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**Datasheet for the decision
of 15 May 2024**

Case Number: T 1276/22 - 3.3.09

Application Number: 14817583.9

Publication Number: 3013154

IPC: A23G1/00, A23G1/30, A23C9/13,
A23G9/42

Language of the proceedings: EN

Title of invention:
PROCESS FOR PRODUCING DARK BROWN NATURAL COCOA

Patent Proprietor:
Olam International Limited

Opponent:
Barry Callebaut AG

Headword:
Dark brown natural cocoa/OLAM

Relevant legal provisions:
EPC Art. 100(a), 56
RPBA 2020 Art. 13(2)

Keyword:

Inventive step - (no)

Amendment after summons - exceptional circumstances (no)

Reimbursement of appeal fee - substantial procedural violation
(no)

Decisions cited:

Catchword:



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Case Number: T 1276/22 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 15 May 2024

Appellant: Olam International Limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
21 February 2022 concerning maintenance of the
European Patent No. 3013154 in amended form.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
R. Romandini

Summary of Facts and Submissions

- I. Both the proprietor and the opponent lodged an appeal against the opposition division's interlocutory decision that what was then auxiliary request II was allowable.
- II. With its notice of opposition, the opponent had requested that the patent be revoked, *inter alia* on the ground for opposition under Article 100(a) EPC (lack of inventive step).
- III. The opposition division decided that the subject-matter of claim 1 of the patent as granted and claim 1 of what was then auxiliary request I lacked novelty over D1. What was then auxiliary request II was considered to be allowable, in particular as regards involving an inventive step.
- IV. Claim 1 of the patent as granted (main request) reads as follows.

"A process for producing a dark brown, natural cocoa product, comprising:

mixing cocoa cake and water, thus producing a mixture; subjecting the mixture to pressure between 34 kPa (5 psi) and 172 kPa (25 psi); and drying the mixture, thus producing a dried cocoa cake; wherein the dark brown, natural cocoa product is not alkalized."

Claim 1 of auxiliary request II (corresponding to claim 1 of auxiliary request I in the proceedings before the department of first instance) differs from

claim 1 of the main request in that the feature "at a temperature of between 85°C and 120°C" is inserted directly after the claim feature "subjecting the mixture to pressure between 34 kPa (5 psi) and 172 kPa (25 psi)".

Claim 1 of auxiliary request IV (corresponding to claim 1 of auxiliary request II in the proceedings before the department of first instance) differs from claim 1 of auxiliary request II in that the feature "at a moisture between 26% and 35%" is inserted directly after the claim feature "mixing cocoa cake and water, thus producing a mixture".

The wording of auxiliary requests I, III and V to X is not relevant to the present decision. In claim 1 of auxiliary requests I, III and V, the pressure is specified as elevated pressure.

V. The following documents were cited in the present case.

D1: WO 2005/004619 A2

D2: S. Wójcik and A. Warzecha, "Technological attempts to deepen the colour of cocoa", *Przemysł Spożywczy*, 1971, Volume XXV, pages 264-266

D3: A. Warzecha and S. Wójcik, "Technological attempts to deepen the colour of cocoa. II", *Przemysł Spożywczy*, 1973, Volume XXVII, pages 73-77

D7: US 2012/0027889 A1

VI. The relevant arguments by the parties, submitted in writing and during the oral proceedings, are reflected in the reasons for the decision below.

VII. Requests

The proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, as an auxiliary measure, that the patent be maintained on the basis of one of auxiliary requests I to X, as filed on 15 April 2024.

The opponent requested that the decision be set aside and that the patent be revoked.

Reasons for the Decision

1. Inventive step - auxiliary request IV
 - 1.1 The proprietor was of the opinion that the claimed process involved an inventive step in view of D2/D3 as closest prior art.
 - 1.2 The board does not agree, as explained below.
 - 1.3 While both D2 and D3 are suitable starting points for assessing the question of inventive step in the present case, D3 is taken as the starting point in assessing inventive step below.
 - 1.4 D3 is a report directed to deepening the colour of cocoa by treating cocoa powder with water vapour and drying the resulting humidified powder. D3 refers to D2, so the disclosure of D2 is considered to be included in D3. In D2 the apparatus for intensifying cocoa colour and the process are explained in more detail (see Figure 1).

1.5 The proprietor argued that the claimed process differed from D3 in that:

- water is used in the mixing step
- cocoa cake is used
- elevated pressure is applied
- no alkalisation is employed
- a step of mixing cocoa cake and water is carried out
- a change that reduces the L value occurs.

1.6 The board comments as follows on the distinguishing features over D3.

1.6.1 D3 discloses that cocoa powder is humidified with water vapour up to a content of 30%. The board concludes that the result of treating cocoa powder with water vapour is a mixture of water and cocoa powder.

The proprietor's argument that D3 did not disclose a mixing step is not convincing, since in example 1 of the patent, too, the cocoa cake is simply treated with water, with no mention of a particular kind of mixing such as stirring. Claim 1 does not specify a specific kind of mixing either. Thus, the step of mixing as defined in claim 1 is fulfilled by the process described in D3.

1.6.2 The proprietor argued that in D3 a cocoa powder was used as the starting material, and not a cocoa cake as specified in claim 1. However, at the oral proceedings

before the board the proprietor confirmed that the powder used in D3 after the water vapour treatment and drying resulted in a dried cocoa cake.

The board agrees that the final product in D3 is a dried cocoa cake. However, the board is unconvinced that the feature "cocoa cake" rather than "cocoa powder" represents a distinguishing feature over D3, since treating the cocoa powder in D3 with water vapour also results in a certain amount of agglomeration or clumping, forming a "cocoa cake". Thus, the board cannot agree that D3 does not disclose a "cocoa cake" in the step of mixing with water.

- 1.6.3 The proprietor argued that D2/D3 only disclosed that the colour of the cocoa powder was intensified, which did not necessarily mean that a dark brown cocoa product was obtained.

The board disagrees. It is explicitly disclosed in D3 that the colour of the cocoa product is deepened, which necessarily implies that the cocoa product obtained in D3 is also dark brown. Furthermore, when considering the term "intensifying the colour of cocoa" as mentioned in D2, the board sees no reason why this process would not also result in a dark brown cocoa product.

- 1.6.4 Since no alkali treatment is mentioned in D3, it must be concluded that no such treatment is carried out in D3. Thus, the claim feature "the dark brown, natural cocoa product is not alkalized" is not a distinguishing feature over D3.

- 1.6.5 In view of the above, the subject-matter of claim 1 differs from D3 only by the pressure range, i.e. the

feature "subjecting the mixture to pressure between 34 kPa (5 psi) and 172 kPa (25 psi)", which is not explicitly disclosed in D3.

- 1.7 No improvement resulting from this difference was shown to exist over D3, so the objective technical problem to be solved is the provision of an alternative process for producing a dark brown natural cocoa product.
- 1.8 With respect to the question of obviousness, the proprietor argued that there seemed to be no hint that the process of D3 could be modified to arrive at the process of the present invention.
- 1.9 The board comes to a different conclusion. In the board's view, it is a routine modification for a skilled person to use a slightly higher pressure than the one applied in the process of D3. No particular hint or motivation is necessary, given the unambitious technical problem to be solved. Moreover, the board shares the opponent's view that applying an antimicrobial treatment with pressurised steam at a pressure of 145 kPa and a temperature of 120°C to 150°C, as taught in D1, is an obvious modification to the process of D3 as well. While it is true that in D1 a whole roasted cocoa bean product, which is more susceptible to microbial contamination, is sterilised, the board sees no reason why a skilled person would not also consider such a sterilisation treatment in the case of a cocoa product according to D3, even though this no longer has any cocoa shells.

For the above reasons, a skilled person would arrive at the pressure range defined in claim 1 without any inventive effort. The claimed process is an obvious alternative in view of D3 as closest prior art.

In view of the above, the subject-matter of claim 1 of auxiliary request IV does not involve an inventive step over D3 as the closest prior art in combination with common general knowledge or D1.

2. Inventive step - auxiliary requests I to III and V

The above conclusion of a lack of inventive step in the process claimed in auxiliary request IV applies equally to claim 1 of the main request and of auxiliary request II, since the processes claimed therein are defined more broadly. The same conclusion also applies to claim 1 of auxiliary requests I, III and V, since in the above assessment claim 1 is interpreted such that the pressure range of claim 1 represents elevated pressure, i.e. atmospheric pressure plus the pressure defined in claim 1. This interpretation is spelled out in claim 1 of auxiliary requests I, III and V.

3. Admittance of auxiliary requests VI to X

3.1 Auxiliary requests VI to X were filed after notification of the board's communication pursuant to Article 15(1) RPBA. The proprietor requested that these requests be admitted to the proceedings.

3.2 For the following reasons, the board has not taken these requests into account.

3.2.1 Auxiliary requests VI and VIII correspond to auxiliary requests III and IV, which were filed on 26 November 2021 in the proceedings before the department of first instance as a possible fall-back position. However, as correctly pointed out by the opponent, the proprietor did not pursue these claim

requests with its statement setting out the grounds of appeal (which refers only to the patent as granted and auxiliary requests I and II, see page 5), or with the reply to the opponent's grounds of appeal (which generally refers to "[t]he requests of the proprietor", see page 7).

- 3.2.2 The proprietor filed auxiliary requests VII, IX and X only after notification of the board's communication pursuant to Article 15(1) RPBA.
- 3.2.3 Considering the above, the admittance of auxiliary requests VI to X is governed by Article 13(2) RPBA.
- 3.2.4 According to Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a communication under Article 15(1) RPBA shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
- 3.2.5 There are no exceptional circumstances which could support consideration of these claim requests on appeal. The preliminary opinion given in the board's communication is based only on the arguments submitted by the parties in their grounds of appeal and reply. No new issue was raised of the board's own motion. Under these circumstances, a negative preliminary opinion from the board cannot be deemed exceptional circumstances.

As a consequence, auxiliary requests VI to X are not taken into account (Article 13(2) RPBA).

4. Reimbursement of the appeal fee

4.1 The opponent argued that the existence of a difference due to the lack of hydrolysed carbohydrate and protein as a process feature was never argued by the proprietor in the opposition proceedings. This argument was introduced only in the decision, depriving the opponent of the chance to respond. This was an obvious breach of the right to be heard and amounted to a substantial procedural violation under Article 113 EPC. For this reason, reimbursement of the appeal fee was requested.

4.2 The board disagrees. During the oral proceedings before the opposition division, the opponent had the chance to discuss the potential structural properties conferred by the process of claim 1 of auxiliary request II, in particular concerning the subject-matter of claim 8, and how they could distinguish the product from D7 (see points 6.1 to 6.11 of the minutes of the oral proceedings before the opposition division). In this context, the impact of enzymatic activity or its absence on the properties of the product was discussed. Thus, the board does not find that the opponent's right to be heard was violated by the conclusions drawn by the opposition division on page 14 of the impugned decision.

When considering the circumstances of the present case, no substantial procedural violation justifying reimbursement of the appeal fee is apparent. Accordingly, the opponent's request for reimbursement is refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated