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Datasheet for the decision of 23 June 2022

Case Number: T 2268/19 - 3.3.09

Application Number: 13713956.4

Publication Number: 2947995

IPC: A23C9/123, A23C9/133

Language of the proceedings: EN

Title of invention:
PROCESS FOR PREPARING STRAINED FERMENTED DAIRY PRODUCT

Patent Proprietor:
Compagnie Gervais Danone
Danone, S.A.

Opponent:
FrieslandCampina Nederland B.V.

Headword:
Process for preparing a strained fermented dairy product/ DANONE

Relevant legal provisions:
EPC Art. 83, 56

Keyword:
Sufficiency of disclosure - (yes)
Inventive step - (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 2268/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 23 June 2022

Appellant: (Opponent)	FrieslandCampina Nederland B.V. Stationsplein 4 3818 LE Amersfoort (NL)
Representative:	FrieslandCampina IP Department Bronland 20 6708 WH Wageningen (NL)
Respondent: (Patent Proprietor 1)	Compagnie Gervais Danone 17, Boulevard Haussmann 75009 Paris (FR)
Respondent: (Patent Proprietor 2)	Danone, S.A. Buenos Aires 21 E-08029 Barcelona (ES)
Representative:	Plasseraud IP 66, rue de la Chaussée d'Antin 75440 Paris Cedex 09 (FR)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 26 June 2019 concerning maintenance of the European Patent No. 2947995 in amended form.**

Composition of the Board:

Chairman	A. Haderlein
Members:	M. Ansorge
	W. Sekretaruk

Summary of Facts and Submissions

I. The opponent (appellant) lodged an appeal against the opposition division's interlocutory decision holding the main request allowable.

II. With its notice of opposition, the opponent had requested revocation of the patent on the grounds for opposition under Article 100(a) EPC (lack of inventive step) and Article 100(b) EPC.

III. The opposition division decided that the subject-matter of claim 1 of the main request could be carried out by a skilled person (Article 83 EPC) and involved an inventive step in view of D8 as the closest prior art.

IV. In the present decision, reference is made to the following documents:

D3: A.Y. Tamime et al., "The production of 'Labneh' by ultrafiltration: a new technology", Journal of the Society of Dairy Technology, vol. 42, no. 2, 1989, pages 35 to 39

D7: A.Y. Tamime et al., Yoghurt: Science and Technology, second edition, 1999, pages 54 to 60, 198, 199 and 330 to 333

D8: C. Hahn et al., "Graininess in fresh cheese as affected by post-processing: Influence of tempering and mechanical treatment", International Dairy Journal 26 (2012), pages 73 to 77

D11: "Dairy Processing Handbook", Tetra Pak Processing Systems AB, 1995, chapter 11, pages 241 to 246

V. With its reply to the grounds of appeal, the proprietors (respondents) filed auxiliary requests 1

to 4.

VI. In preparation for the oral proceedings, the board issued a communication pursuant to Article 15(1) RPBA indicating its preliminary opinion that the subject-matter of claim 1 of the main request did not involve an inventive step in view of D8 as the closest prior art but that auxiliary request 1 was allowable.

VII. All parties withdrew their requests for oral proceedings. Moreover, the respondents withdrew the main request.

VIII. The oral proceedings were cancelled.

IX. Independent claims 1 and 8 of auxiliary request 1 read as follows:

"1. A process for the manufacture of a strained fermented dairy product, comprising at least the following steps:

- a pre-heat treatment step at a temperature of from 75 to 95°C of a dairy material having a fat content of from 0 to 2% by weight,

- a homogenization step at a pressure of from 25 bars to 300 bars of the said dairy material,

- a heat treatment step at a temperature of from 90 to 95°C for 2 to 7 min,

- a fermentation step with at least *Streptococcus thermophilus* and *Lactobacillus delbrueckii subsp. bulgaricus* at a temperature of from 35 to 44°C, during 4 to 7 hours,

- a heat treatment step at a temperature of from 50 to 65°C during from 1 to 10 min,

- a separation step wherein said separation step is performed by a separator at a temperature of from 30 to 45°C, to obtain a strained fermented dairy product wherein the total content of protein is between 6 and 14 g/l00g of product,

- a smoothing step performed by a rotor stator mixer,

- a cooling step to a temperature of from 15 to 20°C."

"8. Strained fermented dairy product obtainable by the process according to any one of claims 1 to 7, comprising, by weight of final product:

- from 0 to 5% of fat, in particular from 2 to 3,5% of fat, more particularly 2,9% of fat, and

- from 6 to 12% of proteins, in particular from 7 to 10% of proteins, more particularly 9% of proteins,

wherein said strained fermented dairy product:

- has from 1.10^5 to 3.10^6 cfu/ml of *Lactobacillus delbrueckii subsp. bulgaricus* and from 1.10^8 to 3.10^9 cfu/ml of *Streptococcus thermophilus* during all the shelf life, in particular during 28 days

- has a pH of from 3,9 to 4,4 , in particular of from 3,95 to 4,3, more particularly of from 4 to 4,2,

- has a viscosity from 2000 to 7000 $mPa.s^{-1}$, in particular from 2200 to 6500 $mPa.s^{-1}$, more particularly

from 2500 to 6000 mPa.s^{-1}, measured with a Rheomat RM 200 at a temperature of 10°C and at a shear of 64 s^{-1}."

X. The parties' relevant arguments are reflected in the reasons for the decision below.

XI. Requests

The appellant requested that the decision be set aside and that the patent be revoked in its entirety.

The respondents requested that the patent be maintained on the basis of one of auxiliary requests 1 and 2 filed with the reply to the appeal or one of auxiliary requests 3 to 5 filed with the letter of 7 February 2022.

Reasons for the Decision

AUXILIARY REQUEST 1

1. Amendments

Claim 1 is based on claims 1, 2 and 9 of the application as filed, the remaining claims finding their basis in their counterparts in the application as filed. The appellant did not raise any objection under Article 123(2) EPC. This provision is therefore met.

2. Sufficiency

2.1 The appellant argued that the invention could not be carried out by a skilled person (Article 83 EPC). It

submitted that the patent merely disclosed steps, optional steps and process condition-ranges for each of those steps in the description but that the working examples were silent on which process steps were applied and which conditions were applied in those process steps. Accordingly, the skilled person could not reproduce the invention as claimed without undue experimentation.

2.2 For the following reasons, the board does not agree with the appellant.

2.2.1 On sufficiency of disclosure, the appellant essentially reiterates the arguments submitted in the opposition proceedings before the department of first instance. It did not provide arguments why the opposition division erred in its assessment of sufficiency of disclosure.

2.2.2 The opposition division held as follows (see point 3.3 of the decision):

"When talking about sufficiency of disclosure, the patent as a whole has to be taken into account. Indeed, example 1 as pointed out by the Opponent, says in [0024] that the products are prepared according to the process of the invention. However, the Opposition Division does not see why this represents an undue burden for the skilled worker and why he should not be able to represent the invention, or as the Opponent wrote the five products of example 1. The patent in suit provides teaching in [0007]-[0011] how to produce the product of the invention according to the process such as claimed in granted claim 1. It is agreed with the Proprietor, that all of the process steps are known to the skilled worker, as being common practise in the dairy industry and are moreover disclosed in the patent

in suit. Additionally, [0026] of the contested patent indicates how the viscosity was measured.

Concerning the bacteria count and the heating step as mentioned by the Opponent, in the absence of the contrary, the Opposition Division has to take the information which it has at hand and has no reasons to believe that the products disclosed in [0025] are not representative for the products as claimed in independent claim 1.

The Opposition Division notes, that the Opponent did not provide any experimental data, showing that the invention cannot be reproduced by the skilled worker. The arguments brought forward by the Opponent are not convincing and without the support of verifiable facts, such as experimental data, said arguments are merely considered as allegations."

2.2.3 The board sees no error in the opposition division's assessment of sufficiency of disclosure and fully concurs with its conclusion. The appellant did not submit any verifiable facts raising serious doubts that the claimed process could be carried out or the claimed product could be obtained, keeping in mind that the burden of proof is on it. Thus, the appellant's objections represent unsubstantiated allegations which cannot raise serious doubts that the invention can be carried out.

In view of the above, the invention can be carried out by a skilled person (Article 83 EPC).

3. Inventive step

3.1 The appellant argued that the subject-matter of claims 1 and 8 of auxiliary request 1 did not involve an inventive step in view of D8 as the closest prior art.

3.2 For the following reasons, the board comes to a different conclusion.

3.2.1 It is not contested that the process of claim 1 of auxiliary request 1 differs from the process of D8 in that a high-pressure homogenisation step at a pressure of from 25 to 300 bars is performed on the dairy material (first distinguishing feature).

In addition, it is not contentious that D8 fails to disclose the temperature of from 35 to 44 °C in the fermentation step (second distinguishing feature).

Furthermore, D8 does not disclose the use of *Streptococcus thermophilus* and *Lactobacillus delbrueckii subsp. bulgaricus* in the fermentation step (third distinguishing feature).

Moreover, D8 does not disclose the heat treatment step at a temperature of from 50 to 65 °C for 1 to 10 min., i.e. the additional heating step between the fermentation and the separation steps (fourth distinguishing feature).

In total, there are four distinguishing features over the process of D8.

3.2.2 Even when assuming to the benefit of the appellant that the objective technical problem is merely the provision

of an alternative process for the manufacture of a strained fermented diary product (or the provision of an alternative strained fermented diary product), the claimed subject-matter involves an inventive step in view of D8, as outlined in the following.

3.2.3 On the obviousness of the second distinguishing feature, the appellant argued as follows:

"A minor difference is the temperature which is applied in the fermentation step [...] according to claim 1. However, this is simply due to the bacteria strains used for fermentation in D8. *Streptococcus thermophilus* and *Lactobacillus delbrueckii subsp. Bulgaricus* are however commonly known fermentation bacteria (see D3, page 35 under 'starter culture', or D7, page 333 under 'Miscellaneous properties', last paragraph or D11, page 258, lines 1-2)."

The board is not convinced by this line of argument since the appellant did not give any reason why a skilled person would have modified the fermentation temperature taught in D8. In addition, no evidence was submitted by the appellant that increasing the fermentation temperature from 20 °C (taught in D8) towards the range 35 to 44 °C (see claim 1 of auxiliary request 1) might be a routine measure for a skilled person.

3.2.4 With respect to the third distinguishing feature, the appellant did not give any reason why a skilled person having knowledge of D8 dealing with the production of fresh cheese would consider *Streptococcus thermophilus* and *Lactobacillus delbrueckii subsp. bulgaricus* (i.e. a different culture) to be typically used in the

fermentation of yogurt (see, for instance, the section "Starter culture" of D3).

3.2.5 With respect to the fourth distinguishing feature, the appellant argued that heat treatment after fermentation but before separation was known in the art; a heat treatment step between fermentation and separation in the preparation of yogurt could be derived from D7 (see pages 330 to 333 of D7).

The board does not find the appellant's line of argument convincing since there is no reason why a skilled person would contemplate such an additional heating step in the process of D8, keeping in mind that D8 is concerned with fresh cheese, whereas D7 is concerned with yogurt.

In view of the above, a skilled person would not contemplate the combination of the above-identified four distinguishing features and would not arrive at the claimed process in an obvious manner. The claimed process represents a non-obvious alternative in view of D8 as the closest prior art.

Thus, the process of claim 1 of auxiliary request 1 involves an inventive step in view of D8 as the closest prior art. The same applies to dependent process claims 2 to 7 of auxiliary request 1.

3.2.6 The parties agreed that the inventive-step arguments directed to the process claims apply equally to the product-by-process claims. Under these circumstances, the subject-matter of independent product-by-process claim 8 of auxiliary request 1, which contains the feature "obtainable by the process according to any one of claims 1 to 7", also involves an inventive step in

view of D8. The same applies to the dependent product-by-process claims 9 to 12 of auxiliary request 1.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division with the order to maintain the patent with the following claims and a description to be adapted thereto:

Claims:
No. 1 to 12 according to auxiliary request 1 filed with the reply to the grounds of appeal

The Registrar: The Chairman:

A. Nielsen-Hannerup A. Haderlein

Decision electronically authenticated