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File Number: T 766/90 - 3.3.2
Application No.: 83 306 018.9
Publication No.: 0 106 620
Title of invention: Process for preparing a butter-like spread

Classification: A23D 3/00

D E C I S I O N
of 15 July 1992

Proprietor of the patent: Dairy Crest Limited

Opponent: 01) An Bord Bainne Co-operative Limited
02) Unilever Plc/Unilever NV
03) Kraye, Warner Dirk

Headword: Oral proceedings/DAIRY CREST

EPC Article 116, Rule 67

Keyword: "Decision issued without granting request for oral proceedings -
silence not to be construed as withdrawal of the request -
substantial procedural violation"



Case Number : T 766/90 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 15 July 1992

Appellant :
(Proprietor of the patent)

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Representative :

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Respondent :
(Opponent 01)

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Respondent :
(Opponent 02)

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Representative :

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Respondent : Krayner, Warner Dirk
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Decision under appeal : Decision of Opposition Division of the European
Patent Office dated 30 July 1990 revoking
European patent No. 0 106 620 pursuant to
Article 102(1) EPC.

Composition of the Board :

Chairman : P.A.M. Lançon
Members : I.A. Holliday
R.L.J. Schulte

Summary of Facts and Submissions

- I. European patent No. 0 106 620 concerning a process for preparing a butter-like spread was granted on the basis of seven claims contained in European patent application No. 83 306 018.9.
- II. Oppositions against the grant of the patent were filed in due time by the following parties:
- (01) An Bord Baine Cooperative Limited
 - (02) Unilever Plc and Unilever NV
 - (03) W.D. Krayner.
- III. On 25 August 1989 the Opposition Division issued a communication which expressed the opinion that the oppositions were well founded. The communication concluded by enquiring whether, in the light of this opinion, the Proprietor of the patent maintained the request for oral proceedings. The Opposition Division set a time limit of four months for responding to the said communication. During this period, the patent was assigned by the proprietors, The Milk Marketing Board, to Dairy Crest Limited. The new proprietor requested two extensions of time to a total of seven months but failed to make any further response.
- IV. The Opposition Division issued a decision dated 30 July 1990 revoking the patent.
- V. An appeal was lodged against this decision. The Appellant (Proprietor of the patent) argued firstly that a procedural violation had taken place on the part of the Opposition Division in that an adverse decision had been issued without oral proceedings having been held. The

Statement of Appeal included an absolute (unconditional) request for oral proceedings before the Board.

- VI. Having regard to the Appellant's unconditional request, the Board appointed oral proceedings to take place on 15 July 1992. The summons was followed by a communication pursuant to Article 11(2) of the Rules of procedure of the Boards of Appeal. The Rapporteur informed the parties that the Board had reached the conclusion that a substantial procedural violation had taken place during the opposition procedure. Accordingly, irrespective of any opinion that the Board may have held in respect of the patentability of the subject-matter of the patent in suit, at the present stage of the procedure, the Board was obliged, having regard to the jurisprudence, to remit the case to the Opposition Division with an order to grant the Appellant's request for oral proceedings.
- VII. With letters dated 4 and 5 June 1992 respectively, Respondents 01 and 02 withdrew their conditional requests for oral proceedings. The Appellant's request was withdrawn in a telefax letter dated 23 June 1992. Respondent 03 had not requested oral proceedings, but in a telefax letter dated 5 June 1992 requested that the case be remitted to the Opposition Division.
- VIII. The Appellant requests that the decision of the Opposition Division be set aside and that the case be remitted to the Opposition Division with an order to grant the request for oral proceedings.

Having regard to the letters referred to in point VII above, the requests of the Respondents are in effect the same.

The Appellant also requested, having regard to the procedural violation, that the appeal fee be funded.

Reasons for the Decision

1. The appeal is admissible.
2. In the judgment of the Board a substantial procedural violation took place during the opposition procedure.
 - 2.1 The right of a party to oral proceedings in examination, opposition and appeal procedure is embodied in Article 116 EPC. Accordingly, an adverse decision issued without granting the aggrieved party's request for oral proceedings must be declared void ab initio and without legal effect (see Decisions T 19/87, OJ EPO 1988, 268, Reasons point 3; T 93/88 dated 11 August 1988, Reasons point 2; and T 668/89 dated 19 June 1990, Reasons point 5).
 - 2.2 The notice from the Formalities Officer dated 9 March 1990, which granted the Proprietor of the patent an extension up to seven months to respond to the communication of the Opposition Division referred to under III above, indicated that no further extension would be granted. The said notice also stated that if a reply had not been received in due time, the procedure would be continued. This should not, however, be construed as indicating that a decision terminating the procedure before the Opposition Division would be issued should the patent proprietor fail to respond. According to the decision of the Enlarged Board, G 1/88 (OJ EPO 1989, 189) relating to Rule 58(4) in opposition procedure, silence on the part of the Opponent could not be interpreted as signifying agreement to the proposed maintenance of the

patent. An analogous conclusion must apply to the silence of the Proprietor of the patent in response to the communication of the Opposition Division dated 25 August 1989. The Opposition Division were in error in construing such silence as a withdrawal of the request for oral proceedings.

2.3 Thus the decision of Opposition Division dated 30 July 1990 must be set aside as void and of no legal effect.

3. The Appellant was entitled to oral proceedings before the Opposition Division. Accordingly, the failure by the Opposition Division to hold such oral proceedings constituted a substantial procedural violation which justifies the reimbursement of the appeal fee under Rule 67 EPC.

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 that oral proceedings under Article 116 EPC shall take place before the Opposition Division decides on the opposition.
3. The appeal fee shall be reimbursed to the Appellant.

The Registrar:

The Chairman:

P. Martorana

P.A.M. Lançon