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D E C I S I O N
of 28 November 2002

Case Number: T 0551/00 - 3.3.2

Application Number: 93917778.8

Publication Number: 0655889

IPC: A23C 9/154

Language of the proceedings: EN

Title of invention:
Bakery Custard

Patentee:
CSM Nederland B.V.

Opponent:
Stichting Behartiging Octrooibelangen

Headword:
Process for preparing a bakery custard/CSM

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
"Novelty (yes): the compositions having 1-5 wt% gelatin are not specifically disclosed in the prior art"
"Inventive step (no): the process claimed is an analogy process."
"The choice in the amounts of the components is not linked to an effect"

Decisions cited:
-

Catchword:
-

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Case Number: T 0551/00 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 28 November 2002

Appellant: (Opponent)
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Decision under appeal:
Decision of the Opposition Division of the European Patent Office posted 17 February 2000 rejecting the opposition filed against European patent No. 0 655 889 pursuant to Article 102(2) EPC.

Composition of the Board:

Chairman: J. Riolo
Members: M. Ortega Plaza
S. U. Hoffmann

Summary of Facts of Submissions

I. European patent No. 0 655 889, which was filed as international application WO-A-94 04037, was granted on the basis of 17 claims.

Independent claim 1 as granted read as follows:

"1. Ready-to-use bakery custard with a long shelf-life comprising:

(i) 65-95 wt%, preferably 70-85 wt% of a water continuous fat emulsion with a fat content of 0.1-10 wt% and containing 0.01-8 wt% of a protein

(ii) 0.01-20 wt% of a sweetener

(iii)2-10 wt%, preferably 2-5 wt% of a modified starch, suitable for UHT-conditions

(iv) 1-5 wt% of a gelatin relating compound, capable of gel formation at ambient temperature

(v) 0.01-5 wt% of a hydrocolloid, other than gelatin, suitable for UHT-conditions and which has gelling properties at temperatures below 60°C

(vi) a pH of 6.5-7.5

which bakery custard displays:

(i) a Stevens-hardness at 20°C without whipping of 50-250 g/cm^2

(ii) a Stevens-hardness at 20°C after a slight whipping of 20-70 g/cm^2

(iii) an upwards viscosity at room temperature, after a slight whipping, at 50 s^{-1} of 4,000-20,000 mPa.s

(iv) a downwards viscosity at room temperature, after a slight whipping, at 50 s^{-1} of 3,000-15,000 mPa.s."

Independent claim 16 as granted read as follows:

"16. Process for the preparation of a bakery custard with the composition according to claims 1-13, wherein:

1) a premix is made at a temperature of 40-70°C of the water continuous fat emulsion, the sweetener, the modified starch, the gelatin relating compound and the hydrocolloid.

2) the premix is heated by indirect heat exchange to 50-100°C.

3) the heated premix is sterilized by indirect heat exchange at temperatures of 130-150°C during 1-20 seconds.

4) the sterilized product is cooled by indirect heat exchange to a temperature between 20 and 70°C.

5) the sterilized product is packed aseptically in a package material."

II. Notice of opposition was filed against the granted patent by the opponent (appellant).

The patent was opposed under Article 100(a) EPC for lack of novelty and lack of inventive step.

The following documents *inter alia* were cited during the proceedings:

(1) US-A-4 479 973

(2) Reinders, M. A.: "The continuous manufacture of ready to use dairy desserts." The Milk Industry, June 1969, NDA Conference Paper.

(3) Experimental report filed with opponent's letter of 17 December 1999

(4) Kessler, H. G.: Lebensmittel-Verfahrenstechnik, Schwerpunkt Molkereitechnologie , München-Weihenstephan, pages 422 and 425, (1976)

(5) Kessler, H. G.: Lebensmittel- und Bioverfahrenstechnik-Molkereitechnologie, Verlag A. Kessler, pages 419-421, (1988)

III. The appeal lies from a decision of the Opposition Division rejecting the opposition under Article 102(2) EPC.

The Opposition Division took the view that none of the grounds for opposition under Article 100(a) EPC prejudiced the patent as granted.

In particular, the subject-matter of the claims as granted was considered to meet the requirements of novelty vis-à-vis document (1). The opposition division considered that document (1) did not describe bakery custards comprising 1-5 wt% of a gelatin relating compound, capable of gel formation at ambient temperature.

The opposition division took the view that document (2) (cf Table 3) did not disclose the specific amounts of gelatin relating compound and the physical requirements of the claimed bakery custard (Stevens hardness, upwards and downwards viscosity). The opposition division further considered that the specific amount of gelatin used in the combination gelatin/agar-agar given in Table 3 of document (2) was not unambiguously derivable from the content of said document. With respect to the test report submitted by the opponent with letter of 17 December 1999 (3), the opposition division was of the opinion that it did not relate to an exact reproduction of the specific disclosure of document (2).

With respect to the inventive step issue, document (2) was considered by the opposition division to represent the closest prior art. In the opposition division's opinion the technical problem to be solved was to provide ready-to-use bakery custards having a suitable consistency in order to be able to remove them from the packaging material, which are pipeable at filling temperature and have a long shelf-life of at least 4 months at 20°C after sterilisation. In the opposition division's view there was no suggestion in document (2) that would have prompted the skilled person to modify the custard of Table 3 by choosing a high gelatin content, a pH of 6.5-7.5 and the physical requirements defined in claim 1 of the contested patent in order to solve the technical problem.

IV. The appellant lodged an appeal against said decision.

V. Oral proceedings were held before the Board on 28 November 2002.

VI. The appellant submitted that the subject-matter of the claims 1 and 16 of the contested patent lacked novelty vis-à-vis the contents of document (2). In the appellant's view the process claim 16 related to a process for the preparation of a bakery custard with the composition constituted by the components as defined in claim 1, but not necessarily fulfilling the rheological requirements specified for the ready-to-use bakery custards of claim 1.

In the appellant's view, the operational steps of the process of claim 16 were known from document (2) (cf Table 1 and pages 1 and 2) and the compositions corresponded to the blancmange products appearing on Table 3 of document (2). Additionally, there was an overlap between the compositions employed in the process of claim 16 and the compositions shown on Table 3 of document (2) for the range of gelatin and hydrocolloid employed. The skilled person, in the light of his general knowledge, would seriously contemplate the preparation of those compositions in the overlapping range. For this purpose the appellant further cited documents (4) and (5) as illustrating the general knowledge of the skilled person in the field of food technology with regard to the amounts of gelatin and agar-agar to be used.

The appellant referred to the experimental data submitted with its letter of 17 December 1999, in case the Board considered the compositions employed in the process of claim 16 to fulfil the rheological requirements expressed in claim 1. It stated that this test report made it plausible that compositions falling within the teaching of document (2) fulfilled the rheological requirements expressed in claim 1.

With respect to inventive step, the appellant considered document (2) as the closest prior art. It defined the objective technical problem to be solved as to provide an alternative to the process known from document (2) for preparing bakery custards. The skilled person starting from the preparation shown on Table 1 for the blancmange compositions of Table 3 would have arrived at the subject-matter of claim 16 without involving an inventive step, merely by working in the overlapping zone.

VII. The respondent's arguments can be summarised as follows.

The subject-matter claimed in the patent in suit was novel over the contents of document (1), especially in view of the amounts of gelatin present.

In the respondent's view the generic formulations disclosed in Table 3 of document (2) mentioned gelatin and two hydrocolloids (locust bean gum and agar-agar). Document (2) did not, however, disclose compositions containing these ingredients in the amounts required by claim 1 of the patent in suit, namely 1-5 wt% gelatin and 0.01-5 wt% of a hydrocolloid. Consequently, the subject-matter claimed in claim 1 was novel vis-à-vis the disclosure of document (2).

The respondent further stated that claim 16 **did not relate** to a process for the preparation of a bakery custard according to claim 1. It also stressed that claim 16 encompassed the preparation of bakery custards with the composition of claim 1 only in so far as the definitions and amounts of its constituents were

concerned, but the bakery custard prepared by the process of claim 16 **did not necessarily fulfil** the rheological requirements mentioned for the bakery custard in claim 1.

The respondent contended that the process claim 16 was novel over the contents of document (2) in view of the gelatin amounts employed in the compositions.

With respect to inventive step the respondent stated that the formulations described in Table 3 of document (2) may comprise from 10 to 15 kgs of a combination of gelatin and agar-agar, but it was not disclosed in which weight ratio gelatin and agar-agar were to be employed. In order to arrive at a formulation meeting the requirements of a minimum content of 1 wt% gelatin, the bulk of the blend gelatin and agar-agar would have to consist of gelatin, the dosage for the said blend should be chosen at its highest value and the other ingredients at their lowest end point. The respondent submitted that it was unreasonable to expect that the skilled person, starting from the disclosure of document (2), would be likely to choose this specific combination of ratios.

In the respondent's opinion, the skilled person would not have been able to arrive at the subject-matter of the contested patent without the benefit of hindsight. To arrive from the contents of document (2) at the bakery custards prepared by the process of claim 16, several choices had to be made. In particular, the following was required: (a) the use of the minimum of sugars (sucrose and dextrose) shown in Table 3; (b) very high quantity of gelatin/agar-agar and (c) very high ratio of gelatin/agar-agar. Moreover, Table 4 was

mentioned in document (2) in connection with high consistency products (blancmange). Table 4 referred to gelling agents in amounts of 1.5-3.0 kgs, which were lower than those required by the invention (cf page 4, left column and Tables 3 and 4, same page, right column).

In the respondent's opinion, even if considering the documents (4) and (5) the skilled person would not have been able to arrive at the subject-matter of claims 1 and 16 of the contested patent.

Documents (4) and (5), by the same author, reflected one and the same teaching. These documents showed that gelatin is commonly applied in a concentration range of 1-6% in sauces, puddings, creams, ice cream, gels and aspic products and that agar-agar, when used in concentrations of 0.5 to 1%, produces strong gels. However, no indications were given in either document as to the ratios in which gelatin and agar-agar should be combined in order to produce, for instance, a pudding. Moreover, document (5) further disclosed that gelatin could be employed in amounts of 6-8% (page 419) for achieving high consistency. Document (5) also disclosed that agar-agar and the carrageenan could be employed in concentrations of 0.05 to 2% (page 421). Neither document (4) nor document (5) taught anything about the specific nature of the gelling agents to be employed and or their gelling strength.

Finally, the respondent contested the results from the test report submitted by the appellant, since the compositions according to Table 3 of document (2) were not exactly reproduced.

The respondent stressed the following differences:

(A) the amounts of sucrose and dextrose were lower than those employed in document (2) with exception of recipe 4, wherein the amount of gelatin exceeded the range which could be derived from document (2);

(B) the choice of the gelatin as Bloom 250 gelatin was made in line with the teaching of the patent in suit but was not suggested in document (2). Furthermore, the Bloom strength 250 of the gelatin chosen was the strongest value known for gelatins used in the food industry;

(C) the use of disodium hydrogen phosphate was made to achieve pH values within the range stated in claim 1 of the patent. However, document (2) disclosed pyrophosphate and hexameta phosphates as the "phosphate" component. Hence, the pH of the resulting custard would have been lower.

VIII. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. The subject-matter of the set of claims as granted.

It is appropriate in the present case to analyse the wording of the two independent claims of the set of claims as granted, ie claims 1 and 16, before

establishing whether their subject-matter claimed in the contested patent meets the requirements of novelty and inventive step.

Claim 1 is an independent product claim which relates to a:

ready-to-use **bakery custard** with a long shelf-life comprising:

(i) 65-95 wt%, preferably 70-85 wt% of a **water continuous fat emulsion** with a fat content of 0.1-10 wt% and **containing** 0.01-8 wt% of **a protein**

(ii) 0.01-20 wt% of a **sweetener**

(iii) 2-10 wt%, preferably 2-5 wt% of a **modified starch**, suitable for UHT-conditions

(iv) 1-5 wt% of a **gelatin relating compound**, capable of gel formation at ambient temperature

(v) 0.01-5 wt% of a **hydrocolloid, other than gelatin**, suitable for UHT-conditions and which has gelling properties at temperatures below 60°C

(vi) a pH of 6.5-7.5

which **bakery custard** displays:

(i) a Stevens-hardness at 20°C without whipping of 50-250 g/cm^2

(ii) a Stevens-hardness at 20°C after a slight whipping of 20-70 g/cm^2

(iii) an upwards viscosity at room temperature, after a slight whipping, at 50 s^{-1} of 4,000-20,000 mPa.s

(iv) a downwards viscosity at room temperature, after a slight whipping, at 50 s^{-1} of 3,000-15,000 mPa.s.

Accordingly, claim 1 relates to a ready-to-use **bakery custard** comprising:

(i) 65-95 wt% of a **water continuous fat emulsion containing a protein**

(ii) 0.01-20 wt% of a **sweetener**

(iii) 2-10 wt% of a **modified starch**

(iv) 1-5 wt% of a **gelatin relating compound**

(v) 0.01-5 wt% of a **hydrocolloid other than gelatin.**

Additionally, the modified starch, the gelatin relating compound and the hydrocolloid have to fulfil some functional requirements related to their suitability for UHT-conditions and to the gelling properties below 60°C (for the hydrocolloid) or at ambient temperature (for the gelatin relating compound).

Apart from the above ingredients, the ready-to-use bakery custard of claim 1 is further characterised by a pH range of 6.5-7.5 and it has to fulfil some rheological requirements expressed in terms of parameter measurements (namely the Stevens-hardness without and after whipping and the upwards and downwards viscosity after whipping).

Summarising, the bakery custard of claim 1 is characterised on the one hand by the composition comprising the constituents (i) to (v), and on the other hand by some physical requirements which it has to fulfil. These physical requirements specified in claim 1 are related to the texture and flow behaviour of the ready-to-use bakery custard.

However, it is a fact not contested by the parties that not every composition defined by the constituents (i) to (v) necessarily fulfils the rheological requirements specified in claim 1.

With respect to the pH value, either it may directly result from the mixture of constituents (i) to (v) or it may be adjusted to the mentioned range by other means (as shown in the examples).

With respect to the independent process claim the following analysis has to be made. Claim 16 is an independent process claim which relates to a **process for the preparation of a bakery custard**. The bakery custard prepared by the process of claim 16 is not necessarily a ready-to-use bakery custard according to claim 1. The only condition set by claim 16 is that the bakery custard is prepared **with the composition according to claim 1**, ie with the **composition comprising the constituents (i) to (v)** as defined in claim 1. Therefore the bakery custard prepared by the process of claim 16 does not necessarily fulfil the rheological requirements appearing in claim 1.

Questioned by the Board during the oral proceedings, the respondent insisted that the wording of claim 16, namely "process for the preparation of a bakery custard **with the composition** according to claims 1-13" (*emphasis added*), was intended and that the process

claim 16 was not restricted to the preparation of a bakery custard according to claim 1. It also acknowledged that the bakery custard prepared by the process of claim 16 did not necessarily fulfil the rheological requirements specified for the ready-to-use bakery custards of claim 1.

The Board made it clear during the oral proceedings that under such circumstances a separate analysis for the subject-matter of claims 1 and 16 was required with respect to the novelty and inventive step assessment.

In conclusion, the product (bakery custard) prepared by the process of claim 16 **is more broadly** defined than the product of claim 1 (ie ready-to-use bakery custard fulfilling certain rheological requirements).

3. *Novelty*

3.1 The objection of lack of novelty vis-à-vis document (1) was no longer pursued by the appellant. The Board is satisfied that the subject-matter claimed in the contested patent is novel over the contents of document (1).

3.2.1 Document (2) relates to the continuous manufacture of ready-to-use dairy desserts. Therefore, it has to be investigated whether the process disclosed in document (2) anticipates the process claimed in claim 16.

3.2.2 The process of claim 16 of the contested patent is characterised by the following steps:

(1) a premix is made at a temperature of 40-70°C of the water continuous fat emulsion, the sweetener, the modified starch, the gelatin relating compound and the hydrocolloid.

(2) the premix is heated by indirect heat exchange to 50-100°C.

(3) the heated premix is sterilized by indirect heat exchange at temperatures of 130-150°C during 1-20 seconds.

(4) the sterilized product is cooled by indirect heat exchange to a temperature between 20 and 70°C.

(5) the sterilized product is packed aseptically in a package material.

Document (2) discloses the process operations and the manufacturing conditions for preparing the dairy desserts in Table 1 (page 2). The preparation of high consistency products (blancmange type) is expressly mentioned at the end of the left column of Table 1. Document (2) discloses blancmange products at the end of the right column of page 1, in which a reference to the formulations of Table 3 is made for illustrating such high consistency compositions.

Therefore, when applying the manufacturing conditions shown in Table 1 to the formulations of Table 3 of document (2) the following can be observed.

The process operations -preparing a milk (water continuous fat emulsion) mixture with all the powder components (sweetener or sugar, modified starch or thickener, gelatin, hydrocolloid, ie locust bean gum and agar agar) at a temperature of 7-40°C and prehomogenisation of the milk mixture- correspond to step 1) of the process of claim 16.

The preheating to a temperature of 80°C appearing in Table 1 of document (2) is made by indirect heat exchange and corresponds to step 2) of the process of

claim 16 (cf the definition of indirect system appearing on page 1 of document (2), end of the middle column and page 2, right column).

The sterilisation (137-max 140°C during 4-5 seconds) by indirect heat exchange is also disclosed in Table 1 of document (2). This operation corresponds to step 3) of the process claim 16.

The sterilisation of the process in Table 1 of document (2) is followed by cooling with water (indirect heat exchange) to approx. 60°C. This operation corresponds to step 4).

The operation "after-homogenisation" appearing in Table 1 of document (2) is optional.

Finally the packaging step 4) of process claim 16 also appears at the end of Table 1 of document (2).

Therefore, the process steps defined in claim 16 of the contested patent correspond to process operations known from document (2).

The respondent did not contest the fact that the process was known from document (2), it contested that the compositions employed in the process were disclosed in the said prior art.

3.2.3 It has therefore to be assessed whether the compositions employed in the process of claim 16 of the contested patent are anticipated by the formulations in Table 3 of document (2).

Table 3 of document (2) discloses generic blancmange formulations comprising 1000 ltrs milk, in which the amounts for the components are given in ranges expressed in kgs. The formulations in Table 3 comprise

the components (i) to (iii) of the compositions of claim 1 of the contested patent. In particular, milk (water continuous fat emulsion containing a protein), sugar (sweetener), special type of amylopectin food starch (modified starch). The amounts of the components (i) to (iii) for the formulations of Table 3 of document (2) overlap with the amounts defined in claim 1 of the contested patent. This was not disputed by the parties.

The formulations of Table 3 of document (2) comprise gelling agents and a stabiliser (locust bean gum). Among the gelling agents two combinations are given as alternatives: a combination of carrageenans and agar-agar or a combination of gelatin and agar-agar. Only the second alternative is relevant for the present analysis. If gelatin and agar-agar are present as gelling agents the amount employed for the combination is 10-15 kgs. In such a case gelatin corresponds to component (iv) of the compositions defined in claim 1 (gelatin relating compound) and locust bean gum and agar-agar correspond to component (v) of the compositions defined in claim 1 (hydrocolloid other than gelatin).

There is a generic overlap between the formulations of Table 3 of document (2) and the compositions defined in claim 1 comprising low amounts of gelatin and low amounts of hydrocolloid. The reason is that, although document (2) is silent about the actual amounts of gelatin, the combination gelatin and agar-agar encompasses generally all imaginable ratios of gelatin/agar-agar, since both are gelling agents which can also be employed separately. Hence, combinations wherein gelatin is present in the highest ratio possible within the blend are also included.

This possible combination would correspond to approx. 1-1.1 wt% gelatin in the total composition, provided that the amounts of the other components, in particular the sweetener, with respect to the total composition are chosen appropriately. For example, the sweetener has to be taken at its lowest value (ie sucrose 70 kgs. and dextrose 30 kgs.).

Hence, compositions comprising approx. 1-1.1 wt% gelatin are encompassed **generically** by the formulations in Table 3 of document (2) and fall within the compositions employed in the process of claim 16 of the contested patent.

However, formulations comprising such specific amounts of gelatin as those mentioned above are not specifically disclosed in document (2). Moreover, there is no indication in document (2) concerning the actual ratio of gelatin/agar-agar to be employed for the formulations appearing in Table 3.

Documents (4) and (5) disclose generic ranges of gelling agents for food compositions, in particular for dairy desserts. However, there is no indication in document (4) or (5) of the specific amounts of gelling agents to be used when both gelatin and agar-agar are present.

Therefore, it can only be concluded that the generic overlap between the contents of document (2) and the subject-matter of claim 16 of the contested patent, which concerns the preparation of bakery custards (blancmange) with the formulations in Table 3 by using the process of Table 1, is not novelty destroying.

With regard to the tests submitted by the appellant, they do not correspond to formulations specifically disclosed in document (2). Additionally, the amount of gelatin employed in recipe 4 is outside the scope of document (2) (too high amount).

Finally, the compositions in Table 3 of document (2) comprise phosphates. The recipes submitted by the appellant use disodium hydrogen phosphate as a phosphate component. These recipes lead to pH values within the range defined in claim 1 of the contested patent. However, disodium hydrogen phosphate, although commonly used in the food industry, is not specifically mentioned in document (2). Document (2) discloses, as examples of phosphates, pyrophosphates and hexemeta phosphates.

3.2.4 In the light of the above analysis it has to be concluded that the subject-matter claimed in claim 16 is novel vis-à-vis document (2).

3.2.5 With respect to the ready-to-use bakery custard claimed in claim 1 the following has to be said. It becomes apparent from the analysis made in point 3.2.3 above that the compositions comprising the ingredients as defined in claim 1 are found to be novel over the contents of document (2). Hence, the ready-to-use bakery custards comprising such compositions are also novel.

3.3 In view of the above, the Board concludes that the subject-matter of claim 16 of the set of claims as granted meets the requirements of novelty under Article 54 EPC.

4. *Inventive step of the process claimed in claim 16*

The Board is in line with the parties in considering document (2) to represent the closest prior art.

It becomes evident from the analysis of the contents of document (2) made in point 3.2 above that document (2) discloses processes for the preparation of high consistency bakery custards, wherein the process operations are like those defined in claim 16. The process of claim 16 is an analogy process to the process disclosed in document (2), since it differs from the prior art process in that the compositions employed contain certain amounts of gelatin not specifically disclosed in document (2).

Accordingly, the difference between the processes disclosed in document (2) for manufacturing the formulations of Table 3 and the process of claim 16 of the patent in suit does not rely upon specific process features, but it is based on the difference between the compositions.

It cannot be ignored that, even if boundary values for gelatin and the other components are to be chosen (as stressed by the respondent), there is an overlap between the subject-matter of claim 16 and the contents of document (2).

Therefore, the objective technical problem to be solved relates to the provision of an alternative process to that known from document (2) for the preparation of high consistency bakery custards.

The solution relates to the use in the process of compositions having a gelatin content of at least 1 wt%, in particular 1-5 wt%.

The Board is satisfied that the problem has been plausibly solved in the light of the description and working examples.

The starch, gelatin and hydrocolloids employed in document (2) are suitable for UHT-conditions, since these are operational modes shown in Table 1. Moreover, gelatin is capable of gel formation at ambient temperature. The gelling agents employed in document (2) have gelling properties below 60°C, since the blancmange is packed at approx. 40-60°C in order to maintain the gel strength (cf Table 1).

It is not relevant, in the present case, whether the skilled person had to perform multiple choices in the compositions disclosed in Table 3, since these choices do not contradict the general knowledge of the field. Moreover, these choices are not linked to a technical effect not previously disclosed.

In the present case, the choices required with respect to the specific amounts of the single components also fall within the generic ranges generally known in documents (4) and (5).

Moreover, the nature of the gelatin and hydrocolloid is not specified in claim 16 (nor in claim 1).

Hence, the bakery custards prepared by the process claim 16 encompass those compositions comprising the starch, gelatin and hydrocolloids of document (2) appearing in Table 3.

Starting from the preparation of the formulations shown in Table 3 of document (2) by the process of Table 1, the skilled person would have arrived at the solution proposed in claim 16 of the contested patent, merely by working in the overlapping area. In doing so he would not have required inventive skills.

With respect to the arguments put forward by the respondent and which concern the specific nature of the gelatin, as gelatin 250 bloom or gelatin 180 bloom, and hydrocolloid, as kappa-, iota-, lambda carrageenan, employed in the examples of the patent in suit, the following has to be said. The specific nature of these components is not defined in claim 16 (nor in claim 1).

Moreover, the ratio of gelatin/hydrocolloid is not fixed for the compositions employed in the process of claim 16. The amounts of the components appearing in claim 1 are defined independently as ranges in wt%.

With respect to the pH value it has been shown by the test examples submitted by the appellant that the use of disodium hydrogen phosphate (which is encompassed by the term "phosphate" of document (2)) gives pH values which are encompassed by the range defined in claim 1.

The respondent has not based its arguments on the presence of a technical effect beyond the teaching of document (2). Therefore, the skilled person does not require a pointer in the prior art document for working in the overlapping area. The fact that the blancmange formulations appearing in Table 4 of document (2) contain lower amounts of gelling agents than those required for the subject-matter claimed in the contested patent only means that Table 4 illustrates other blancmange types than Table 3.

Therefore, the Board concludes that the subject-matter of claim 16 does not involve an inventive step under Article 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar:

Mr Townend

The Chairman:

Mr Riolo