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**Datasheet for the decision
of 3 February 2021**

Case Number: T 0348/20 - 3.3.09

Application Number: 02447020.5

Publication Number: 1228703

IPC: A23L1/212, A23P1/08, A23B7/16,
A23B7/04, A23B7/154

Language of the proceedings: EN

Title of invention:
Frozen fruits

Patent Proprietor:
Dirafrost F.F.I. n.v.

Opponent:
CROP'S nv

Headword:
Preventing the leakage of juice from frozen fruits/DIRAFROST

Relevant legal provisions:
EPC Art. 54(2), 56

Keyword:
Public prior use - (no)
Granted claims - Novelty (yes)
Granted claims - Inventive step (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0348/20 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 3 February 2021

Appellant: dirafrost F.F.I. n.v.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 20 December
2011 revoking European patent No. 1228703
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Ansorge
Members: A. Veronese
E. Kossonakou

Summary of Facts and Submissions

- I. The appeal was filed by the proprietor (appellant) against the decision of the opposition division to revoke European patent No. EP 1 228 703 B1.
- II. With its notice of opposition, the opponent had requested revocation of the patent in its entirety on the grounds under Article 100(a) EPC (lack of novelty and lack of inventive step) and Articles 100(b) and 100(c) EPC.
- III. The documents submitted during the opposition proceedings included:
- D1: US 2,511,609
 - D10: Technical brochure from Forberg describing the "Forberg Vacuum Coater"
 - D14a: Telefax dated 20 December 2002 displaying an information sheet for the product "Demi-Fraises Enrobées Surgelées"
 - D14b: Information sheet for the product "Fraises demi-enrobées" ("Les Délices de Ninon")
 - D14c: Brochure of the product "Deco Fruits" from dirafrost
- IV. By letter of 4 July 2011, the opponent withdrew its opposition.
- V. The decision of the opposition division was based on the granted patent (main request) and an auxiliary request, filed on 30 November 2011.

Granted claims 1, 5 and 10 read:

"1. Preparation process for coated frozen fruits or frozen fruit pieces with between 0.05 weight % and 5 weight % of coating powder able to avoid juice leaking from said fruits or fruit pieces applied in a layer, comprising the following steps:

- loading a continuously agitating sealed preparation container with individually quick frozen fruits,*
- deaerating said continuously agitating sealed preparation container,*
- dosing the coating powder on the fruits,*
- mixing the fruits on the powder in order to obtain an homogenous dispersion of the coating powder upon the surface of the fruits,*
- recovering the obtained fruits."*

"5. Frozen fruits or frozen fruit pieces coated with between 0.05 weight % and 5 weight % of coating powder frozen on the surface of the fruit or fruit piece able to avoid juice leaking from said fruits or fruit pieces applied in a layer obtainable with the process according to any of the claims 1 to 4."

"10. Use of the frozen fruits or the frozen fruit pieces according to any of the preceding claims 5 to 9, or obtained according to the method of the claim 1 to 4 for the preparation of a food composition."

The auxiliary request differed from the main request in that claims 5 to 11 were deleted.

VI. The opposition division held that:

- the claimed subject-matter did not enjoy priority from the earlier application EP 01870019
- the prior uses of the products described in D14a, D14b and D14c were part of the state of the art
- the product and the use defined in granted claims 5 and 10 lacked novelty over the prior uses
- the process defined in claim 1 of the auxiliary request lacked an inventive step over the teaching of document D1, the closest prior art, in combination with that of D10

VII. The appellant requested that the decision be set aside and that the patent be maintained as granted (main request) or, alternatively, on the basis of one of auxiliary requests 1 to 3, all filed with the statement setting out the grounds of appeal.

VIII. With the statement of grounds, the appellant contested that the purported prior uses are part of the state of the art with respect to the dates on the evidence and to the circumstances.

Regarding D1, the appellant argued that it did not aim, as the opposed patent did, at preventing water loss from frozen fruits upon thawing. According to D1, the fruits were coated with a powder before freezing. This resulted in fruits coated with a mixture of juice and the powder dissolved in the juice. D1 and D10 did not hint at coating fruits with a powder after the freezing step. The apparatus of D10 was for coating a product with a liquid, not a powder.

Reasons for the Decision

Main request (the granted patent)

1. *Priority*

The opposition division decided that the claimed subject-matter did not enjoy priority from the earlier application EP 01870019. This finding was not contested by the appellant and the board does not see any reason for departing from it. Thus, the effective date for determining the prior art pursuant to Article 54 EPC is the filing date, 6 February 2002.

2. *Alleged public prior uses and novelty*

2.1 The opposition division concluded that the purported prior uses are part of the state of the art and that the subject-matter of granted claims 5 and 10 lacks novelty over the products described in D14a, D14b and D14c.

2.2 According to established case law (see Case Law of the Board of Appeal of the European Patent Office, 9th edition 2019, chapter I.C.3.2.4), the following has to be established when determining whether an invention has been made available to the public by means of a prior use:

- when the prior use occurred
- what was made available to the public
- where, how and by whom the subject-matter was made public, i.e. the circumstances of the use

- 2.3 D14a relates to the first alleged instance of prior use. It is an information sheet for a product labelled "Demi-Fraises Enrobées Surgelées", i.e. frozen coated strawberries. It bears a printed date "19/11/2001", pre-dating the filing date, on the right side of the first page. A signature and a handwritten date, "20/12/02" (after the filing date of the application underlying the patent in suit), are visible on page 1. The same date appears as the fax-transmission date. Admitting the opponent's submission that the handwritten number at the bottom of page 1 is the opponent's own fax number, the only thing that D14a can prove with any degree of certainty is that the information in it was transmitted to a third party, but on a date clearly after the filing date of the application underlying the patent in suit.
- 2.4 D14b relates to a second instance of alleged prior use. It is an information sheet issued by the company "Lachaise sa" describing coated frozen fruits. A first date, "24 October 2001", which pre-dates the filing date, is visible on page 1 under the heading "Date de création" (date of creation). A second date, "12-Févr-03" (12 February 2003), i.e. one year after the filing date, is shown on page 3, under the heading "date de validation" (validation date). In the absence of any further explanation as to the meaning of these dates, it is impossible to determine whether the complete information shown in D14b was included in the sheet before its "validation date".
- 2.5 D14c relates to yet a further instance of alleged prior use. It is a brochure from "dirafrost" describing the product "Deco fruits". However, no date is indicated on this document. The opponent had admitted that this "is

an undated information sheet..." (see letter of 22 May 2007) and pleaded for indirect dating through the product code which was to be found also in D14b. Since however the only certain date in D14b is after the contested patent's effective date, D14c can add nothing to the debate.

2.6 From these considerations alone, it follows that D14a, D14b and D14c do not constitute convincing evidence that these documents and/or the products described in them were made available to the public before the filing date of the opposed patent.

2.7 Since the alleged prior uses are not sufficiently proven, the board concludes that the claimed subject-matter is novel.

3. *Inventive step*

3.1 The claimed invention relates to frozen fruits which can be added in their frozen state to a food, such as a pastry. As explained in paragraph [0005] of the opposed patent, frozen fruits leak juice upon thawing. The juice is created because the cell structure is broken during freezing. When frozen fruits are deposited on a food, e.g. on a pastry or glazing gel, the leaked juice negatively affects its organoleptic properties. For example, it soaks the pastry or is captured by the gel creating an unpleasant appearance. The invention aims at providing frozen fruits which can be deposited on a food and not leak juice when thawing (see paragraphs [0002], [0005], [0011] to [0013] and [0017] of the opposed patent).

3.2 The opposition division decided that the process of claim 1 does not involve an inventive step in view of

D1, considered the closest prior art, in combination with D10.

- 3.3 D1 discloses frozen fruits coated with saccharin and pectin to compensate for the loss of sweetness occurring when the juice formed upon freezing leaks from the fruit. The board sees no reason to depart from the opposition division's choice of D1 as the closest prior art.
- 3.4 The process described in granted claim 1 differs from that of D1 in that the fruits are coated with a powder after having been frozen and deaerated. According to D1, the fruits are coated with a liquid or powder, but only before the freezing step (see examples I to IV and in particular example IV).
- 3.5 The patent teaches that if fruits in the frozen state are coated with a powder, the juice leaking out during thawing is absorbed by the powder and a gel is formed. The fruit then keeps its shape in a gel layer having a smooth texture and a nice mouthfeel (see paragraphs [0025] and [0026]).
- 3.6 Furthermore, the appellant stated that if the powder is applied on fresh non-frozen fruits, like in D1, it cannot retain the bulk juice leaking from the thawing fruit and provide the aforementioned benefits. This fact was not contested.
- 3.7 Therefore, starting from D1, the underlying objective technical problem is the provision of a process for manufacturing frozen fruits which do not suffer from the problems associated with the leaking of juice during thawing.

- 3.8 D1 does not in any way hint at the proposed solution. This is because it neither deals with the aforementioned problem nor suggests dispersing a powder on frozen fruits. To the contrary, D1 teaches to add a powder before freezing the fruits.
- 3.9 D10 would not have led the skilled person to the proposed solution, either. This document only describes a vacuum coater for coating products such as extrudates, pellets, muesli with a liquid rather than a powder. Furthermore, D10 neither relates to the underlying technical problem nor mentions that frozen fruits might be coated.
- 3.10 For these reasons, the process defined in granted claim 1 involves an inventive step.
- 3.11 In the absence of any inventive step line of argumentation against independent claims 5 and 10, the board does not see why its subject-matter might lack an inventive step. The same applies to the dependent claims.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is maintained as granted.

The Registrar:

The Chairman:



A. Nielsen-Hannerup

M. Ansorge

Decision electronically authenticated