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**Datasheet for the decision
of 8 March 2010**

Case Number: T 0854/07 - 3.3.09

Application Number: 97947746.0

Publication Number: 0948265

IPC: A23L 1/30

Language of the proceedings: EN

Title of invention:

A method to prepare food seasoning, food ingredient and food item compositions, seasoning and use thereof

Patentee:

Mirador Research Oy Ltd.

Opponent:

Unilever N.V.
Raisio Nutrition Ltd.

Headword:

-

Relevant legal provisions:

EPC Art. 84, 123(2)
RPBA Art. 13(1)(3)

Relevant legal provisions (EPC 1973):

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Keyword:

"Main request; auxiliary requests 1-3 (not admitted)"
"Auxiliary request 4: Compliance with Article 84, 123(2) (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0854/07 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 8 March 2010

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office orally announced
6 February 2007 and posted 21 March 2007
revoking European patent No. 0948265 pursuant
to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: W. Sieber
Members: W. Ehrenreich
W. Sekretaruk

Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 0 948 265 in respect of European patent application No. 97 947 746.0 filed on 17 December 1997 as International application No. PCT/FI97/00797 in the name of *Pharmaconsult Oy* - now *Mirador Research Oy Ltd.* - was announced on 23 April 2003 in Bulletin 2003/17.

The patent, entitled "*A method to prepare food seasoning, food ingredient and food item compositions, seasoning and use thereof*" was granted with fifty-two claims.

Claims 1 and 11 read as follows:

"1. A method of producing food seasoning, food ingredient and/or food item compositions capable of decreasing elevated serum cholesterol and lowering elevated blood pressure, comprising providing in said composition an increased level of plant sterol/stanol and an increased level of mineral element nutrient, said sterol/stanol [*sic*] comprising at least one plant sterol or plant sterol derivative selected from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of said sterols and stanols, and said mineral element nutrient comprising at least one selected from the group consisting of magnesium, calcium, and potassium."

"11. A method according to claim 1, comprising incorporating in a bread, cookie or biscuit like food an increased level of plant sterol/stanol and an

increased level of at least one of magnesium, calcium, and potassium, said increased levels being sufficient for providing in the ultimate food a plant a sterol/stanol concentration by weight of between 0.1 and 8%, a magnesium concentration between 0.01 and 1%, a calcium concentration between 0.01 and 1%, and a potassium concentration between 0.1 and 1.5%."

The remaining claims are not relevant to this decision.

II. Notices of opposition against the patent were filed by

Unilever N.V (opponent I) on 15 January 2004

and

Raisio Benecol Ltd. (opponent II) on 23 January 2004.

The oppositions were based on the grounds of

- Article 100(a) EPC that the claimed subject-matter was not novel and did not involve an inventive step (opponents I and II);
- Article 100(b) EPC that the invention was insufficiently disclosed (opponent II);
- Article 100(c) EPC that the subject-matter of the patent extended beyond the content of the application as filed (opponent II).

III. With its decision announced orally on 6 February 2007 and issued in writing on 21 March 2007 the opposition division revoked the patent. The decision was based on sets of claims according to a main request and auxiliary requests 1, 2, 3a, 3b, 4a and 4b, all filed with the letter dated 27 December 2006, and sets of

claims according to auxiliary requests 5 and 6 submitted in the oral proceedings.

The main and auxiliary requests 1, 2, 3a, 3b, 4a, 4b and 5 were considered not to be allowable because amendments to various claims did not comply with Article 123(2) EPC.

In the opposition division's view, auxiliary request 6 was also not allowable because the subject-matter of claim 5 according to this request was not novel over D3 (WO-A 92/19640).

IV. On 18 May 2007 the patent proprietor (hereinafter: the appellant) filed a notice of appeal against the decision of the opposition division with simultaneous payment of the prescribed fee. Together with the statement of the grounds of appeal, the appellant filed on 30 July 2007 two sets of claims as a basis for a main request and an auxiliary request. These requests were attacked by opponent I and opponent II (hereinafter: respondent I, respondent II) under Rule 80 EPC and Articles 54, 56, 83, 84, 123(2) and 123(3) EPC (letters dated 29 January 2008 and 8 February 2008).

Summons to oral proceedings pursuant to Rule 115(1) EPC was issued on 2 December 2009.

With a letter dated 8 February 2010, the appellant filed a new main request and auxiliary requests 1 to 4, which replaced those previously on file.

Claim 1 of each of the requests read as follows:

Main Request

"1. A method of producing food seasoning, food ingredient and/or food item compositions which decrease elevated serum cholesterol and lower elevated blood pressure, comprising changing the composition of the food seasoning, food ingredient and/or food item compositions by the addition of at least one plant sterol or plant sterol derivative from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of the said sterols and stanols, and by the addition of at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium."

Auxiliary Request 1

"1. A method of producing food seasoning, food ingredient and/or food item compositions selected from the group consisting of bread, cookies and biscuit-like products, sausages and other meat products, egg foods, dairy products, baby foods and salad dressings which decrease elevated serum cholesterol and lower elevated blood pressure, comprising changing the composition of the food seasoning, food ingredient and/or food item compositions by the addition of at least one plant sterol or plant sterol derivative from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of the said sterols and stanols, and by the addition of

at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium."

Auxiliary Request 2

"1. A method of producing food seasoning, food ingredient and/or food item compositions selected from the group consisting of bread, cookies and biscuit-like products, sausages and other meat products, egg foods, dairy products, baby foods and salad dressings which decrease elevated serum cholesterol and lower elevated blood pressure, comprising the addition of at least one plant sterol or plant sterol derivative from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of the said sterols and stanols, and the addition of at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium."

Auxiliary Request 3

"1. A method of producing a bread, cookie or biscuit-like food which decreases elevated serum cholesterol and lowers elevated blood pressure, comprising changing the composition of the bread, cookie or biscuit-like food by the addition of at least one plant sterol or plant sterol derivative from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of the said sterols and stanols in an amount producing in the ultimate bread, cookie or biscuit-like food a plant sterol or plant sterol derivative concentration by

weight of between 0.1 and 8 %, and by the addition of at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium in an amount producing in the ultimate bread, cookie or biscuit-like food a magnesium concentration of between 0.01 and 1 %, a calcium concentration of between 0.01 and 1 % and a potassium concentration of between 0.1 and 1.5 %."

Auxiliary Request 4

"1. A method of producing a bread, cookie or biscuit-like food which decreases elevated serum cholesterol and lowers elevated blood pressure, comprising the addition of at least one plant sterol or plant sterol derivative from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of the said sterols and stanols in an amount producing in the ultimate bread, cookie or biscuit-like food a plant sterol or plant sterol derivative concentration by weight of between 0.1 and 8 %, and the addition of at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium in an amount producing in the ultimate bread, cookie or biscuit-like food a magnesium concentration of between 0.01 and 1 %, a calcium concentration of between 0.01 and 1 % and a potassium concentration of between 0.1 and 1.5 %."

- V. With their letters dated 26 February 2010 (correction submitted by fax on 1 March 2010) and 1 March 2010 the respondents *inter alia* raised multiple formal objections under Rule 80 EPC, and Articles 84 EPC 1973,

123(2) and 123(3) EPC against the amendments in the new requests.

In the respondents' view, the requests should not be admitted into the proceedings, in particular owing to their filing at a very late stage of the appeal proceedings, i.e. one month before the date of the oral proceedings, and the significant number of amendments.

VI. On 8 March 2010 oral proceedings were held before the board, where, first of all, the admittance of the new request was discussed in the light of the amendments made.

VII. The essential arguments provided orally and in written form by the respondents - as far as they are relevant to this decision - were as follows:

(a) Main Request, Auxiliary Request 1, Auxiliary Request 3:

concerning the feature "comprising changing the composition of ... by the addition of at least one plant sterol ... and by the addition of at least one mineral element nutrient ..."

(i) The feature made the claim unclear, contrary to Article 84 EPC 1973:

The wording "changing the composition by addition" could be interpreted in several ways:

it could refer to the fact that when something was added to the composition, its

presence inevitably resulted in a different composition;

it could mean that the addition of the component brought about a change in one or more components in the composition (eg by chemical reaction);

the feature did not clearly express whether the component had to be added to the composition in isolation or could also be added in combination with one or more additional components.

(ii) the amendment contravened Article 123(2) EPC:

The feature "changing the composition of ... by the addition of ... " implied a requirement in relation to the time of the addition of the mineral element and the sterol/stanol in that these components were to be added to a "basic composition", ie a previously prepared food seasoning, food ingredient or food item composition. Such a teaching was not derivable from the application as filed. Neither original Claim 1 nor the passages at page 7, lines 13 to 16 and lines 31 to 32 of the application as filed constituted a basis for such a requirement.

(b) Auxiliary Request 2:

concerning the feature "food seasoning, food ingredient and/or food item compositions selected from the group consisting of bread, cookies and biscuit-like products, sausages and other meat

products, egg foods, dairy products, baby foods and salad dressings ... "

The list from which the food seasoning, food ingredient and/or food item composition is to be selected made the claim unclear, contrary to Article 84 EPC 1973. None of these listed compositions related to a food seasoning or a food ingredient, but related to food items only. Moreover, the meaning of some terms in this list was not defined in the patent in suit, in particular the terms "other meat products", "egg foods" (which possibly included mayonnaise, cakes or biscuits), "baby foods".

(c) Auxiliary Request 4:

concerning the feature "... addition of at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium in an amount producing ... a magnesium concentration of between 0.01 and 1 %, a calcium concentration of between 0.01 and 1% and a potassium concentration of between 0.1 and 1.5 %" and

amendment of the feature " ... capable of decreasing elevated serum cholesterol and lowering elevated blood pressure ..." in Claim 1 as granted to " ... which decreases elevated serum cholesterol and lowers elevated blood pressure ..."

- (i) the combination of the term "at least one" with specific values for calcium, magnesium and potassium contravened Article 123(2) EPC.

In original Claim 1 the term "at least" related to calcium, magnesium and potassium in a general way and was not linked to specific amounts for the minerals;

- (ii) the change of the term "capable of decreasing elevated serum cholesterol/lowering elevated blood pressure" to "which decreases elevated serum cholesterol/lowers elevated blood pressure" was either not occasioned by an opposition ground, contrary to Rule 80 EPC or, if it introduced a material change to the meaning of the claim, rendered its scope unclear, contrary to Article 84 EPC, because the claim could then be interpreted as a second medical use claim, which however was not in the correct format.

VIII. The Appellant's counterarguments against the Respondents' objections were as follows:

- (a) Main Request, Auxiliary Request 1, Auxiliary Request 3:

The feature "changing the composition of the food seasoning, food ingredient and/or food item by the addition ... " was introduced to reflect that sterols/minerals had to be added externally to a basic composition irrespective of whether the composition already contained sterols/minerals as natural ingredients.

The skilled person had (i) no difficulties in understanding this feature and (ii) no new matter

was introduced by this amendment. The requirements of Articles 84 and 123(2) EPC were therefore met.

(b) Auxiliary Request 2

The terms "bread, cookies, biscuit-like products ... " etc listed in Claim 1 were standard terms which were common in the prior art and would therefore perfectly be understood by a skilled person.

(c) Auxiliary Request 4

(i) The feature "at least one" in combination with specific ranges for calcium, magnesium and potassium, including the embodiment that only one of the minerals may be present, was supported by Example 12 of the application as filed. According to this embodiment, only magnesium in a specific amount was added to yogurt. Non-compliance with Article 123(2) could therefore not be seen.

(ii) The amendment from "capable of decreasing elevated serum cholesterol and lowering elevated blood pressure" according to Claim 1 as granted to "*which decreases elevated serum cholesterol and lowers elevated blood pressure*" was made in line with Claim 1 of the application as filed, in order to overcome a deficiency under Article 123(2) EPC.
The meaning of this amended feature was that the level of fortification of the ultimate

bread, cookie or biscuit-like food with sterol/mineral was such that the effect of a decrease of elevated serum cholesterol and lowering elevated blood pressure was reached.

- IX. The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request or one of auxiliary requests 1 to 4, all requests filed with the letter dated 8 February 2010.
- X. The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. Procedural matter
 - 2.1 Admittance of the Main Request and Auxiliary Requests 1 and 3

The board was confronted with the filing of new requests at a very late stage of the appeal proceedings. In fact, the new requests have been filed after oral proceedings have been arranged and just one month before oral proceedings were actually held.

According to Article 13(1) of the Rules of Procedure of the Boards of Appeal any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the Board's discretion. The discretion has to be exercised in view of inter alia

the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

- 2.1.1 Each Claim 1 of the main request and auxiliary request 1 and 3 is in essence based on granted Claim 1 (main request), granted Claim 1 and page 7, lines 13 to 16 of the application as filed (auxiliary request 1) and granted Claims 1/11 (auxiliary request 3), whereby each Claim 1 of these requests has the following amendment in common:

the wording "providing in said composition an increased level of plant sterol ... and an increased level of mineral element ... " in granted Claim 1 has been replaced by "changing the composition of the food seasoning ... by the addition of at least one plant sterol ... and by the addition of at least one mineral element ..."

In the board's judgment the feature "changing the composition ... by the addition" can be interpreted in several ways.

- (a) One interpretation, which is apparently favoured by the appellant, in particular at page 8, paragraph 2 of its letter dated 8 February 2010, is that a 'basic composition' of a food seasoning, food ingredient or food item is changed by the addition of plant sterol/mineral. In this case, however, the question arises as to the meaning of "basic composition". A definition of "basic composition" is found nowhere in the patent specification and in the application as

filed, respectively. Also, the examples cannot contribute to the clarification of this term, because no consistent interpretation of "basic composition" is derivable therefrom. For instance, Examples 1 and 2 in the patent specification (preparation of a white bread/rye bread) imply that the basic composition of the bread (which is changed by the subsequent addition of plant sterol/mineral) is a complete mixture of common ingredients forming the dough and containing wheat flour/rye meal yeast, water. This interpretation is, however, not applicable to all examples because common ingredients for a food composition, plant sterol and mineral, can alternatively either be mixed all at once (eg Examples 4, 9) or the plant sterol can be added to one part of the composition and the minerals to another part, which are then mixed to form the final composition (eg Examples 3, 10). Thus, the skilled person is not provided with clear information which "base composition" of the food seasoning, food ingredient and/or food item is the starting point for the addition of plant sterol/mineral.

- (b) The board also concurs with the submissions of respondent I provided in its letter dated 26 February 2010 and in the oral proceedings that other interpretations of the feature "changing the composition ... by the addition" are possible.

"Changing the composition ... by the addition" could refer merely to the fact that when something is added its presence in the composition to which it is added inevitably results in a different

composition. Alternatively, it could mean that the addition of the relevant ingredient brings about a change in the one or more components in the composition to which it is added, eg by chemical reaction. Or it could mean that sterol/minerals are added at a certain stage. It could, for example, be intended to mean that the added ingredient(s) is/are added at the very last stage, ie after all the other components of the composition are already in place and in particular, no further ingredient can then be added after the addition of the sterol/stanol derivative and the mineral element nutrient. Moreover, it is not completely clear whether it covers the situation only when the added component is added in isolation or whether it also allows it to be added in combination with one or more additional components, eg in solution.

- (c) However, if for the sake of argument, the wording "changing the composition ... by the addition" were deemed to be clear, then, the next question would be whether the amendment is occasioned by the grounds of opposition. If "changing the composition ... by the addition" only means that when something is added to a composition, that composition is inevitably changed, then the amendment perhaps does not alter the meaning of the wording used in granted Claim 1 and has no impact on the meaning of the claim and therefore, is not in response to a ground of opposition, ie not in compliance with Rule 80 EPC.

(d) In the alternative, it could be deemed to alter the granted wording by (say) implying something about the stage in the making of the composition at which sterol/stanol derivative and mineral element nutrient is added. However, if "changing the composition ... by the addition" does impart new meaning, ie with regard to the timing/stage of addition, it appears that there is no basis in the application as filed for this meaning (Article 123(2) EPC). Thus, "changing" comes from page 1, line 5 of the application as filed. "Addition" comes from eg the claims as filed. "Changing by addition" is a new construct which has no explicit support in the application as filed.

2.1.2 In summary, the amended feature "changing the composition ... by the addition" introduces issues which enhance the uncertainty about the claimed subject-matter. In fact, the amendment introduces a complexity into the present case which would lead to divergent rather than convergent oral proceedings, the latter being one of the guiding principles for procedural economy. Since the amendment "changing the composition ... by the addition" and furthermore, many other amendments were not present in the claims as granted and in the claims of the requests submitted with the grounds of appeal, such amendment(s) could not have been reasonably anticipated by the respondents. The Board therefore exercises its discretion in accordance with Article 13(1) RPBA not to admit the main request and auxiliary requests 1 and 3 into the proceedings.

2.2 Admittance of Auxiliary Request 2

Claim 1 of auxiliary request 2 relates to a method of producing food seasoning, food ingredient and/or food item compositions and then provides a list of food products. Firstly, it is not clear whether the grammatical antecedent for this list is, as alleged by the appellant, "food item compositions" or, as alleged by respondent II, the whole group, namely "food seasoning, food ingredient and/or food item compositions". In the latter case, the food seasoning, food ingredient and/or food item compositions would have to be selected from a list where none of the products mentioned in this list relates either to a food seasoning or a food ingredient, and, as such, the claim would lack clarity.

However, even if one assumes, in favour of the appellant, that the list refers to food item compositions only, it is conspicuous to the board that the meaning of various terms used in this list are not defined in the patent in suit and are unclear. Firstly, the list includes "other meat products". The list also includes "egg foods". It is unclear what is encompassed by the term "egg foods", eg whether any food stuff including eggs (such as cakes and biscuits) is encompassed by this term, in which case there is an overlap with biscuits and biscuit-like products. Also mayonnaise generally contains eggs.

Furthermore, this amendment has no counterpart in the granted claims but is based on a passage on page 7 of the application as filed, ie represents an amendment which could not have been reasonably foreseen by the

respondents. Therefore, for the same reasons as mentioned under point 2.1.2 above, auxiliary request 2 is not admitted into the proceedings (Article 13(1) RPBA).

2.3 Admittance of Auxiliary Request 4

The claims according to auxiliary request 4 do not contain the above uncertainties under Article 84 EPC 1973 and their subject-matter is closest to that of granted claims. Furthermore, as far as the replacement of the term "capable of decreasing elevated serum cholesterol and lowering elevated blood pressure" of granted Claim 1 by the expression "*which decreases elevated serum cholesterol and lowers elevated blood pressure*" is concerned, this amendment was already subject of the claims submitted with the grounds of appeal. Therefore, no new issues arise in this context whose discussion in the oral proceedings could have surprised the parties.

Auxiliary request 4 is therefore admitted into the proceedings.

3. Auxiliary request 4

3.1 Added subject-matter

Claim 1 of auxiliary request 4, which is based in essence on Claims 1 and 11 as granted (point I, above), requires "the addition of at least one mineral element nutrient selected from the group of magnesium, calcium, and potassium in an amount producing in the ultimate bread, cookie or biscuit-like food a magnesium concentration of between 0.01 and 1 %, a calcium

concentration of between 0.01 and 1 % and a potassium concentration of between 0.1 and 1.5 %".

This feature, in particular with respect to the term "at least", implies that only one or alternatively two or three of the minerals magnesium, calcium and potassium are added in order to obtain the respective ranges.

Such a disclosure is not found in the application as filed.

3.1.1 Claim 1 as filed reads as follows:

"A method of producing food seasoning, food ingredient and/or food item compositions which decrease elevated serum cholesterol and lower elevated blood pressure, comprising the addition of at least one plant sterol or plant sterol derivative from the group consisting of beta-sitosterol, stigmasterol, campesterol, dihydrobrassicasterol, and/or the hardened stanol forms of said sterols, and/or fatty acid esters of said sterols and stanols, and the addition of at least one mineral element nutrient selected from the group consisting of magnesium, calcium, and potassium."

Claim 1 as filed requires the addition of at least one mineral element nutrient selected from magnesium, calcium and potassium to the food seasoning, food ingredient, and/or food item compositions. This requirement is neither linked to the specific compositions nor to the specific amounts of the minerals now indicated in Claim 1 of auxiliary request 4. Thus, Claim 1 as filed discloses the possibility that one, two or three of the minerals may

be added to the food seasoning, food ingredient and/or food item compositions merely in a rather general manner.

3.1.2 In contrast thereto, the disclosure of dependent Claim 2 as filed is much more specific. Claim 2 as filed reads as follows:

"A method according to claim 1 comprising incorporating in a bread, cookie or biscuitlike food item a plant sterol or plant sterol derivative, magnesium, calcium, and potassium in an amount producing in the ultimate edible bread plant a sterol or plant sterol derivative concentration by weight of between 0.1 to 8%, a magnesium concentration of between 0.01 to 1%, a calcium concentration of between 0.01 to 1%, and a potassium concentration of between 0.1 to 1.5%.

It is quite clear from the wording of Claim 2 as filed - in particular with respect to the missing term "at least" - that this claim represents a more restricted embodiment of the general disclosure of Claim 1 as filed and that all three minerals have to be added in order to achieve the specified amounts thereof. In other words, Claim 2 as filed no longer encompasses the possibilities of Claim 1 as filed, that only one or two of the mineral element nutrients can be added.

3.1.3 The appellant argued that Example 12 of the patent in suit (corresponding to Example 12 in the application as filed) would provide a proper basis for the term "at least" in combination with the amounts indicated in Claim 1 of auxiliary request 4. In Example 12 only magnesium oxide was added to a yogurt, nevertheless,

contents of the mineral elements in the final yogurt were indicated as 0.01 to 3% magnesium, 0.1 to 3% calcium and 0.1 to 3% potassium.

However, the appellant's argument is not convincing because Example 12 is directed to a yogurt whereas the subject-matter of Claim 1 of auxiliary request 4 is directed to a bread, cookie or biscuit-like food. There is nothing in the application as filed which would allow the generalisation of the specific embodiment disclosed in Example 12, namely a yogurt, to other food products.

3.1.4 Therefore, the term "at least" in Claim 1 of auxiliary request 4 (which has been present in granted Claim 11, too) is contrary to Article 123(2)/Article 100(c) EPC.

3.2 Thus, for this reason alone, auxiliary request 4 is not allowable.

Under these circumstances, there is no need to discuss the respondents' further objections against the claims of auxiliary request 4.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

C. Eickhoff

W. Sieber