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**Datasheet for the decision
of 29 November 2006**

Case Number: T 0031/03 - 3.3.09

Application Number: 96917474.7

Publication Number: 0828434

IPC: A23D 9/00

Language of the proceedings: EN

Title of invention:
Fat based food products

Patentee:
UNILEVER N.V., et al

Opponents:
Novartis Nutrition AG
Walter Rau Lebensmittelwerke GmbH & Co. KG
ST. IVEL LIMITED
RAISO BENECOL OY
McNeil-PPC, Inc.

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
"Main request: compliance with Art. 123(2) EPC: no"
"Auxiliary requests presented in the oral proceedings: not admitted"

Decisions cited:
-

Catchword:
-



Case Number: T 0031/03 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 29 November 2006

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(Patent Proprietor)

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office orally announced
22 October 2002 and posted 19 November 2002
revoking European patent No. 0828434 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. Kitzmantel
Members: W. Ehrenreich
K. Garnett

Summary of Facts and Submissions

I. Mention of the grant of European Patent No. 0 828 434 in respect of European patent application No. 96 917 474.7, filed on 31 May 1996 as International application No. PCT/EP96/02344 in the name of *Unilever N.V. and Unilever PLC*, was announced on 9 February 2000. The patent, entitled "*Fat based food products*" was granted with nine claims, Claim 1 reading as follows:

"1. Fat based food product wherein the fat used in the product is a fat comprising at least 30 wt%, and preferably at least 45 wt% of pufa-rich triglycerides, calculated on the total weight of the fat present in the product, and wherein the fat comprises at least one compound of the group consisting of tocotrienol, phytosterol, and oryzanol in an amount of at least 0.2 wt% for tocotrienol, at least 0.25 wt% for phytosterol, and at least 0.25 wt% for oryzanol, or their relative amounts if mixtures of one or more of these components are used, the weight percentages being based on the total weight of the fat based food product."

Claims 2 to 4 and 7 were, either directly or indirectly, dependent on Claim 1, Claims 5 and 6 were directed to a yellow fat spread and Claims 8 and 9 related to the use of an oil concentrate for the preparation of a fat based product or a yellow fat spread according to any of the Claims 1 to 7.

II. Notices of opposition based on the grounds of Articles 100(a), (b) and (c) EPC were filed by *Novartis Nutrition AG* - Opponent I - on 6 November 2000;

Walter Rau Lebensmittelwerke GmbH & Co. KG

- Opponent II on 9 November 2000;

St. Ivel Limited- Opponent III - on 9 November 2000;

Raisio Benecol OY - Opponent IV - on 9 November 2000
and

McNeil PPC, Inc. - Opponent V - on 8 November 2000.

In support of the objections under Article 100(a) (lack of novelty and lack of inventive step) the documents A1 to A86 were cited by the Opponents, from which the following documents were in particular considered by the Opposition Division:

A4 Official Journal of Pharmacological Therapy,
vol. 31 (1985) pages 177-208

A11 US-A 4 160 850

A13 GB-A 1 413 102.

III. The Patent Proprietors defended as their main request the maintenance of the patent as granted. With a letter dated 10 August 2001, new sets of claims as bases for auxiliary requests 1 to 3 were filed. Further sets of claims as bases for auxiliary requests 2a and 4 were filed during the oral proceedings on 22 October 2002.

IV. By its decision orally announced in the oral proceedings and issued in writing on 19 November 2002 the Opposition Division revoked the patent. All requests were rejected for various reasons. The main request and the auxiliary requests 1 and 2a were held to be anticipated by document A4 and/or documents

A11 and A13. The auxiliary requests 2 and 3 were rejected for contravention of Article 123(3) EPC; and auxiliary request 4 was not admitted into the proceedings.

- V. Notice of appeal was filed by the Patent Proprietors (hereinafter: the Appellants) on 11 December 2002. The Statement of the Grounds of Appeal was submitted on 11 March 2003.

The Appellants maintained their main request and submitted, with the statement of the grounds, new sets of claims as bases for auxiliary requests 1 to 12.

The Respondents/Opponents I to V maintained their objections under Articles 100(a) to (c) raised before the opposition division and further stated that the claimed subject-matter contravened the requirements of Articles 84 and 123(3) EPC. With respect to the objections as to lack of novelty and lack of inventive step they relied in particular upon the above documents A4, A11 and A13 as well as upon the following documents:

- A2 Journal of the American College of Nutrition, vol. 10 (1991), pages 593-601
- A3 Progress in Lipid Researches, vol. 22 (1983), pages 161-188
- A9 JP-A 61-015 647, Derwent abstract
- A10 JP-A 57-206 336
- A12 GB-A 1 405 346
- A42 GB-A 1 598 638
- A83 American Journal of Clinical Nutrition, vol. 35 (1982), pages 697-700.

Documents A87 to A91 were cited by Respondents IV and V for the first time in the appeal proceedings.

VI. A communication was issued by the Board on 15 September 2006 with provisional comments on the Respondents' objections as to sufficiency of disclosure (Article 83 EPC), added subject-matter (Article 123(2) EPC), extension of the protection (Article 123(3) EPC), Rule 57a EPC (an objection raised against the claims according to auxiliary request 2), clarity (Article 84 EPC), novelty (Article 54 EPC) and inventive step (Article 56 EPC).

In response to the communication the Appellants submitted, with a letter dated 26 October 2006, seven sets of claims as bases for a new main request and auxiliary requests 1 to 6, which replaced all previous requests on file. With a letter dated 23 November 2006 further sets of claims as bases for auxiliary requests 7 to 13 were submitted.

Claim 1 of the new main request reads as follows:

"1. Fat based food product which is a yellow fat spread, dressing, coffee creamer, filling or topping wherein the fat used in the product is a fat comprising at least 30 wt%, and preferably at least 45 wt% of pufa-rich triglycerides, calculated on the total weight of the fat present in the product, and wherein the fat comprises at least one compound of the group consisting of phytosterol, and oryzanol in an amount of at least 1.2 wt% for phytosterol, and at least 1.2 wt% for oryzanol, or their relative amounts if mixtures of one or more of these components are used, the weight

percentages being based on the total weight of the fat based food product."

- VII. In the oral proceedings which took place on 29 November 2006 in the presence of the Appellants and the Respondents II to V (Respondent I had informed the Board with a letter dated 9 August 2006 that it would not attend the oral proceedings) the amendments in Claim 1 of the main request were discussed having regard to the requirements of Article 123(2). After the Board had stated that the requirements of Article 123(2) were not met, the Appellants withdrew the auxiliary requests 1 to 13 and presented two sets of claims as bases for new auxiliary requests 1 and 2.

Claim 1 of the new auxiliary request 1 reads as follows:

"1. Use of an oil concentrate comprising more than 4 wt% of one or more of oryzanol and phytosterol for the preparation of a fat based food product wherein the fat used in the product is a fat comprising at least 30 wt%, and preferably at least 45 wt% of pufa-rich triglycerides, calculated on the total weight of the fat present in the product, and wherein the fat comprises at least one compound of the group consisting of tocotrienol, phytosterol, and oryzanol in an amount of at least 0.2 wt% for tocotrienol, at least 0.25 wt% for phytosterol, and at least 0.25 wt% for oryzanol, or their relative amounts if mixtures of one or more of these components are used, the weight percentages being based on the total weight of the fat based food product."

Claim 1 of the new auxiliary request 2 corresponds to Claim 1 of the auxiliary request 1 except that the fat based food product is now characterised as a yellow fat spread.

VIII. The arguments of the Respondents with regard to the compliance of the main request with the requirements of Article 123(2) EPC can be summarised as follows:

The features

- (a) that the fat based product
 - (i) is a yellow fat spread, dressing, coffee creamer, filling or topping,
 - (ii) comprises at least 30 wt% and preferably at least 45 wt% pufa-rich triglycerides and
- (b) wherein the fat comprises at least 1.2 wt% oryzanol or phytosterol

resulted from a combination of elements which were disclosed at different places in the publication WO-A 96/38047, representing the application as filed. Feature (a)(i) was disclosed on page 10, paragraph 2, feature (a)(ii) was the subject of Claim 5 and the amounts of 1.2 wt% for oryzanol and phytosterol in feature (b) were indicated in paragraph 3 of page 5. However, there was no information to be found in the WO publication suggesting that these embodiments could be considered to be correlated in the sense that any one of these disclosures was clearly linked to the others. The combination of these features in Claim 1 of the main request, therefore, constituted a new selection which was not directly and unambiguously disclosed in the application as filed and therefore contravened Article 123(2).

Moreover, Claim 1 of the main request indicated that the fat - i.e. the fatty substance as such - comprises 1.2 wt% of phytosterol or oryzanol, whereas paragraph 3 of page 5 of the WO publication stated that the fat based food product - which means a composition which contains the fatty substance and other ingredients - comprised phytosterol or oryzanol in the above amounts. The amendment in Claim 1 that "*the fat comprises ... phytosterol and oryzanol in an amount of at least 1.2 wt% ...*" was therefore another violation of Article 123(2) EPC (emphasis added).

IX. The Appellants' response was as follows:

Original Claim 5, indicating that the fat comprises at least 30 wt%, preferably at least 45 wt% of pufa-rich triglycerides referred back to original Claim 1. The combination of these two claims was therefore an allowable amendment under the provisions of Article 123(2) EPC.

It was furthermore clear from the wording in the second paragraph of page 10 of the WO publication that yellow fat spreads, dressings, coffee creamer, fillings or toppings constituted common fat based products in the sense of the invention. Incorporation of these embodiments into combined Claims 1 and 5 was therefore also allowable.

Paragraph 3 at page 5 defined the limited range of at least 1.2 wt% for phytosterol or oryzanol in the food based product as a preferred embodiment of the invention. It was therefore evident for a skilled person that this paragraph had to be considered in direct conjunction with paragraph 2 of page 4, where the amounts of phytosterol and oryzanol in their

broadest aspects were defined. Because this definition on page 4 corresponded to original Claim 1, a combination of this Claim with paragraph 3 on page 5 was also within the bounds of the original disclosure.

Therefore, the amendments to Claim 1 of the main request resulting from a combination of original Claims 1, 5 and the passages at page 10 and 5 of the description as filed did not violate Article 123(2) EPC.

Furthermore, the expression "fat" in Claim 1 was a global term and encompassed, in the context of Claim 1, the fat ingredients of the product, including phytosterol and oryzanol. Indeed, the fat based product as claimed had no discrete fatty phase and the weight percentages of phytosterol and oryzanol were based on the total weight of the fat based food product. It made therefore no difference whether phytosterol and oryzanol were defined as an ingredient of the fat or of the fat based food product (emphasis added).

Thus, deviation from the disclosure in paragraph 3 at page 5 indicating the fat based food product comprises at least 1.2 wt% phytosterol or oryzanol was not a violation of Article 123(2).

- X. The Appellants requested that the decision under appeal be set aside and the patent be maintained on the basis of Claims 1 to 3 of the main request filed with the letter dated 26 October 2006, alternatively on the basis of Claims 1 to 4 of the first or second auxiliary requests filed during the oral proceedings.

In the event that any of the requests be considered formally admissible and the corresponding claims novel,

the case be remitted to the Opposition Division for further prosecution.

XI. The Respondents requested that

1. The appeal be dismissed.
2. In the event that either of the first or second auxiliary requests were admitted into the proceedings, the case be adjourned and an award of costs be made against the Appellants.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request: Allowability under Article 123(2) EPC*

When considering the main request in the light of the provisions of Article 123(2) EPC, it has in particular to be assessed whether the features in Claim 1

- (a) combining the amount of pufa-rich triglycerides of at least 30 wt%, preferably at least 45 wt% with the enhanced minimum amount of at least 1.2 wt% for phytosterol or oryzanol and
- (b) characterising phytosterol and oryzanol in the above amount as an ingredient of the fat component (instead of the fat based product)

can be derived from the application as filed.

In the Board's opinion, the prerequisite for the compliance of amendment (a) with Article 123(2) EPC would be a direct correlation between original Claim 5, referring back to Claim 1 and defining the minimum amounts of pufa-rich triglycerides, and the above-mentioned statement at page 5, paragraph 3 of the WO publication, which correlation, if it existed, implied that a fat based food product with

- an unlimited fat content (according to Claim 1),
- an enriched pufa content (according to Claim 5) and
- enhanced amounts of phytosterol or oryzanol, ie at least 1.2 wt%, preferably of at least 4 wt%,
(according to said statement in the WO publication)

was disclosed as a particularly preferred embodiment of the invention.

Such a correlation, however, is not directly and unambiguously derivable from the application as filed.

As far as the pufa-rich triglycerides in amounts of at least 30%, preferably 45% are concerned, it is only disclosed at page 13, lines 8 to 11 of the WO publication that these amounts are preferably comprised by fat blends. But no disclosure is found of an embodiment combining the requirement for these amounts of pufa-rich triglycerides with the requirement for enhanced amounts of at least 1.2 wt% of phytosterol or oryzanol.

The reference in Claim 7 of the WO publication to a yellow fat spread with at least 1.2 wt% phytosterol or oryzanol cannot provide a basis for such a combination

because this claim refers back to Claim 6, which is an independent claim, ie not dependent on Claim 1, limiting the spread to 60% fat but not limiting the content of pufa-rich triglycerides to at least 30% or 45%.

Therefore, the amendment (a) contravenes Article 123(2) EPC.

In the oral proceedings the Appellants argued with respect to the amendment (b) that no principal difference could be seen between a fat comprising at least 1.2 wt% phytosterol or oryzanol according to Claim 1 of the main request and a fat based food product comprising at least 1.2 wt% of these compounds as disclosed in paragraph 3 of page 5 of the WO publication.

This argument is not convincing.

The feature that the fat comprises phytosterol or oryzanol implies that these compounds are ingredients of the fat or oil source as such which according to the WO publication is of natural vegetable origin (cf. eg page 3, lines 16 to 29; page 12, line 34 to page 13, line 3). As can be derived from page 7, line 27 to page 8, line 22 of the WO publication, natural vegetable oil sources contain only "minor amounts" of these "*non-triglyceride healthy components*" (including phytosterol and oryzanol). Normally these amounts are below 1 wt% of the fat source (cf. for instance A17 "Miscellaneous Foods" in McCane and Widdowson's, 4th supplement of the 5th edition (1994) page 21), except in

the case of (unrefined) rice bran oil (1.6% γ -oryzanol, cf. A2, page 593).

In this context it has also to be taken into account that present Claim 1 requires that the entire fat based food product (ie spread, dressing, etc., consisting of fat plus other specific ingredients) comprises at least 1.2 wt% phytosterol or oryzanol, which means that the phytosterol/oryzanol content naturally contained in the fat component is further "diluted".

It follows that, in order to arrive at the required minimum concentration of these compounds in the food product of at least 1.2 wt%, the naturally existing "minor" content of natural oil/fat sources must be further enhanced. The statement on page 5, paragraph 3 defining minimum concentrations of phytosterol/oryzanol in excess of those obtainable by using the natural fat sources as such therefore has to be considered in conjunction with the passage between page 9, line 33 and page 10, line 18 disclosing an enrichment of the food products with the "healthy oil components", either by addition of the pure components or via specific oil concentrates. There is however no disclosure in these statements justifying the Appellants' contention that the additional "healthy oil components" are necessarily comprised by the fat phase.

The Appellants' argument that the reference in Claim 1 with regard to the presence of phytosterol or oryzanol in the fat was equivalent to the presence of these compounds in the fat based food is therefore at variance with the factual situation.

Hence, amendment (b) does not comply with Article 123(2) EPC, either.

The main request is therefore not allowable.

3. *Admissibility of auxiliary requests 1 and 2*

An opportunity to submit further requests was given to the Appellants in order to overcome the deficiencies of Claim 1 of the main request under Article 123(2) EPC, leading to the above discussed rejection of this request.

The auxiliary requests 1 and 2 filed thereafter by the Appellants were based on claims of a different claim category, namely directed to the use of an oil concentrate for the preparation of the fat based food product.

Such a change in claim category at this late stage of the proceedings, however, came as a surprise for the Respondents because the focus of the invention was thereby shifted to a subject-matter which had never been discussed in the opposition or appeal proceedings under any of the opposition grounds according to Articles 100(a) to (c) EPC and would therefore have required remittal of the case to the opposition division or at least an adjournment of the oral proceedings. Such an approach would be contrary to the principle of procedural economy to be respected in appeal proceedings (see "Guidance for parties to appeal proceedings and their representatives", OJ EPO 1996, 342 point 3.3).

In these circumstances the Board exercised its discretion not to admit the late filed auxiliary requests 1 and 2 into the appeal proceedings.

4. It follows that none of the Appellants' requests are allowable.

The requests of the Respondents made in point IX.2. are therefore redundant.

Order

For these reasons it is decided that:

1. The first and second auxiliary requests are not admitted into the proceedings.
2. The appeal is dismissed.

The Registrar

The Chairman

G. Röhn

P. Kitzmantel