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**Datasheet for the decision
of 27 November 2015**

Case Number: T 0366/13 - 3.3.09

Application Number: 07111471.4

Publication Number: 1872666

IPC: A23L1/10, A23L1/164

Language of the proceedings: EN

Title of invention:
Production of whole grain-containing composite food products

Patent Proprietor:
Intercontinental Great Brands LLC

Opponent:
PepsiCo International Limited

Headword:

Relevant legal provisions:
EPC Art. 56, 84, 123(2)
RPBA Art. 13

Keyword:
Main request - Inventive step (no)
1st auxiliary request - Clarity (no)
New 1st auxiliary request - Admitted (no)
2nd auxiliary request - Added subject-matter (yes)
3rd auxiliary request - Clarity (no), added subject-matter (yes)
4th and 5th auxiliary requests - Inventive step (no)

Decisions cited:

Catchword:



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Case Number: T 0366/13 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 November 2015

Appellant: PepsiCo International Limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 December 2012 maintaining European patent
No. 1872666 in amended form.**

Composition of the Board:

Chairman W. Sieber
Members: J. Jardón Álvarez
E. Kossonakou

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the opponent against the interlocutory decision of the opposition division that European patent No. 1 872 666 as amended met the requirements of the EPC.
- II. The opponent had requested revocation of the patent in its entirety on the grounds of Article 100(a) EPC (lack of novelty and inventive step).

The documents cited during the opposition proceedings included:

D1: CA 2069213 A1;

D18: US 3 703 378 A; and

D19: US 4 623 548 A.

- III. The set of claims maintained by the opposition division filed as "New Second Auxiliary Request" on 26 November 2012 during the oral proceedings included eighteen claims. Claim 1 read as follows (amendments over claim 1 as granted in bold):

"1. A method for producing a whole-grain containing composite food product, comprising:

- preparing a dough, comprising
 - cooking whole grain cereal grain particles in the presence of water effective to gelatinize starch content of the whole grain cereal particles to provide gelatinized whole grain cereal grain particles,

- mixing the gelatinized whole grain cereal grain particles with starch, whole grain flour, optional leavening agent, and a food component selected from the group consisting of vegetables and fruits, effective to prepare dough;
- forming the dough into discrete dough units;
- baking or frying the dough units to provide a whole-grain containing composite food product,

wherein said composite food product comprises the food component in a range amount of from about 10 wt.% to about 32 wt.%, on a dry weight basis, of the composite food product, and

wherein the food component comprises vegetables selected from the group consisting of onions, sweet potatoes, cabbage, carrots, spinach, broccoli, peas, beans, peppers, zucchini, okra, Brussels sprouts, cucumber, tomatoes, and any combinations thereof, or

wherein the food component comprises fruit selected from the group consisting of apples, strawberries, blueberries, raspberries, blackberries, peaches, apricots, pears, pineapples, oranges, grapes, cranberries, bananas, citrus fruits, figs, prunes, and any combination thereof."

Claims 2 to 16 were dependent claims and claims 17 and 18 were directed to a whole-grain containing composite food product, which is shelf-stable for at least six months.

IV. The opposition division's finding on the allowed request can be summarised as follows:

- The amendments made met the requirements of Article 123(2) EPC. The amount of fruit/vegetable was originally disclosed in combination with the features of claim 1, and the lists for the fruits and the vegetables were disclosed in original claims 16 and 19. The deletion of "potato" from the list for the vegetables did not introduce new subject-matter.
- The amended claims were clear. In particular, the total amount of the fruit/vegetable component in the range of 10-32 wt.% was already present in the granted claims.
- The claimed subject-matter involved an inventive step starting from D1 as the closest prior art. The subject-matter of claim 1 differed from the teaching of D1 in that starch and at least one specific fruit or vegetable component had to be added, and the total amount of fruit/vegetable component was 10-32 wt.% of the final product. The technical problem was the provision of a healthier snack, without affecting the texture of both the dough and the final snack. The claimed solution was seen as inventive because the skilled person had no incentive to add a relatively high quantity of fruit or vegetable to the dough while not disrupting its structure.

V. On 8 February 2013 the opponent (in the following: the appellant) lodged an appeal. With the statement setting out the grounds of appeal it requested that the

decision under appeal be set aside and that the patent be revoked.

VI. With its reply dated 15 November 2013, the patent proprietor (in the following: the respondent) disputed the arguments submitted by the appellant and requested that the appeal be dismissed (main request). The reply included 1st to 5th auxiliary requests and the following further documents:

D24: Mintel GNPD Classification Document, 2009; retrieved from: http://www.gnpd/about/ingredients_methodology.pdf (4 pages); and

D25: US Department of Agriculture Food Patterns Guide, 2011; retrieved from: Internet page <http://www.cnpp.usda.gov/Publications/USDAFoodPatterns/USDAFoodPatternsSummaryTable.pdf> (2 pages).

VII. In a communication the board indicated the points to be discussed during the oral proceedings scheduled for 27 November 2015.

VIII. With letter of 26 October 2015, the appellant requested that documents D24 and D25 and the 1st to 5th auxiliary requests not be admitted into the appeal proceedings.

IX. During the oral proceedings the appellant withdrew its request that the 1st to 5th auxiliary requests not be admitted into the appeal proceedings. The respondent filed a further auxiliary request headed "New 1st Auxiliary Request".

The order of the requests discussed at the oral proceedings was as follows: main request, new 1st auxiliary request, 4th, 3rd, 1st, 2nd and 5th auxiliary

requests, whereby with regard to the 1st, 2nd and 5th the parties relied on their written submissions.

- X. The claims of the main request are the claims maintained by the opposition division (see point III above).
- XI. Claim 1 of the "New 1st Auxiliary Request" reads as follows (amendments over claim 1 of the main request in italics and underlined):

"1. A method for producing a whole-grain containing composite food product, comprising:

- preparing a dough, comprising
 - cooking whole grain cereal grain particles in the presence of water effective to gelatinize starch content of the whole grain cereal particles to provide gelatinized whole grain cereal grain particles,
 - mixing the gelatinized whole grain cereal grain particles with starch, whole grain flour, optional leavening agent, and a food component selected from the group consisting of vegetables and fruits, effective to prepare dough;
- forming the dough into discrete dough units;
- baking or frying the dough units to provide a whole-grain containing composite food product,

wherein said composite food product comprises the food component in a range amount of from about

10 wt.% to about 32 wt.%, on a dry weight basis, of the composite food product, and

wherein the food component consists of vegetables selected from the group consisting of onions, sweet potatoes, cabbage, carrots, spinach, broccoli, peas, beans, peppers, zucchini, okra, Brussels sprouts, cucumber, tomatoes, and any combinations thereof, and the whole grain particles and vegetables are mixed in a mixing ratio of about 30:70 to about 50:50, on a wt%:wt% basis, respectively, or

wherein the food component consists of fruit selected from the group consisting of apples, strawberries, blueberries, raspberries, blackberries, peaches, apricots, pears, pineapples, oranges, grapes, cranberries, bananas, citrus fruits, figs, prunes, and any combination thereof, and the whole grain particles and vegetables are mixed in a mixing ratio of about 30:70 to about 50:50, on a wt%:wt% basis, respectively."

XII. Claim 1 of the 1st auxiliary request is based on claim 1 of the main request with the further restriction at the end of the claim:

"and wherein the dough contains less than 5wt% added sugar and less than 1wt% added shortening or similar fat."

XIII. Claim 1 of the 2nd auxiliary request differs from claim 1 of the main request in that it is restricted to the so called "hot feeding" method. Compared to claim 1 of the main request, it specifies:

- that the cooking is carried out "at a temperature of from 49°C to 93°C (120°F to 200°F) under atmospheric pressure in a dough mixer"; and
- that before forming it, the dough "[is fed] to dough machining stations in its heated condition of from 49°C to 93°C (120°F to 200°F)".

XIV. Claim 1 of the 3rd auxiliary request is based on claim 1 of the main request and further includes the amendments of both the 1st and 2nd auxiliary requests. It reads as follows (amendments over claim 1 of the main request in italics and underlined):

"1. A method for producing a whole-grain containing composite food product, comprising:

- preparing a dough, comprising
 - cooking at a temperature of from 49°C to 93°C (120°F to 200°F) under atmospheric pressure in a dough mixer whole grain cereal grain particles in the presence of water effective to gelatinize starch content of the whole grain cereal particles to provide gelatinized whole grain cereal grain particles,
 - mixing in said dough mixer the gelatinized whole grain cereal grain particles with starch, whole grain flour, optional leavening agent, and a food component selected from the group consisting of vegetables and fruits, effective to prepare dough;

- feeding the dough to dough machining stations in its heated condition of from 49°C to 93°C (120°F to 200°F) and forming the dough into discrete dough units;

- baking or frying the dough units to provide a whole-grain containing composite food product,

wherein said composite food product comprises the food component in a range amount of from about 10 wt.% to about 32 wt.%, on a dry weight basis, of the composite food product, and

wherein the food component comprises vegetables selected from the group consisting of onions, sweet potatoes, cabbage, carrots, spinach, broccoli, peas, beans, peppers, zucchini, okra, Brussels sprouts, cucumber, tomatoes, and any combinations thereof, or

wherein the food component comprises fruit selected from the group consisting of apples, strawberries, blueberries, raspberries, blackberries, peaches, apricots, pears, pineapples, oranges, grapes, cranberries, bananas, citrus fruits, figs, prunes, and any combination thereof,

and wherein the dough contains less than 5wt% added sugar and less than 1wt% added shortening or similar fat."

- XV. Claim 1 of the 4th auxiliary request is based on claim 1 of the main request wherein the lists for the fruits and vegetables have been turned into "closed" lists by replacing the wording "comprises" by "consists of".

- XVI. Claim 1 of the 5th auxiliary request is based on claim 1 of the main request wherein the alternative that the food component comprises vegetables has been deleted.
- XVII. The arguments of the appellant, insofar as they are relevant for the present decision, may be summarised as follows:
- The subject-matter of claim 1 of the main request lacked inventive step. There was no evidence of any unexpected effect. In its view, starting from D1 as closest prior art, the problem to be solved was merely to provide an alternative healthy snack and the claimed solution was obvious in view of D1 alone or in combination with any of the documents on file disclosing onion or tomatoes as flavourings and/or with the disclosure of D18 using 20% dehydrated apple;
 - The "New 1st Auxiliary Request" should not be admitted into the proceedings. It had been filed too late and included a new feature not hinted at during the whole opposition/appeal proceedings. The appellant had no opportunity to look for prior art relevant to this new feature;
 - The subject-matter of claims 1 of the 1st, 2nd and third auxiliary requests contravened the requirements of Articles 123(2), 84 and 56 EPC because
 - there was no direct and unambiguous disclosure in the application as filed of the now claimed combinations of features;
 - the weight basis of the added sugar and added shortening or similar fat was not clear;

- it was not clear what "added sugar" and "similar fat" was and
- the limitations added to the claims did not overcome the inventive step objections raised against the main request;

- The subject-matter of claims 1 of the 4th and 5th auxiliary requests lacked inventive step essentially because there was no evidence to support any unexpected effect resulting from the recited amount of the specific fruits now claimed.

XVIII. The relevant arguments of the respondent may be summarised as follows:

- The respondent agreed to D1 as the closest prior art. In its view the problem to be solved was the provision of a method for producing a healthier snack without compromising the machinability of the dough or the shelf stability of the final product. The addition of a high amount of fruit or vegetables was not hinted at either in D1 or in the other prior-art documents that added flavouring in very small amounts. The only document cited using a high amount of fruit, D18, related to quite a different product, namely a starch puff half-product. The skilled person would have expected that the addition of fruit/vegetables would disrupt the structure of the dough and the snack. The objections of the appellant were based on hindsight;

- The new 1st auxiliary request was filed as a reaction to the finding of the board that the subject-matter of claim 1 of the main request lacked an inventive step in view of D1 alone. It

was based on granted claims and there was no added subject-matter;

- The subject-matter of claim 1 of the 4th auxiliary request was limited to embodiments wherein the food component "consists of" the fruits or vegetables therein cited and was still further away from the disclosure of D1;
- The amendments made in claim 1 of the 3rd auxiliary request were, at least implicitly, supported in the application as filed. Moreover they were entirely clear, the basis for the added sugar and fat was weight percent and the fat used were specified in the description.

XIX. The appellant requested that the decision under appeal be set aside and that the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed (main request). Subsidiarily it requested that the patent be maintained with the claims according to the "New 1st Auxiliary Request", 4th, 3rd, 1st, 2nd or 5th auxiliary requests (in that order). The "New 1st Auxiliary Request" was filed on 27 November 2015 during the oral proceedings, the 1st to 5th auxiliary requests on 15 November 2013 with the reply to the statement of grounds of appeal.

Reasons for the Decision

MAIN REQUEST

1. *Interpretation of claim 1*

1.1 Claim 1 of the main request as upheld by the opposition division reads as follows (numbering of the features added by the board):

- (i) A method for producing a whole-grain containing composite food product, comprising:
- (ii) preparing a dough, comprising
- (iii) cooking whole grain cereal grain particles in the presence of water effective to gelatinize starch content of the whole grain cereal particles to provide gelatinized whole grain cereal grain particles,
- (iv) mixing the gelatinized whole grain cereal grain particles with starch, whole grain flour, optional leavening agent, and
- (v) a food component selected from the group consisting of vegetables and fruits, effective to prepare dough;
- (vi) forming the dough into discrete dough units;
- (vii) baking or frying the dough units to provide a whole-grain containing composite food product,
- (viii) wherein said composite food product comprises the food component in a range amount of from about 10 wt.% to about 32 wt.%, on a dry weight basis, of the composite food product, and
- (ix) wherein the food component comprises vegetables selected from the group consisting of onions, sweet potatoes, etc., or

(x) wherein the food component comprises fruit selected from the group consisting of apples, strawberries, etc.

1.2 Feature (viii) recites that the food component is in a range amount of from about 10 wt.% to about 32 wt.%, on a dry weight basis, of the composite food product. Since, however, the food component only "comprises" the specific vegetables or fruits (features (ix) and (x)), this weight range is not directed to any of the specific vegetables or fruits recited in features (ix) and (x). In other words, the range of 10 to 32 wt.% may include other vegetables or fruits in addition to those specified in features (ix) and (x), and there is no minimum amount for any of the listed vegetables or fruits.

1.3 Feature (iv) requires that *inter alia* starch is mixed with the gelatinized whole grain cereal grain particles. The board agrees with the respondent that a skilled person would read this feature as requiring the addition of starch as a "stand-alone ingredient" and not merely in the form of a starch-containing component, e.g. corn meal or whole brown rice flour. It is, however, noted in this context that the amount of starch to be added is not specified, so that the addition of very small amounts of starch is encompassed by the claim.

1.4 Lastly, it was contentious between the parties whether the term "fruit" included nuts, such as the peanuts used in example 11 of D1. There is, however, no need to decide this issue. As explained below, there is a general teaching in D1 of adding pieces of dried fruit to the dough. The use of nuts is simply preferred.

2. *Inventive step*

2.1 The patent relates to the production of composite food products made from gelatinized whole cereal grains and other natural food components, namely vegetables or fruits. It aims at the production of such shelf-stable whole grain-containing composite food products by preparing a dough by cooking whole grain cereal grain particles in the presence of water to provide gelatinized whole cereal grain particles, which are mixed with starch, whole grain flour and vegetables or fruits (see paragraph [0008]). It is stated in paragraph [0011] that the gelatinized starch developed in the cooked whole grain(s) assists in the formation of cohesive dough even with no or very low additional amounts of shortening or fat and/or sugar to the dough formulation.

2.2 Closest prior art

2.2.1 The appellant relied on D1 and, alternatively, D19 as the closest prior-art document. The board agrees with the respondent and the opposition division that indeed D1 represents the closest prior art. D19 is directed to a method for preparing extruded fried snack products from corn and other cereal flours (see title and claim 1), while the method of claim 1 (see feature (iii)) and the method of D1 use whole grain cereal particles as starting material .

2.2.2 D1 discloses the production of an unpuffed cereal grain dough, preferably a multigrain dough, suitable for the manufacture of fried snack foods. The dough comprises a total moisture content of about 20% to 35%, about 3% to 8% of added vegetable oil and nonionic emulsifier with the remainder being principally cooked grain and

optionally pieces of cooked unground whole red wheat and dried fruit discernible in the dough due to colour differences (see abstract).

2.2.3 In example 11 of D1 a dough was prepared which included cooked whole red wheat (corresponding to features (i) and (ii) of claim 1). As disclosed on page 23, last paragraph, the unground whole red wheat has been pregelatinized by cooking in the presence of water (see also page 19, lines 16 to 17). Since it is unground, it is present as particles. Thus, feature (iii) is disclosed by example 11. The dough of example 11 includes whole oat flour, i.e. whole grain flour, corn meal and whole brown rice flour, both containing starch, and ground peanuts (6.8 wt%). The dough is extruded into pellets which are then fried to produce individual fried snack food pieces (see page 24, second paragraph) and so features (vi) and (vii) of claim 1 are disclosed by example 11.

2.2.4 Thus, apart from the question as to whether peanuts are fruits (feature v), the subject-matter of claim 1 differs from the disclosure of example 11 of D1 by:

- the use of starch as "stand-alone ingredient" (part of feature (iv)); the board does not consider the mere addition of a starch-containing component, such as corn meal and whole brown rice flour, as meeting this requirement (see point 1.3 above);
- an increase of the amount of fruit/vegetable to a value of from 10 to 32% (dry weight) of the food product (feature (viii)); and

- the presence of one of the specific vegetables or fruits recited in features (ix) and (x).

2.3 Problem and solution

2.3.1 According to the respondent, the problem underlying the patent in the light of example 11 of D1 is to provide a method for producing a healthier snack, without compromising the machinability of the dough or the shelf stability of the final product (see paragraph [0011] of the patent specification).

2.3.2 Examples 1 and 2 of the patent show that snacks with the specified amount of fruit or vegetable can be obtained with the method of claim 1. The board is therefore satisfied that the above problem is credibly solved by the measures taken.

2.4 Obviousness

2.4.1 It remains to be decided whether the solution proposed for the problem, i.e. the method of claim 1, is obvious in view of the cited prior art. In other words, it is to be investigated whether the distinguishing features identified in point 2.2.4 above can justify the presence of an inventive step.

2.4.2 As regards the aspect of machinability of the technical problem, it is stated in paragraph [0022] of the patent specification that the use of (extraneous) starch assists in reducing the moisture content and in stiffening the dough to enhance its tolerance of sheeting or other dough machining treatments without tearing. It is, however, noted that good machinability is already achieved in D1 using starch-containing components. The replacement of corn meal or whole rice

flour, that is to say starch-containing compounds, by a non-defined amount of extraneous starch, or the mere addition of such a non-defined amount of extraneous starch to the already present starch-containing compounds is therefore a routine modification of the method of D1 and thus obvious for the skilled person;

- 2.4.3 Concerning the aspect of producing a healthier snack, it is undisputable that it is common general knowledge in the food manufacturing art that increasing vegetable or fruit content may increase the vegetable or fruit taste and may also provide a natural source of vitamins and minerals to provide a "healthier snack".

In this context, there was a dispute between the parties whether the term "fruit" included nuts, such as the peanuts used in example 11 of D1. Claim 1 of D1 relates to a cooked dough composition, whereby 15 to 30% of said dough are pieces of food which have a different coloration from the cooked ground grain and are visually discernible in the composition, said pieces of food being selected from the group consisting of gelatinised unground whole red wheat and dried fruit. It is apparent from the disclosure of D1 that "dried fruit" has to be read in rather general terms, and that nuts are only considered to be a particularly preferred embodiment of dried fruit. Thus, it is explicitly stated at the top of page 13 of D1 that "Apart from the whole red wheat, the food pieces can be made up of dried fruit, particularly nuts." Since the teaching of D1 is not restricted to the particular embodiment of example 11, the question as to whether the peanuts of example 11 qualify as fruit, becomes moot.

Concerning the specific amount of fruit of from 10 to 32 wt.%, on a dry weight basis, it is considered that this range is obvious in view of the whole teaching of D1. The reason is that D1 clearly discloses the addition of pieces of food selected from the group of gelatinized unground whole red wheat and dried fruit to the dough in amounts that overlap with the range now claimed. Thus, apart from claim 1 (see above), D1 discloses at page 12, lines 15 to 17 that the cooked dough composition comprises up to 32% of pieces of food which are visually discernible in the composition due to color differences of the food pieces from the base feed. Apart from whole red wheat, the food pieces can be made up of dried fruit, particularly nuts (page 13, lines 1 to 3). Furthermore, the third paragraph at page 16 discloses that when a portion of the ground grain is substituted with gelatinized unground whole red wheat or pieces of fruit, the quantity by weight of such pieces can vary from about 10 to 32% of the dough composition, preferably from about 15 to 20% on a dry, moisture free basis, based on the weight of the dough composition.

Nothing inventive can be seen in specifying an amount of from 10 to 32 wt.% for the fruit component, which overlaps to a great extent with the range generally disclosed in D1. As set out above, up to 32% of pieces of food in the form of whole pieces of grain and/or of dried fruit (fruit in a broad sense) can be present in D1 in a form which can withstand the further processing of the dough composition after it exits from the extruder (see paragraph bridging pages 12 and 13), that is to say, in a form that would not disrupt the structure of the dough and/or final product and thus not affect the machinability of the dough or the shelf stability of the final product.

It follows from the above that the amount of fruit used overlaps to a great extent with the amount used in D1 and can therefore also not be used to justify an inventive step.

2.4.4 Lastly, the specific selection of the fruits listed in feature (x) must be examined. As pointed out by the appellant during the oral proceedings and as exemplified by the various documents discussed in paragraphs 68 to 82 of its statement of grounds of appeal, it was common general knowledge to add specific dried fruits such as apricots, raisins or apples to snack foods (see, for instance the apple chip product of example 3 of D18 containing 20% of dehydrated apple). Thus, the selection of such specific fruits cannot contribute to an inventive step.

2.4.5 For these reasons, the board concludes that at least the "fruit alternative" of claim 1 is not based on an inventive step.

2.4.6 The respondent argued that the claimed method was not obvious essentially because the skilled person would have no motivation to add the claimed (relatively high) quantity of fruit/vegetable component to the dough without an expectation that the addition would disrupt the dough and product.

It appears that the respondent's argument is, at least in part, based on the assumption that the disclosure of D1 is limited to peanuts and that nuts should not be considered as fruits. However, as pointed out above, the teaching of D1 is not limited to the use of nuts but discloses the use of pieces of fruit in general.

2.4.7 In view of the disclosure of D1, the skilled person would arrive at the method of claim 1 in an obvious manner and the subject-matter of claim 1 therefore lacks an inventive step.

NEW 1ST AUXILIARY REQUEST

3. *Admissibility*

3.1 This request was filed by the respondent during the oral proceedings after the board had concluded that the main request was not allowable, i.e. at the very last moment.

The respondent justified the late filing as being a result of the negative finding of the board that the main request lacked inventive step in view of the disclosure of document D1 alone. The amendments were made to deal with the concept of the invention as set out in granted claims 17 and 20, whereby the mixing ratio has been further limited to the values disclosed in paragraph [0012] of the patent specification. Thus, although admittedly the preferred range for the ratio had been taken from the description, the feature of the mixing ratio was already present in the granted claims and the arguments for inventive step were in line with those used for the main request.

3.2 The board cannot agree with this. The amendment concerning the requirement that the whole grain particles and vegetables (or fruits) are mixed in a mixing ratio of 30:70 to 50:50, on a wt%:wt% basis, shifts the claimed subject-matter in a new direction that could not have been foreseen from the written proceedings.

Moreover, there is no indication in the patent specification that the added feature would overcome the inventive step objection against the main request. As not disputed by the respondent, apparently none of the examples in the patent is within the scope of amended claim 1. Thus, it was highly questionable how the amendment indeed affected the assessment of inventive step.

Furthermore, the respondent had already filed auxiliary requests during the written proceedings limiting the scope of the claims with features such as the low levels of added sugar and added fat (1st and 3rd auxiliary requests) or the direct feeding of the dough in its mixed heated condition from the dough mixer to dough machining stations (2nd and 3rd auxiliary requests) going in quite different directions. The amendment now made relied, at least partially, on a feature from the description, which had not been discussed before. Thus, the amendment unexpectedly shifted the scope of the claim in a new direction at a late stage in the proceedings.

3.3 Consequently, the board exercised its discretion not to admit "New 1st Auxiliary Request" into the proceedings (Article 13(1) RPBA).

4TH AUXILIARY REQUEST

4. Inventive step

4.1 Claim 1 of the 4th auxiliary request is based on claim 1 of the main request wherein the lists of fruits and vegetables have been made into closed "consisting" lists.

- 4.2 With this amendment the claim now mandatorily requires that the fruits or vegetables listed in features (ix) and (x) are present in an amount of from 10 wt.% to 32 wt.% of the food product.
- 4.3 This amendment was made by the respondent in order to exclude the possibility that the listed fruits/vegetables would be present in very small amounts and other non-listed vegetables or fruits would make up the total 10 to 32 wt% (see point 1.2 above).
- 4.4 However, this amendment cannot overcome the inventive step objection in relation to the main request. The board held that the subject-matter of claim 1 of the main request was obvious in view of the teaching of D1 that allows up to 32% of pieces of food in the form of whole pieces of grain or of dried fruit (see main request). This still applies to the subject-matter of claim 1 of the 4th auxiliary request which therefore lacks inventive step for the same reasons as the subject-mater of claim 1 of the main request.

3RD AUXILIARY REQUEST

5. *Amendments*

- 5.1 Compared to claim 1 of the main request (see point 1.2 above), claim 1 of the 3rd auxiliary request specifies the temperature in the cooking step (iii) that now reads:

(iii') *cooking at a temperature of from 49°C to 93°C under atmospheric pressure in a dough mixer whole grain cereal grain particles in the presence of water effective to gelatinize starch content of*

the whole grain cereal particles to provide gelatinized whole grain cereal grain particles,

includes an extra step (feature (iii')) wherein the dough is fed in heated condition to the forming step:

(iii') feeding the dough to dough machining stations in its heated condition of from 49°C to 93°C (120°F to 200°F);

and introduces a further limitation, namely the amount of added sugar and fat by specifying:

(xi) [that] the dough contains less than 5 wt% added sugar and less than 1 wt% added shortening or similar fat.

5.2 Concerning feature (iii') the respondent relied on the disclosure of paragraph [0021] of the application as filed wherein it is stated that:

"Referring to FIG. 2, in this particular embodiment whole grain particles are heated/cooked in the presence of water under atmospheric pressure conditions, such as in a dough mixer adapted for steam injection and open to the atmosphere...".

Concerning feature (iii') it relied on the disclosure of paragraph [0025], namely that:

"One of the discoveries of the present invention is that the dough composed of gelatinized whole grains and fruit or vegetables can be fed directly in its mixed heated condition (e.g., about 120°F to about 200°F) from the dough mixer to dough machining stations".

5.3 It is noted, however, that these two paragraphs are more specific than the amendments incorporated into claim 1. Thus, paragraph [0021] specifies that the dough mixer is adapted for steam injection and paragraph [0025] requires that the dough be fed directly from the dough mixer to dough machining stations.

By omitting these underlined features, the subject-matter of amended claim 1 now embraces embodiments not disclosed in the application as filed, namely those embodiments wherein any dough mixer (that is to say including those not adapted for steam injection) and embodiments wherein the dough is not fed directly to the dough mixer. These embodiments now claimed find no support in the application as filed.

5.4 The board cannot accept the argument of the respondent that these limitations would be implicit in the amended claim 1. By not incorporating the word "directly" into the claim, the claim now allows a step of cooling the dough to a temperature below the claimed range and a later step of warming it before feeding it to the dough machining station. Similar argumentation applies to the deletion of the requirement that the dough mixer should be one mixer adapted for steam injection. The claim now embraces the use of any dough mixer. There is no implicit limitation of the claim to the features not incorporated. These two amendments therefore contravene the requirements of Article 123(2) EPC.

5.5 Concerning feature (xi), the board agrees with the appellant that the weight basis of the "added sugar" and "added shortening or similar fat" is not clear. It is firstly not clear whether the weight basis is on a wet or on a dry basis, or whether the weight basis is

by weight of the dough including or excluding the added sugar and added shortening or similar fat. Further, the expression "similar fat" gives no information as to which fats are meant and leaves completely open the nature of the fat that could be similar to the added shortening. Therefore this amendment contravenes the requirements of Article 84 EPC.

5.6 In summary, the amendments made to claim 1 of the 3rd auxiliary request contravene the requirements of Articles 123(2) (see point 5.4 above) and 84 EPC (see point 5.5).

1ST, 2ND AND 5TH AUXILIARY REQUESTS

6. None of the parties provided further arguments as to the 1st, 2nd and 5th auxiliary requests, basically because it was evident that the reasons for non-allowance of the previous requests also applied to these requests.

6.1 Claim 1 of auxiliary request 1 includes the limitation concerning the low levels of added sugar and added fat. Thus, this claim is not allowable because this feature lacks clarity (point 5.5 above).

6.2 Claim 1 of the 2nd auxiliary request includes features (iii') and (iii'') relating to the "hot feeding" method, both of which are not supported by the disclosure of the application as filed (point 5.4 above).

6.3 Lastly, in claim 1 of the 5th auxiliary request the "vegetable alternative" was deleted, but the fruit alternative of claim 1 of the 4th auxiliary request was

maintained. As set out in point 4.5 above, this fruit alternative lacks inventive step.

7. It follows that none of the requests of the respondent is allowable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



M. Cañueto Carbajo

W. Sieber

Decision electronically authenticated