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**Datasheet for the decision
of 28 September 2021**

Case Number: T 1814/19 - 3.3.09

Application Number: 08774687.1

Publication Number: 2185003

IPC: A23G9/34, A23G9/32, A23G9/42

Language of the proceedings: EN

Title of invention:
NATURAL STABILISER SYSTEM FOR FROZEN DESSERT

Patent Proprietor:
Société des Produits Nestlé S.A.

Opponent:
Delica AG

Headword:
Natural stabiliser system/Nestlé

Relevant legal provisions:
EPC Art. 54, 56, 108 sentence 3
EPC R. 99(2)

Keyword:

Admissibility of appeal - (yes)

Novelty - main request (yes)

Inventive step - main request (yes)

Oral proceedings - withdrawal of request for oral proceedings



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Case Number: T 1814/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 28 September 2021

Appellant: Delica AG
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Respondent: Société des Produits Nestlé S.A.
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Representative: Rupp, Christian
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 2 April 2019
rejecting the opposition filed against European
patent No. 2185003 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
D. Rogers

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent (appellant) against the opposition division's decision to reject the opposition against European patent No. EP 2 185 003.
- II. With its notice of opposition, the opponent had requested that the patent be revoked based on Article 100(a) EPC for lack of novelty and inventive step.
- III. The documents submitted during the opposition proceedings included:
- 03: "160410200000 Vieille Prune Sélection Becher" (Midor recipe)
 - 04: "160410000000 Grappa Sélection Becher" (Midor recipe)
 - 05: "160410100000 Marc de Champagner Sélection Becher" (Midor recipe)
 - 023: J. Fischer, "Ballaststoffe in Speiseeis" (print-out of a slide presentation at: Inter-Eis 2000, International ZDS Symposium, 13-15 November 2000)
 - 054: Production order (Marc de Champagner Sélection Becher; Grappa Sélection Becher; Vieille Prune Sélection Becher)
 - 080: "Meyprogen™ FA-1675/IC - Basis Rezeptur" (Rhodia product information, not dated)
 - 097: J. Schormüller, "Lehrbuch der Lebensmittelchemie", 2nd ed., Berlin: Springer-Verlag, 1974, 104-107

- O98: "Stärkenachweis mit Iodlösung" (photos of experiment)
- O100: "Amtliche Sammlung von Untersuchungsverfahren nach § 35 LMBG: Untersuchung von Lebensmitteln - Bestimmung von Stärke in Kinder-Zwieback und Zwiebackmehl", May 1985, 1-4
- O101: Ohtsubo K et al., "Cultivar identification of rice by PCR method and its application to processed rice products", International Union for the Protection of New Varieties of Plants, Geneva, 15 August 2003, 1-8
- O103: "Amtliche Sammlung von Untersuchungsverfahren nach § 35 LMBG: Untersuchung von Lebensmitteln - Bestimmung der Ballaststoffe in Lebensmitteln", January 1997, 1-6

IV. In the decision under appeal, the opposition division decided, *inter alia*, that:

- the subject-matter of the claims as granted was novel over the prior uses P1 to P3;
- O80, not O23, was the closest prior art; and
- the claims as granted involved an inventive step.

V. The claims that are relevant for this decision are claims 1, 2, 3 and 9 of the patent as granted (main request):

"1. Stabiliser system of natural ingredients for use in frozen confectionery characterised in that it comprises native rice starch, egg yolk as a natural emulsifier and citrus fibres.

2. Use of a stabiliser system according to claim 1 in the manufacture of frozen confectionery.

3. Method for the manufacture of a frozen confectionery comprising the steps of:

- a. Blending frozen confectionery ingredients with a stabiliser system as defined in claim 1,
- b. Pasteurising and homogenising the mix,
- C. Freezing the mix.

9. Frozen confectionery product characterised in that it comprises a stabiliser system as defined in claim 1."

- VI. The patent proprietor (respondent) filed ten auxiliary requests in the appeal proceedings.
- VII. The board summoned the parties to oral proceedings and issued a communication under Article 15(1) RPBA 2020. In this communication, the board explained its preliminary opinion that the appeal appeared to be admissible and that it appeared that the main request was allowable and that the appeal would have to be dismissed.
- VIII. The appellant informed the board that neither it nor its representative would attend the oral proceedings.
- IX. The board cancelled the oral proceedings.

X. The parties' requests are 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 rejected as inadmissible or dismissed; or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1 to 10 filed with the reply to the statement setting out the grounds of appeal.

Reasons for the Decision

1. *Admissibility of the appeal*

1.1 The respondent argued that the statement setting out the grounds of appeal merely repeated verbatim the notice of opposition. It contained no argument on why the opposition division's decision was incorrect. Thus, the appeal had to be held inadmissible.

1.2 However, in its statement setting out the grounds of appeal, the appellant addressed two aspects discussed in the decision under appeal and relevant for the decision with which it did not agree:

- It explained that, contrary to the opposition division's finding, production order O54 could be linked to recipe O3 (point 14).
- The opposition division had erred in disregarding the teaching of O23 when discussing inventive step starting from O80 as the closest prior art (point 75).

1.3 Therefore, the appellant set out two reasons why it requests that the decision under appeal be set aside. Whether these reasons are successful is irrelevant for the admissibility of the appeal. Also, whether further objections may be raised is not a question relevant to the admissibility of the appeal and is governed by the Rules of Procedure of the Boards of Appeal.

1.4 In view of this, the appeal is sufficiently substantiated within the meaning of Article 108, third sentence, and Rule 99(2) EPC and therefore admissible.

2. *The patent*

The patent relates to an "all natural" frozen confectionery which can be manufactured without resorting to artificial ingredients. Standard stabiliser systems which comprise "E numbers" or chemically synthesised compounds can be dispensed with and organoleptic aspects such as creaminess are not compromised. The stabiliser system in the patent comprises native rice starch, egg yolk and citrus fibres (paragraphs [0020] and [0049]).

3. *Novelty - main request*

3.1 As to the alleged public prior uses, the opposition division decided, *inter alia*, that the opponent had not shown:

- what had been made available to the public through products P1, P2 and P3 prior to the filing date of the patent in suit (decision under appeal, points 16.1 to 16.3); and

- that a product including all the features of claim 1 had been available to the public and that it could have been analysed (*ibid.*, point 16.4).

3.2 On appeal, one issue in dispute was whether the composition of P1 to P3 (based on recipes O3 to O5 respectively) was analysable, i.e. whether it would have been possible to determine that P1 to P3 included native rice starch, citrus fibres and egg yolk.

3.3 On this question, the board's communication under Article 15(1) RPBA 2020 sets out the following (in points 5.2 to 5.4):

"... the board agrees with the respondent that even if products P1 to P3 had been made available to the public (before the effective date of the patent), the products could not have been analysed to determine whether they included the stabiliser system of claim 1.

5.3 For instance O97, O98 and O100 show that starch can be identified in a sample and O101 that a rice cultivar can be analysed by the PCR method. However, it appears that this evidence, taken together, does not support the finding that a sample (here: P1 to P3) includes rice starch, more particularly native rice starch. Similar considerations apply also for the citrus fibres: O103 is an analytical method for determining dietary fibres but does not discuss how to discriminate between different sources of fibres.

Consequently, it appears that P1 and P3 do not disclose at least the features native rice starch and citrus fibres.

5.4 *Thus, on this basis already, the subject-matter of claim 1 and of claims 2, 3 and 9, which also involve the stabiliser system of claim 1, appears to be novel (Article 54 EPC)."*

3.4 The appellant did not provide any counter-arguments. Therefore, the board has no reason to review its preliminary opinion.

3.5 Therefore, the subject-matter of claims 1 to 3 and 9 is novel (Article 54 EPC).

4. *Main request - inventive step*

4.1 In the decision under appeal, when discussing inventive step of claim 1, the opposition division held as follows:

- O80 is the closest prior art.
- The stabiliser system of claim 1 differs in that it comprises citrus fibres and native rice starch that has not undergone any chemical or physical modifications.
- The technical effect is that stability and organoleptic aspects such as creaminess are not compromised.
- The technical problem is how to prepare a stabiliser system of natural ingredients for use in frozen confectionery which does not compromise the stability or creaminess of the frozen confectionery.

4.2 The appellant did not contest any of these findings. In particular, while the statement setting out the grounds of appeal contains arguments on inventive step starting from O23 as the closest prior art (seemingly the same

arguments as provided in the notice of opposition), the appellant did not provide any argument why the opposition division was wrong in deciding that O80 was a more suitable starting point than O23.

Thus, the board sees no reason to depart from the opposition division's findings in this respect: O80, not O23, is the closest prior art.

- 4.3 The appellant's argument was that the opposition division had erred in disregarding the teaching of O23 when discussing obviousness starting from O80 (see above, point 1.2). In its view, this document suggested the use of the combination of citrus fibres and an additional stabiliser in ice cream.
- 4.4 However, the appellant's argument is not convincing. As the opposition division correctly explained in the decision under appeal (points 17.1 to 17.4), the skilled person starting from O80 would not have been motivated to turn to O23 and selectively modify or adapt the teaching of O80 to solve the technical problem ("does not compromise stability or creaminess"). There was simply no indication that adding citrus fibres - which are mentioned in O23 - would have been the way to solve the technical problem.
- 4.5 Therefore, the board cannot identify any error in the opposition division's decision. The subject-matter of claim 1 - and claims 2, 3 and 9, which also involve the stabiliser system of claim 1 - complies with the requirement of Article 56 EPC. The same applies to dependent claims 4 to 8 and 10 to 15.

5. *Conclusion*

In view of the reasons set out above and considering that the appellant did not raise any further objections which the board has to consider, the main request is allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated