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**Datasheet for the decision
of 13 September 2011**

Case Number: T 2298/10 - 3.3.09

Application Number: 06726949.8

Publication Number: 1879467

IPC: A23G 1/00

Language of the proceedings: EN

Title of invention:

Process for the manufacture of reduced fat chocolate powder

Applicant:

Zumbe, Albert

Headword:

-

Relevant legal provisions:

EPC Art. 54

Relevant legal provisions (EPC 1973):

-

Keyword:

"Status of requests (unclear)"

"Novelty (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 2298/10 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 13 September 2011

Appellant: Zumbe, Albert
23 Glendon Way
Dorridge, Solihull B93 8SY (GB)

Representative: -

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 28 September 2010
refusing European patent application
No. 06726949.8 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: W. Sieber
Members: N. Perakis
K. Garnett

Summary of Facts and Submissions

- I. European patent application No. 06726949.8, in the name of Zumbe Albert filed as PCT/GB2006/001569, claiming priority from the GB application No. 0509363.8 of 9 May 2005 and published as WO 2006/120380, was refused by decision of the examining division issued in writing on 28 September 2010.

- II. The decision of the examining division concerned amended Claims 1-18 filed by letter dated 10 March 2010. The examining division refused the application as it considered that the claimed subject-matter did not fulfil the requirements of Articles 123(2), 84 and 56 EPC. Document D1 (WO 96/17523) was considered relevant for the issue of inventive step.

- III. On 22 October 2010 the applicant filed an appeal against the decision of the examining division, the notice of appeal also containing the statement of the grounds of appeal. The appeal fee was paid on the same day.

- IV. In his statement of the grounds of appeal, the appellant stated that he "would like to go back to the original patent claims" (which were said to be attached, but which in fact were not) that were submitted to the British Patent Office with the priority date of 9 May 2005 and published as European patent application No. 06726949.8 with amendments dated 28 August 2006.

V. Originally filed Claims 1, 2 and 18 (identical to those of the above priority document, namely GB application No. 0509363.8) read as follows:

"1. A method of producing a chocolate powder having a fat content of less than 16 wt %, comprising the steps of:

- (a) forming a chocolate composition which has a higher fat content than desired in the chocolate powder to be produced,
- (b) subjecting this chocolate composition to a flavour development procedure to conching, intimate mixing and kneading,
- (c) mixing the chocolate composition of higher fat composition to at least one chocolate making ingredient so that the final chocolate composition has a fat content of less than 16 wt %, and
- (d) milling the mixture, or the two separate components (i.e. b and c) and then blending them together, to the required particle size to produce a powder."

"2. A method as claimed in claim 1, whereby the fat content of the powder is from 16 to 25 wt % fat."

"18. A method whereby the higher fat chocolate composition of more than 25 wt % is spray crystallised into cryogenic chamber to form a powder, and is mixed with at least one milled chocolate making ingredient,

cocoa shells or cocoa fibre such that the resulting mixture has less total fat."

VI. The amendments to the claims received by the International Bureau on 28 August 2006 included the following:

"A chocolate making ingredient" in this claim is defined as cocoa solids incorporated into reduced fat cocoa liquor, cocoa powder and/or cocoa extract and /or chocolate extract. The term "low fat" chocolate making ingredient in this claim is defined as an ingredient or mixture of ingredients with a lower fat content of the chocolate composition of higher fat compositions as mention in 1c." (It is clear that the reference to "this claim" is meant to be to Claim 1).

Claim 2: This should read:

"A method as in claim 1, whereby the final fat content of the powder is from 16-25 wt % fat."

Claim 18: This should read:

"A method whereby the higher fat chocolate composition of more than 25 wt % fat is Spray Crystallised (i.e. made by the spray crystallisation of of [sic] liquid chocolate into a cryogenic chamber to form a powder) and is mixed with at least one chocolate making ingredient as defined in claim 4 such that the resulting mixture has less total fat."

VII. The arguments of the appellant as put forward in the statement of the grounds of appeal were all directed to the objections concerning lack of clarity which had been raised by the International Searching Authority in

its preliminary report dated 10 July 2006. The appellant also stated that claim 2 should possibly be re-written to clarify what was meant and that claims 14 and 20 could be eliminated.

VIII. By a communication dated 15 July 2011, sent in preparation for the oral proceedings scheduled for 13 September 2011, the board pointed out that it was not clear what set of claims formed the basis of the appellant's request for the grant of a patent; the appellant was requested to clarify the subject-matter to be claimed as soon as possible. The board also raised objections regarding (a) the presence of three independent method claims (Rule 43(2) EPC), (b) the apparent lack of unity of the inventions claimed by independent Claims 1, 2 and 18, (c) the novelty of the method of Claim 2 in view of the disclosure of D1 and (d) the inventive step of Claims 1 and 18 in view of this document.

IX. The appellant did not reply to the communication.

X. On 8 September 2011, the registrar of the board contacted the appellant by telephone. The appellant confirmed that he had received the communication of the board but stated that he did not intend to attend the oral proceedings and that he was considering abandoning the application.

XI. Oral proceedings were held before the board on 13 September 2011 in the absence of the appellant.

Reasons for the Decision

1. The appeal is admissible.

2. As pointed in the board's communication of 15 July 2011 the request of the appellant in the statement of the grounds of appeal is ambiguous. The basis of the request for the grant of a patent could be either the claims of the priority document or those of the PCT document published by the WIPO as WO 2006/120380. The claims of the PCT publication differ from those of the priority document in that they were amended under Article 19 PCT (see Point VI, above).

3. It is not the task of the board of appeal to try and work out what the appellant's request amounts to. However, even giving the appellant the benefit of the doubt that a set of claims can be clearly identified as the basis of a request for the grant of a patent, the appeal must be dismissed since at the very least the subject-matter of independent Claim 2 (which, despite minor linguistic differences, is the same in both alternative set of claims) lacks novelty over D1, as will be explained below.
 - 3.1 Although in Claim 2 reference is made to Claim 1, this is only to avoid recitation in Claim 2 of the method steps (a) to (d) of Claim 1. These claims are in fact independent since the fat content in the two claims is different: from 16 to 25 wt % in Claim 2; less than 16 wt % in Claim 1. This is confirmed by the appellant, who in the statement of the grounds of appeal said: "Claim 2 is not supposed to depend on claim 1, but rather to emphasise the same principle of manufacture,

namely mixing a higher fat chocolate content with a lower fat chocolate ingredient so that the final fat content is lower [than] the fat content in the "higher fat chocolate."

3.2 D1 discloses a method for the production of a chocolate composition comprising the steps of forming a chocolate composition with a higher fat content than desired in the final chocolate composition, and mixing the higher fat chocolate composition with at least one chocolate-making ingredient having a fat content which is appropriately below the desired fat content of the chocolate composition to be produced so as to result in a final chocolate composition having the desired fat content (Claim 1). The method includes a step of subjecting the higher fat chocolate composition to a flavour development procedure (dependent Claim 2), e.g. conching (dependent Claim 3), and a step of blending the at least one chocolate-making ingredient in unmilled form with the higher fat chocolate composition in a ratio to reduce the fat to the desired value, followed by milling of the resultant mixture (dependent Claim 7). The final chocolate composition has a fat content of from 16.5 to less than 25 wt% (dependent Claim 9). Hence, D1 discloses all the features of the method as claimed in Claim 2, including a milling step of the mixture of the low fat and the high fat component. Such a milling step can produce a powder as is apparent from Example 6 of D1 where the mixture of a low fat and a high fat component is milled to a particle size of 8 μm .

3.3 The objection of lack of novelty as regards Claim 2 was raised by the board in its communication of 15 July

2011 but the appellant has not responded to it. The board sees no reason to change its preliminary opinion expressed in the communication.

4. In the circumstances it is not necessary to consider the arguments of the appellant raised in the statement of grounds of appeal or the other possible objections to the claims.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Röhn

W. Sieber