato fibers, barley fibers, rye fibers, sugar beet fibers, buckwheat fibers, potato fibers, cellulose fibers, apple fibers, cocoa fibers, or a combination thereof, preferably in flour form, optionally preceded by grinding or cutting and/or sieving of raw material for providing said one or more type of plant fibers;

b) processing of one or more plant fibers provided in step a), preceded by mixing if more than one type of fibers are used or if fibers with different

size distribution are used; wherein step b) comprises the following steps:

i) adding water, one or more humectants, and NaCl to the plant fibers under stirring to form a mixture;

ii) heating and keeping the mixture heated, thus achieving a pasteurisation of the mixture,

iii) cooling the moist snuff mixture; and

iv) optionally adding other ingredients such as one or more other salts, humectants, dyes, flavours and flavour additives, such as liquorice and ammonium chloride,

c) and optionally packing, either in pouches, which is preferred, or as is in cans."

"11. A pouch containing a moist snuff composition according to any one of claims 1-10."

II. The following documents are referred to in the present decision:

D2: WO 2004/056218

D3: GB 981 137

D5: US 2004/0123873

D7: US 2005/0115580

D18a: International Standard ISO 6488, second edition,
15 February 2004

D18b: CORESTA recommended method No. 56, May 2011

III. In the decision under appeal, the opposition division considered that the claims of the main request did not

add subject-matter, their underlying invention was sufficiently disclosed, and the subject-matter to which they related was novel and inventive starting from document D5 as the closest prior art.

- IV. In its statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that the patent be revoked.
- V. With its reply to the statement of grounds of appeal, the patent proprietor (respondent) requested that the appeal be dismissed and filed three sets of claims as auxiliary requests 1 to 3.
- VI. In a communication annexed to the summons to oral proceedings, the board gave its preliminary opinion on the salient issues that might be debated at the oral proceedings.
- VII. Oral proceedings were held before the board on 18 November 2019. During the oral proceedings, the appellant requested the admission of a new inventive-step attack starting from document D3.
- VIII. The appellant's arguments, where relevant to the present decision, may be summarised as follows:

Added subject-matter - claim 1 of the main request

The reference of the water content of 30-50 wt.% in claim 1 to the total weight of the final composition adds subject-matter. In the application as filed, that water content was disclosed in relation to the intermediate composition resulting from processing step b)i), which is not necessarily the same as the water content of the final product.

The reference to step b)i) is apparent from page 2, lines 15-17; page 4, lines 2-3; and the combination of claims 1 and 2. The fact that the intermediate and final compositions do not contain the same water content is a consequence of the possibility to add further ingredients downstream of step b)i), including water (see Figure 2).

The mention on page 2, lines 15-17, that the water content of 30-50 wt.% is for good performance on pouch packing cannot be construed as meaning that the given water content is that of the final composition. This mention is made in the context of step b)i), which allows the subsequent addition of ingredients, and packing into poaches is only an option which does not limit the final composition of claim 1. For instance, in example 6, water was added to achieve a content of approximately 30-40 wt.%. Subsequently, additives were added, and the final product was not filled into poaches (see page 11, line 20).

Regarding the respondent's argument that the reference to Karl Fischer titration in the description indicated that the water content meant was that of the final product, the fact that documents D18a and D18b state that Karl Fischer titration is used for the determination of water in finished tobacco products does not exclude its applicability to intermediate products. The applicability to non-tobacco snuffs is not mentioned in the documents either, but the respondent does not see any problem in extending it in that respect.

Sufficiency of disclosure - claim 1 of the main request

The patent does not sufficiently disclose the invention of claim 1 in two respects. One, it does not disclose at which state of the manufacturing process (intermediate or final composition) the water content has to be set to 30-50 wt.%. Two, it does not provide any information on how to perform the pasteurization of step b)ii). The examples do not contain any guidance on these two aspects either.

The problems with the water content have been already discussed in the context of added subject-matter. Regarding the pasteurisation step, the opposition division acknowledged that the skilled person would have needed to select several parameters such as the initial bacterial count, the water activity of the final composition, the desired bacterial count of the packed snuff, etc. to achieve pasteurisation. However, the application contains no information at all on any of the parameters required for pasteurisation.

Novelty - claim 1 of the main request

The composition of claim 1 is not novel over the moist snuff composition disclosed in Table 4 of document D5. This table discloses an amount of water of up to 18 wt.% which, added to the water contained in other components such as glycerine, flavourings, molasses, caramel colour and corn silk, results in an amount of water of at least 30 wt.%.

Moreover, there is no evidence that the pasteurisation in the method of claim 1 produces any difference in the

final product. Thus, pasteurisation cannot provide for a difference over the compositions of document D5.

Inventive step - claim 1 of the main request

Document D5 is the closest prior art. The composition of claim 1 differs from the ones disclosed in document D5 in the water content. Pasteurisation is not a distinguishing feature because there is no proof that pasteurisation makes the claimed compositions different to those that have been sanitised according to document D5 (paragraphs [0055] and [0066]).

There is no evidence on file that the higher water content of the compositions of claim 1 brings about an advantageous effect over the compositions of D5. The technical problem to be solved is therefore the provision of an alternative non-tobacco moist snuff composition.

The solution proposed in claim 1 is an obvious alternative based on consumer preference; the claimed water content falls within the standard water content of moist snuff compositions, as taught in documents D2 and D7. Document D2 teaches that moist snuff compositions contain preferably 30-65 wt.% water (page 4, lines 7-11), and document D7 states that moist snuff compositions typically contain 40-60 wt.% moisture (paragraph [0005]).

Although document D5 relates to non-tobacco snuffs and documents D2 and D7 to tobacco snuffs, the skilled person would have combined their teachings because tobacco and non-tobacco snuffs are analogous and must have the same organoleptic qualities (see D5, paragraph [0009]).

Hence, the skilled person searching for an alternative to the compositions of document D5 would have increased their water content to 30-65 wt.% or 40-60 wt.%. By doing so, they would have arrived at the composition of claim 1 without the involvement of an inventive step.

Admission of the problem/solution approach starting from D3

Document D5 is closer to the invention if the only difference to be considered is the water content. However, if pasteurisation were acknowledged as an additional distinguishing feature, the case would change, and document D3 would be closer. Therefore, the assessment of inventive step starting from D3 should be admitted by the board.

The argument starting from document D3 cannot take the respondent by surprise since the document was already discussed as the closest prior art in the opposition proceedings, and the opposition division considered it to be a suitable springboard (see appealed decision, points 5 and 11.4).

IX. The respondent's arguments, where relevant to the present decision, may be summarised as follows:

Added subject-matter - claim 1 of the main request

The application as filed defines "water content" (page 2, lines 35, to page 3, line 2) as the water content measured by Karl Fischer titration, which is an international standard (ISO) for determining the water content of raw tobacco or tobacco final products. This method was well-known at the priority date (see

documents D18a and D18b). However, there is no disclosure in the prior art that Karl Fischer titration can be applied for measuring the water content of an intermediate product. In this connection, the passage on page 4, lines 1-5, of the application as filed refers to the process step b)i), defined on page 2 and in claims 1 and 2. The passage states that step b)i) gives a final moisture content of 30 to 50 wt.%, as determined by Karl Fischer titration, to obtain good performance for packing the product in pouches. The word "final" and the aim of obtaining good performance for packing make clear that the water content refers to the final product. Interpreting that the final water content referred to on page 4, lines 2-3, is that of an intermediate product makes no technical sense.

The situation reflected in Figure 2 is that the bulk of the water is added in step b)i), although it may be necessary to adjust the water content afterwards to bring it to the desired final concentration within the range 30-50 wt.%.

Regarding example 6, it discloses "[w]ater to achieve water content of approximately 30-40%" but does not disclose any specific step. The example refers to the water content in the moist snuff (final product), which is the only entity disclosed in the example.

Thus, the only technically meaningful interpretation of the passages in the application as filed that disclose a water content of 30-50 wt.% is that they refer to the water content of the final composition.

Sufficiency of disclosure - claim 1 of the main request

As discussed in the context of added subject-matter, the application as filed discloses that the water content of 30-50 wt.% is that of the final composition. Any other interpretation makes no sense.

With regard to the pasteurisation step, pasteurisation is such a well-known method that the skilled person would have had no difficulties to apply it to the plant fibre mixture of claim 1.

Novelty - claim 1 of the main request

Table 4 of document D5 does not disclose a composition having a water content of 30-50 wt.%. This table indicates the preferred concentration ranges of the ingredients of a moist snuff, but it does not disclose any specific composition. The range of 8-18 wt.% defined in Table 4 is the water content in the total composition rather than the amount of water added. This range takes account of the water present in all the other ingredients. This is supported by the teaching in paragraph [0042] and Table 6.

An additional difference is that document D5 does not disclose any pasteurisation step. Pasteurisation produces changes in the organoleptic properties of the final composition.

Inventive step - claim 1 of the main request

Document D5 is the closest prior art. The composition of claim 1 differs from the moist snuff compositions of document D5 in its water content (30-50 wt.% vs

8-18 wt.%) and in that it has been sanitised by pasteurisation.

The higher water content confers the composition of claim 1 organoleptic properties which are closer to those of tobacco compositions. Thus, the technical problem to be solved is the provision of non-tobacco moist snuff compositions which are more similar to tobacco moist snuff compositions.

The composition of claim 1 is a suitable solution to this problem because it has the same consistency as tobacco compositions.

Starting from document D5, the skilled person would not have been prompted to look for alternative compositions since the document states in paragraph [0031] that its non-tobacco moist snuff compositions have superior organoleptic qualities that favourably compare to tobacco-based moist snuff compositions. Furthermore, the skilled person would have had no motivation to increase the water content of the compositions of D5 to improve their organoleptic properties. If any, the motivation would have been to increase the corn silk content since paragraphs [0035] and [0066] of D5 teach that the organoleptic qualities of the compositions increase when the percent of corn silk in the herbal component is increased.

Furthermore, the skilled person would not have combined the teachings of documents D5 and D2 to solve the problem posed. Firstly, because D2 is concerned with tobacco rather than non-tobacco snuffs. Secondly, because D2 does not deal with the problem of improving the organoleptic properties but with the provision of more cohesive snuffs using a thickener. Thirdly,

because the teaching of D2 to increase the water content of the snuff deviates from the teaching of document D5.

Similarly, the skilled person would not have combined the teachings of documents D5 and D7 either.

Admission of the problem/solution approach starting from D3

Document D3 was cited in the appealed decision as a suitable closest prior art, but it was not discussed in detail. It was considered to be less close to the invention than D5 due to the water content. During the appeal proceedings, the appellant decided not to raise any inventive-step objection starting from D3. Thus, the respondent assumed that the argument based on D3 had been abandoned, and it could not have expected that it would be raised at the oral proceedings before the board.

Hence, the new line of reasoning should not be admitted into the appeal proceedings.

X. The final requests of the parties were as follows:

- The appellant requested that the decision under appeal be set aside and that the patent be revoked.

- The respondent requested that the appeal be dismissed or, alternatively, that the patent be maintained on the basis of any of the three sets of claims filed on 4 July 2016 with the reply to the statement of grounds of appeal as auxiliary requests 1 to 3.

XI. At the end of the oral proceedings, the decision of the board was announced.

Reasons for the Decision

1. The appeal is admissible. It complies with the requirements pursuant to Articles 106 to 108 and Rule 99(2) EPC.

2. Added subject-matter - claim 1 of the main request

On the issue of added subject-matter in relation to claim 1 of the main request, the parties disputed whether, in the application as filed, the feature "a water content of 30 to 50 weight percent" was disclosed in relation to the weight of the intermediate composition resulting from step b)i), or to the final composition.

The board agrees with the respondent that, from a general reading of the application as filed, the water content of 30-50 wt.%, disclosed on page 2, lines 15-17; page 4, lines 2-3; and claim 2, can only be understood as referring to the weight of the final composition rather than the intermediate composition resulting from step b)i).

As noted by the respondent, "water content" in the sense of the invention is defined in the application as filed (page 2, line 35, to page 3, line 2) as being the water content measured by Karl Fischer titration. This is an international standard method (ISO6488) for determining the water content of raw tobacco and

tobacco taken from finished products (see D18a, title "Introduction"). In other words, Karl Fischer titration is used for determining the water content of final products.

The board does not dispute that Karl Fischer titration might be used for determining the water content of an intermediate product. However, this was not its purpose and there is no document on file proving that this has ever been done in connection with tobacco products. Thus, in the absence of further explanation in the application as filed, the skilled person would have understood that the water content measured by Karl Fischer titration was that for which the method is conceived, namely, the water content of the final product.

Furthermore, the passage on page 4, lines 1-4, of the application as filed states that, according to a preferred embodiment, water is added in step b)i) and that this gives a final moisture content of approximately 30-50 wt.% as determined by Karl Fischer titration to obtain good performance for packing the product in pouches. The fact that the passage refers to the "final moisture content"; to the properties of the product to be packed, i.e. the final product; and to Karl Fischer titration makes it difficult to hold the view that the "final moisture content" to which the application refers is the moisture of the intermediate product rather than that of the final product.

The interpretation that the water content of 30-50 wt.% is related to the final composition is also compatible with Figure 2 and example 6.

In the process of claim 1, the addition of water is explicitly mentioned only in step b)i), thus suggesting that, as argued by the respondent, the bulk of the water required for the final 30-50 wt.% water content is added in that step. This is not in contradiction with the situation depicted in Figure 2 that additional water might need to be added downstream of step b)i) to adjust the moisture of the final product.

The preparation disclosed in example 6 is not a specific example but a generic way of carrying out the invention. It discloses neither specific amounts of fibres, nor the actual amounts at which the additives mentioned on page 11, line 31, to page 12, line 34, are added. Rather, the example discloses preferred additives and the ranges at which they may be added, but it does not illustrate any specific embodiment. Regarding the water content, the example discloses a moist snuff manufactured in accordance with the GothiaTek[®] standard (i.e. a final product) and "[w]ater to achieve water content of approximately 30-40%". However, the example does not disclose at which stage of the preparation process the defined water content was achieved. Hence, example 6 contains only a generic teaching, and it is not incompatible with the interpretation that the application as a whole discloses a water content of 30-50 wt.% based on the total weight of the final composition.

The board therefore concludes that claim 1 does not add subject-matter (Article 123(2) EPC).

3. Sufficiency of disclosure - claim 1 of the main request

On this issue, the appellant raised two aspects. Firstly, it argued that the patent did not sufficiently

disclose at which stage of the preparation process of claim 1 the water content had to be set to 30-50 wt.%, namely, at the end of step b)i) or at the very end of the process. Secondly, it argued that the patent did not provide any information on how to perform the pasteurization cited in step b)ii).

Regarding the first aspect, the question of whether the water content of 30-50 wt.% in claim 1 refers to the composition resulting from step b)i) or to the final composition amounts to a lack of clarity rather than a lack of sufficiency. It has not been disputed that skilled person would have been able to set the required water content at any of the two stages of the preparation process. Thus, as the technical feature at issue (water content of 30-50 wt.%) was already present in the claims as granted, and the cause of uncertainty is not the amendment of claim 1 with respect to its corresponding granted claim, this issue is not within the scope of the opposition appeal proceedings (see Enlarged Board of Appeal decision G 3/14, catchword).

On the second aspect, pasteurisation is a mild heat treatment for eliminating pathogens from a product. It dates back to the 19th century and was so well-known at the priority date that the board fails to understand how carrying it out in the process of claim 1 could have represented an undue burden to the skilled person. This was also indirectly acknowledged by the appellant with its arguments of inventive step at the oral proceedings before the board, where it stated literally that "pasteurisation was an incredibly broadly known process" so that it could not be the basis for the acknowledgement of an inventive step.

Accordingly, the subject-matter of claim 1 and the invention to which it relates are sufficiently disclosed (Article 83 EPC).

4. Novelty - claim 1 of the main request

According to the appellant, the composition of claim 1 is not novel over the moist snuff composition disclosed in Table 4 of document D5 because a calculation of the total water content considering the water contained in the components glycerol, flavourings, molasses, caramel colour and corn silk amounted to at least 30 wt.%

The board does not agree. Document D5 explains in paragraphs [0010] and [0026] that moist snuffs are produced from two components, a herbal component and a casing component, and that the herbal component is made moist by the addition of the casing component. Table 3 discloses a most preferred embodiment where the herbal component and the casing component represent 16-32 wt.% and 68-84 wt.% of the total composition, respectively. Table 4 illustrates a more detailed definition of that most preferred embodiment, where the herbal component consists of corn silk, present in 16-32 wt.% of the total composition, and where the ingredients of the casing component are further specified. In particular, water is disclosed to be present in the composition at a concentration of 8-18 wt.%. Other ingredients of the casing component and their corresponding concentrations in the total composition are given as well, e.g. caramel colour, flavourings, glycerin and molasses.

In the discussion of the casing component, D5 states (paragraph [0042]) that water is present in the casing component in an amount of 8-18 wt.% of the total composition, which represents 9.5-21.5 wt.% of the

casing component. This is clearly the teaching illustrated in Tables 4 and 6, which show the ingredients of the total composition and the casing component, respectively.

Having regard to the fact that document D5 teaches that the casing component, which is the component containing water, is aimed at providing the desired amount of moisture, and that it speaks about the "water content" of the composition rather than the water added to it, the board agrees with the respondent that the water range disclosed in Table 4 is the total water content of the composition and that it also takes account of the water that might be present in the other ingredients. Consequently, as document D5 discloses a water content in the final composition of 8-18 wt.%, it does not anticipate the composition of claim 1, which contains 30-50 wt.%.

The non-tobacco moist snuff of claim 1 is therefore novel (Article 54 EPC).

5. Inventive step - main request

5.1 The parties concurred that document D5 was the closest prior art. The board sees no reason to take another stance.

Like the patent in suit, document D5 concerns the preparation of non-tobacco moist snuff compositions comprising a plant fibre (corn silk), one or more humectants (glycerin or propylene glycol), sodium chloride and additional ingredients.

5.2 Following the discussion of novelty above, the moist snuff composition of claim 1 differs from the ones disclosed in D5, at least in the water content.

It was disputed between the parties whether pasteurisation in the preparation process of claim 1 resulted in a product different to that of document D5. However, in view of the outcome of the assessment of inventive step based on the difference of the water content, the board sees no need to establish whether pasteurisation introduces an additional difference over the closest prior art.

5.3 According to the respondent, the higher water content of the composition of claim 1 would result in a product which better resembles tobacco moist snuff. This allegation, however, was not supported by any evidence and therefore cannot be taken into consideration by the board.

For this reason, the board agrees with the appellant that the technical problem to be solved by the subject-matter of claim 1 is the provision of an alternative non-tobacco moist snuff composition.

5.4 It was not disputed between the parties that the non-tobacco moist snuff composition defined in claim 1 was a suitable solution to this problem. The board does not call this into question, either.

5.5 On the issue of obviousness, the board notes that a water content of 8-18 wt.% is an essential feature in the non-tobacco snuffs of document D5. This is apparent from the teaching of paragraph [0042] and the generic embodiments of Table 4 and Figure 1A. A confirmation of this may be found in the specific compositions

illustrated in Tables 7-11 and Figures 1 and 1A, all of which contain water within this range.

Having regard to this teaching, it appears unlikely that, starting from document D5, the skilled person would have added, without further prompting, water up to an amount of 30-50 wt.% to prepare alternative non-tobacco snuff compositions.

5.6 In this context, the appellant argued that the amount of water of moist snuffs may be modified discretionarily based on consumer preference, and pointed to documents D2 and D7, which show that a water content of 30-50 wt.% was standard for tobacco moist snuffs at the priority date. The appellant also contended that the skilled person would have applied the teaching on tobacco snuffs in documents D2 and D7 to the non-tobacco snuffs of D5 because tobacco and non-tobacco moist snuffs are analogous and must have the same organoleptic properties.

5.7 The board does not find this argument convincing and, for the following reasons, holds that it was not obvious that the water content taught in documents D2 and D7 for tobacco snuffs could be directly applied to the non-tobacco snuffs of D5.

As argued by the respondent, document D5 states in paragraph [0031] that thanks to its specific herbal component (corn silk), its moist snuff compositions have superior organoleptic properties to tobacco moist snuffs. Thus, the skilled person would not have been prompted to look into documents disclosing tobacco moist snuffs, such as D2 or D7, to find alternative compositions. They would not have simply increased the water content of the snuffs of the closest prior art to

the level proposed in documents D2 and D7, without making further modifications, and still expect that the resulting products would be suitable alternatives.

Regarding document D2, the document was primarily concerned with the problem of improving the cohesion of tobacco moist snuffs, a problem that was solved by the addition of a water soluble thickener (see page 1, lines 25-32). However, that problem was not contemplated at all in document D5. Thus, its combination with document D2 would also have been unlikely from this point of view.

5.8 The board therefore concludes that the skilled person would have had no reason to combine the teaching of document D5 with that of documents D2 and D7 and, therefore, that they would not have been motivated to increase the water content of the non-tobacco moist snuffs of D5 from 8-18 wt.% to 30-50 wt.% without further prompting. The subject-matter of claim 1 is therefore inventive (Article 56 EPC).

6. Admission of a new inventive-step approach based on D3

At the oral proceedings before the board, the appellant requested the admission of an inventive-step approach starting from document D3 as the closest prior art. The reason given by the appellant for introducing the new approach was that although document D5 was closer to the invention based on its water content, document D3 would become more relevant if pasteurisation were considered to also be a distinguishing feature.

The admission at the oral proceedings of a new line of reasoning based on document D3 as the closest prior art would have introduced a new factual framework (new

closest prior art), changing the appellant's case at a late stage of the appeal proceedings, and would have taken the respondent by surprise. In addition, the reason given by the appellant for introducing the new approach was to address the issue according to which not only the water content but also pasteurisation would be considered a distinguishing feature.

In view of the late introduction of the new approach and the fact that the reason justifying its introduction was not applicable because the board came to a conclusion on inventive step considering the water content as the only distinguishing feature, the board decided to exercise its discretion not admit the new argument (Article 13 RPBA 2007).

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated