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Datasheet for the decision of 6 February 2015

Case Number: T 1111/12 - 3.3.09

Application Number: 04739416.8

Publication Number: 1635653

IPC: A23L1/40, A23P1/02

Language of the proceedings: EN

Title of invention:
MARBLED BOUILLON, BROTH, SOUP, SAUCE OR SEASONING CUBE AND PROCESS FOR PREPARING THE SAME

Patent Proprietor:
Unilever N.V.
Unilever PLC

Opponent:
NESTEC S.A.

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)

Keyword:
Grounds for opposition - subject-matter extends beyond content of earlier application (yes)

Decisions cited:

Catchword:

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Case Number: T 1111/12 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 6 February 2015

Appellant: (Patent Proprietor 1)	Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Appellant: (Patent Proprietor 2)	Unilever PLC Unilever House 100 Victoria Embankment London EC4Y 0DY (GB)
Representative:	Reijns, Tiemen Geert Pieter Unilever Patent Group Olivier van Noortstraat 120 3133 AT Vlaardingen (NL)
Respondent: (Opponent)	NESTEC S.A. Avenue Nestlé 55 1800 Vevey (CH)
Representative:	Rupp, Christian Mitscherlich PartmbB Patent- und Rechtsanwälte Sonnenstraße 33 80331 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 6 March 2012 revoking European patent No. 1635653 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	W. Ehrenreich
	E. Kossonakou

Summary of Facts and Submissions

I. The decision concerns the appeal of the patent proprietors Unilever N.V. and Unilever PLC against the decision of the opposition division to revoke European patent No. EP 1 635 653.

II. The patent was granted with 2 claims reading as follows:

"1. Bouillon, broth, soup, sauce or seasoning cube of at least 2, preferably at least 4g weight, said cube comprising at least two phases with a different colour, which cube has a marbled, speckled or spotted multicoloured appearance, wherein said multicoloured appearance extends through the whole cube, wherein said at least two differently coloured phases are of granulated or agglomerated powdery and/or crystalline material, wherein at least 80% (wt) of said granulated or agglomerated powdery and/or crystalline material has a diameter of between 0.5 and 10mm, and wherein each phase is present in a minimum amount of 5% (wt)."

"2. Use of a cube according to claim 1 for preparing a bouillon, broth, soup, or sauce or for use as a seasoning."

III. The opposition of Nestec S.A. was based on the grounds that the subject-matter of the patent was not novel and not inventive (Article 100(a) EPC), that the invention was insufficiently disclosed (Article 100(b) EPC) and that the subject-matter of the patent extended beyond the application as filed (Article 100(c) EPC).

IV. The decision of the opposition division was based on the claims as granted (main request) and four auxiliary

requests. Claim 1 of auxiliary requests 1 to 3 related to a cube, and the sole claim of auxiliary request 4 was directed to a process for preparing a cube. In each claim 1 of these requests the cube (auxiliary request 4: the cube as a result of the process) was *inter alia* characterised by the following feature:

"wherein at least 80% (wt) of said granulated or agglomerated powdery and/or crystalline material has a diameter of between 0.5 and 10 mm (main request, auxiliary request 1) or between 1 and 10 mm (auxiliary requests 2, 3 and 4)".

The opposition division revoked the patent because the above feature was not originally disclosed in conjunction with the cube. Thus, claim 1 of all the requests contained subject-matter which extended beyond the application as filed (Article 100(c)/123(2) EPC).

V. The appeal of the proprietors (hereinafter: appellants) was filed on 11 May 2012. The grounds of appeal were received on 6 July 2012. Enclosed with the grounds of appeal was a report with experimental data, including images made by X-ray tomography (XRT). The appellants requested that the decision be set aside and the case be remitted to the first instance.

VI. In its letter of response dated 16 November 2012 the opponent (hereinafter: respondent) maintained its objections with respect to Article 100(c) and 123(2) EPC raised in the opposition proceedings.

VII. On 18 November 2014 the board issued a communication and provided its preliminary observations on the issue whether the feature:

"wherein at least 80% (wt) of said granulated or agglomerated powdery and/or crystalline material has a diameter of between 0.5/1 and 10mm"

in conjunction with the claimed cube extended beyond the application as filed. The board in particular referred to the following critical points:

- the passage in the paragraph bridging pages 3 and 4 of the application as filed, which disclosed the above feature, had to be read in context with the passage under the heading "Summary of the invention" which clearly related to the process for preparing the cube by mixing granules of fraction 1 with ingredients of fraction 2 (step a) and compressing a portion of mixed granules 1 and fraction 2 to a cube (step b); i.e. the above diameter of the granules and the percentage of the granules with this size directly and unambiguously related to the granules prior to compressing them to a cube;
- the passage in the second paragraph of page 8 "Marbling effect of systems containing fat-based granules can be influenced by the pressure of the press (the higher the pressure, the lower the marbling effect as the fat starts melting during pressing)" seemed to imply that it was intended to influence the initial size of the (fat-based) granules - and consequently the marbling effect of the cube - by the pressure applied during the compression step.

VIII. In their letter of response dated 15 December 2014 the appellants defended their position that the claims did not contain subject-matter that extends beyond the content of the application as filed.

IX. In the oral proceedings before the Board on 6 February 2015 the only matter of discussion was the issue of Article 100(c)/123(2) EPC in the light of the above points.

The arguments of the parties provided in this respect in writing and orally are summarized in the following.

X. Arguments of the appellants

Claim 11 as filed is an independent product claim which relates to the cube itself, without indicating that the cube is compressed. Dependent claim 12 mentions that the coloured phases of the cube "are of granulated or agglomerated powdery and/or crystalline material." The same wording is found in the paragraph bridging pages 3 and 4, and in particular in the sentence spanning the bottom of page 3 to the top of page 4. It is explained in this sentence that the term "granules" herein refers to all particles having a certain size being larger than most components of the granules such as powdery and/or crystalline material. Thus, it becomes evident that the subsequent disclosure in this paragraph that "The granules suitably have a diameter of between 0.5 and 10mm (some fines may be allowed, at least 80% wt should have such size)" unambiguously defines the granulated or agglomerated powdery and/or crystalline material of the whole invention, and hence also of the cube as claimed in claim 12 of the application as filed.

Concerning the argument of the opposition division in the appealed decision that it was "highly probable" that there would be a physical change of the granulated particles when they were compressed to form a cube, the

experimental data based on example 7 of the patent and provided with the statement of grounds of appeal confirm that this is not the case. The images at page 3 of the report demonstrate that there is not much difference in the size of the mixed granules before and after being compressing them to a tablet, except that the air has largely disappeared.

XI. Arguments of the Respondent

According to the first paragraph on page 1 of the application as filed, the invention relates to cubes which can be prepared by compressing a matrix material and a coarse granular material. In accordance with that, the section under the heading "Summary of the invention" relates to a process including the steps:

a. mixing granules fraction 1 with ingredients fraction 2,
b. compressing a portion of mixed granules 1 and fraction 2 to a cube.

The paragraph bridging pages 3 and 4, which was referred to by the appellants, unambiguously refers to the granules of fraction 1, and has thus to be considered strictly in conjunction with the process for preparing the cube. Hence, the particle size of the granules mentioned in this paragraph is only disclosed in context with the process for preparing the cube.

As far as the appellants refer to claims 11/12 as filed, it should be noted that these claims do not indicate any particle size of the granules in the cube. Furthermore, the experimental evidence provided by the appellants gives no information as to which pressure has been applied during pressing the mix into a tablet,

and the values for the particles sizes given on pages 2 and 3 of this report include a broad standard deviation.

It should further be noted that the marbling effect of systems containing fat-based granules can be influenced by the pressure of the press (the marbling effect is associated with the size of the granules). In conjunction with this, a high pressure of 25 to 30 kN is applied in examples 1, 2 and 8 concerning the formation of cubes by compressing systems including fat-based granules.

Therefore, the particle size of the granules in the cube can deviate from its initial size. Consequently, the particle size given in the paragraph bridging pages 3 and 4 of the description as a characterising feature of the claimed cube extends beyond the application as filed.

XII. The appellant requested that the decision under appeal be set aside and the case be remitted to the opposition division for further prosecution.

XIII. The respondent requested that the appeal be dismissed and that the appellant's request to remit the case to the opposition division be rejected.

Reasons for the Decision

1. The appeal is admissible.

2. Main request (claims as granted)

2.1 Claim 1 as granted (point II above) relates in general terms to a bouillon, broth, soup, sauce or seasoning cube comprising at least two phases with a different colour and having a marbled, speckled or spotted multicoloured appearance, wherein said at least two differently coloured phases are of granulated or agglomerated powdery and/or crystalline material.

The objection under Article 100(c) EPC against claim 1 as granted is directed to the further definition of said granulated or agglomerated powdery and/or crystalline material, namely that

"at least 80% (wt) of said granulated or agglomerated powdery and/or crystalline material has a diameter of between 0.5 and 10 mm".

2.2 It is uncontested that there is a disclosure at the end of the paragraph bridging pages 3 and 4 of the description as filed which defines the particle size of granules as follows:

"The granules suitably have a diameter of between 0.5 and 10 mm (some fines may be allowed, at least 80% wt should have such size), preferably between 1 and 5 mm, more preferably 2-5 mm."

The opposition division held that this passage defined only the material from which the marbled bouillon cube had been prepared (i. e. the material before the pressing step) but not the properties of the (final) cube. The appellant challenged this finding and argued that the term "compressed" would not be an element of the claim and the definition of the granules given in the paragraph bridging pages 3 and 4 applied generally and not only to the starting material in a process comprising a pressing step.

Hence, the question which arises under Article 100(c) EPC is whether there is a direct and unambiguous, at least implicit, indication in the application as filed from which it can be derived that the above definition also characterises the granules present in the cube. It is thus necessary to consider the relevant sentence in the context of the disclosure of the application as filed.

2.3 Under the heading "Field of the invention" at page 1 of the application as filed it is stated that the invention relates to cubes ... "which cubes can be prepared by compressing a matrix material and a coarse granular material having a different colour than the matrix".

According to the paragraph bridging pages 2 and 3 it is "a continuous demand for novel shaping techniques for solid bouillon, broth, soup, sauce and seasoning cubes ...". It is further said (last sentence bridging pages 2 and 3) "that the cubes can be shaped from a powdery, granular or flaky state ... and still multiphase, speckled appearance can be obtained".

The subsequent paragraph unambiguously points out under the heading "Summary of the invention" that the above objections may be met by a process which comprises the steps of:

"a. mixing granules fraction 1 with ingredients fraction 2,
b. compressing a portion of mixed granules 1 and fraction 2 to a cube, ...".

Claim 1 as filed relates exactly to this process. Dependent claim 2 as filed requires prior to mixing step a. the step of preparing granules of powdery and/or crystalline ingredients fraction 1.

The paragraph bridging pages 3 and 4 elaborates on the step of preparing granules prior to mixing step a. It starts:

"Thus, if fraction 1 is not yet in the form of granules, the invention further relates to the above process which is proceeded by a process for preparing granules of at least fraction 1, or of more than one fraction."

and continues with the sentence after next:

"Thus, although called 'granules' herein, it does refer to all particles having a certain size (being larger than most components of the granules such as powdery material and/or crystalline material), and such granules can be prepared by granulation, but also by other techniques."

In the following, some techniques for size enlargement are mentioned, depending on the nature of the

(conventional) ingredients of cubes, including granulation, agglomeration, pelletisation, sintering, briqueting or extruding and other techniques. It is thus clear that the paragraph bridging pages 3 and 4 expresses the fact that the process for preparing the cube requires the presence of granules in the mixing step a., suitably with a diameter of between 0.5 and 10mm for at least 80% wt of them, and that eventually powdery and/or crystalline ingredients of fraction 1 have to be size-enlarged first to "granules" in that sense, e.g. by one of the techniques mentioned.

The disclosure that the "granules suitably have a diameter of between 0.5 mm and 10 mm (some fines may be allowed, at least 80% wt should have such size) ..." exclusively relates to a preferred granule size obtained from a powdery and/or crystalline material by a suitable size-enlarging technique before process step a. has been applied. Nothing is said in this paragraph about the size of the granules after compressing step b in the final cube.

2.4 The appellant relied on the word "herein" used twice in this paragraph in conjunction with "granules", and argued that the term "granules" should be interpreted very broadly in the definition of the patent and not just as an isolated comment relating to the process. This argument is not convincing. When reading the wording "granules herein" and "larger particles, herein referred to as granules" in the context of the whole paragraph, the skilled reader would understand that powdery and/or crystalline materials after they were enlarged in size by known size-enlarging techniques are called "granules" prior to mixing step a and compression step b. However, this information does not allow any direct and unambiguous conclusion as to the

size of the "granules" which are later present in the cube - i.e. after performing process steps a. and b.

2.5 The appellant also argued that the technical evidence submitted with the statement of grounds of appeal showed that even after the preparation of a cube (i. e. after compression step b.), the particle size of the granules had not changed compared with the starting granules.

It might be true that under some conditions the granule size after compression into a cube is similar to that prior to compression, such as in example 7 for which experimental data including XRT images were provided. However, it is also evident from the second paragraph on page 8 of the application as filed that the size of the granules in the cube after compression can deviate from their initial size prior to compression. It is disclosed therein that the marbling effect of systems containing fat-based granules can be influenced by the pressure of the press and that the marbling effect becomes lower if pressure is increased as the fat starts melting during pressing. Because, as uncontested by the appellant, the appearance of the marbling effect depends on the size of the granules in the cube (besides the particle distribution within the cube), this paragraph clearly implies the variability of the size of fat-based granules, by the amount of pressure applied in process step b.

In this context it is noted that the appellant had argued that the compression would merely remove the air between the granules but not alter the particle size. However, this appears not possible from a physical point of view. When taking particles of a defined particle size and diameter and squeezing out the air

located between the particles by whatever measure, it is apparent that the particles have to deform to at least some extent to fill the space formerly occupied by the removed air. Then, however, the particle size is no longer the same as prior to the forming of such cubes.

2.6 Finally, the appellant argued that the cube of claim 1 (and of claims 11 and 12 as filed, which form the basis of claim 1 as granted) does not require any compression (i. e. a "compressed" cube is not required). The cubes could also be made by gluing the starting granules together as done in Example 9 of the patent specification. In Example 9 water-based granules were mixed with a glue until a homogeneous mass was obtained. Then the cubes were formed by hand and dried in an air dryer to below 2% moisture. No compression step is mentioned but, notably, also no particle size. Although one could accept that in this process the particle size of the granules does not change, there is nevertheless a doubt as to the particle size used as it is not specified (is it the particle size mentioned in the paragraph bridging pages 3 and 4, or another one?). Furthermore, Example 9 (as well as the passage on page 7, lines 23 to 25 relied upon by the appellant in this context) is specifically directed to water-based granules, and could not be used to generalize this disclosure.

2.7 In summary, there is no direct and unambiguous disclosure in the application as filed, let alone an implicit one, that at least 80% (wt) of the granulated or agglomerated powdery and/or crystalline material in the cube has a diameter of between 0.5 and 10 mm.

It might be worth mentioning at this juncture that there is no generally applicable disclosure in the application as filed that the particle size of the granules in the final cube should be the same as that of the starting granules. Any explanation as to what might be the case under certain circumstances cannot offer an unambiguous support for the objected feature in the claim.

2.8 Article 100(c) EPC thus prejudices the maintenance of the patent as granted.

3. Auxiliary requests 1 to 3

Claim 1 of each of auxiliary requests 1 to 3 (identical to auxiliary requests 1 to 3 before the opposition division) equally relates to a cube, wherein the particle diameter of the granulated or agglomerated powdery and/or crystalline material is characterised by the same size parameters referred to in the paragraph bridging pages 3 and 4 of the description as filed. Thus, the arguments given with regard to the main request also apply to these requests.

4. Auxiliary request 4

The sole claim of auxiliary request 4 (identical to auxiliary request 4 before the opposition division) relates to a process for preparing a cube, including the process steps a. and b. of original claim 1 and defining for this process the diameter of the granules of the starting material in accordance with the disclosure in the paragraph bridging pages 3 and 4 of the description as filed. Although this definition complies with the requirements of Article 123(2) EPC, as far as the starting material in the process is

concerned, the further requirement in the claim that the granules in the resulting cube have the same particle size as in the starting material extends beyond the content of the application as filed for the reasons given above. Thus, auxiliary request 4 is not allowable either.

5. From the above it follows that there is no allowable request which can be the basis for further prosecution either by way of remittal of the case to the opposition division as requested by the appellant or before the board itself.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated