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**Datasheet for the decision
of 12 March 2015**

Case Number: T 1505/13 - 3.3.09

Application Number: 03756998.5

Publication Number: 1513410

IPC: A23C9/154, A23C9/13, A23L1/035

Language of the proceedings: EN

Title of invention:
GELATINE FREE DAIRY DESSERT

Patent Proprietor:
Campina B.V.

Opponent:
DuPont Nutrition Biosciences ApS

Headword:

Relevant legal provisions:
EPC Art. 54, 84, 114
RPBA Art. 15(3), 12(2)

Keyword:
Late-filed document - admitted (yes)
Main request and auxiliary requests 1 to 6 - novelty (no)
Auxiliary requests 5 to 7 - clarity (no)

Decisions cited:
G 0001/84, T 0156/84, T 1002/92

Catchword:



**Beschwerdekammern
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Chambres de recours**

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Case Number: T 1505/13 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 12 March 2015

Appellant: Campina B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
6 May 2013 concerning maintenance of the
European Patent No. 1513410 in amended form.**

Composition of the Board:

Chairman W. Sieber
Members: N. Perakis
E. Kossonakou

Summary of Facts and Submissions

- I. Mention of the grant of European patent No. 1 513 410 to Campina B.V. was published on 3 December 2008 (Bulletin 2008/49). Claims 1 and 9 read as follows:

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier comprises a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.2-2.5%w/w".

"9. Composition for use as a gelatine replacer, in particular in dairy desserts, comprising 20-70w/w% unsaturated emulsifier, comprising a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids, 2-20w/w% of milk protein and/or soy protein, and 20-78w/w% carbohydrates".

- II. A notice of opposition was filed against the patent by Danisco A/S, now DuPont Nutrition Biosciences ApS, requesting the revocation of the patent on the grounds that the claimed subject-matter was neither novel nor inventive (Article 100(a) EPC), that it extended beyond the content of the application as filed (Article 100(c) EPC) and that the European patent did not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art (Article 100(b) EPC).

The documents cited in the opposition proceedings included:

D8: US 4127679 A.

III. In its interlocutory decision announced orally on 18 October 2012 and issued in writing on 6 May 2013, the opposition division held that the subject-matter of claim 1 of the main request lacked novelty over D8 and considered auxiliary requests 1-3 inadmissible under Rule 80 EPC and Article 84 EPC. The patent was maintained in amended form on the basis of auxiliary request 4, claim 1 of which read as follows (amendments over claim 1 as granted underlined):

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.6-2.5% w/w".

IV. Appeals were filed by both the patent proprietor and the opponent against this interlocutory decision. As the patent proprietor and the opponent are respectively both appellant and respondent in these proceedings, for simplicity the board will continue to refer to them as the patent proprietor and the opponent.

V. The patent proprietor filed its appeal on 3 July 2013 and paid the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 12 September 2013 and included a main request and auxiliary requests 1 to 4. The relevant claims of these requests read as follows:

Main request

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride

glycerol esters of unsaturated fatty acids and is present in an amount of 0.2-2.5% w/w".

Auxiliary request 1

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.2-2.5% w/w, and wherein said dessert comprises a hydrocolloid".

"2. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.6-2.5% w/w".

Auxiliary request 2

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in (i) an amount of 0.2-2.5% w/w, wherein said dessert comprises a hydrocolloid; or (ii) an amount of 0.6-2.5% w/w".

Auxiliary request 3

Claim 1 is identical to claim 1 of auxiliary request 4 before the opposition division (see point III above).

Auxiliary request 4

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier,

characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.6-2.5% w/w, wherein said dessert comprises a hydrocolloid".

- VI. The opponent filed its appeal on 5 July 2013 and paid the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 6 September 2013 and included new document D11 and technical evidence E16:

D11: WO 93/24019 A1,

E16: Repetition of Composition A of Example 1 and Example 2.

According to the opponent, the subject-matter of claim 1 of auxiliary request 4 upheld by the opposition division (auxiliary request 3 in these appeal proceedings) lacked novelty over D11.

- VII. By letter of 17 January 2014 (erroneously dated 2013) the patent proprietor filed observations on the appeal of the opponent and requested that late-filed documents D11 and E16 not be admitted into the proceedings. It also filed clean copies of the main request and auxiliary requests 1 to 4 and new auxiliary requests 5 to 7. Auxiliary requests 5 to 7 were filed in reaction to the novelty objection based on D11 in case the board should be inclined to admit D11 into the proceedings. Claim 1 of each of these requests reads as follows:

Auxiliary request 5

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier

constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.2-2.5% w/w, and wherein said dessert comprises a hydrocolloid, wherein said dessert is a non-aerated dessert or an aerated mousse or aerated creme".

Auxiliary request 6

"1. Gelatin free dairy dessert comprising less than 10% w/w fat and an unsaturated emulsifier, characterised in that said unsaturated emulsifier constitutes of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids and is present in an amount of 0.6-2.5% w/w, wherein said dessert is a non-aerated dessert or an aerated mousse or aerated creme".

Auxiliary request 7

"1. Composition for use as a gelatine (sic) replacer, in particular in dairy desserts, comprising 20-70 w/w% unsaturated emulsifier, constituting of a mixture of mono- and diglyceride glycerol esters of unsaturated fatty acids, 1-30 w/w% spray drying aid and 3-90 w/w% filling agent, said composition comprising 2-10 w/w% of milk protein and/or soy protein, and 20-78 w/w% carbohydrates".

VIII. By letter of 23 January 2014 the opponent argued that the main request and auxiliary requests 1-3 lacked novelty in view of D8 and D11. Furthermore, it filed an additional document, D12:

D12: R.J Whitehurst, "Emulsifiers in Food Technology", Blackwell Publishing Ltd, 2004, pp. 41-42.

- IX. On 18 November 2014 the board summoned the parties to oral proceedings.
- X. On 17 December 2014 the board issued a communication expressing its preliminary non-binding view on the appeals. The board indicated *inter alia* that D11 appeared to be *prima facie* highly relevant and thus susceptible to be admitted into the proceedings.
- XI. By letter dated 12 February 2015 the opponent filed objections against the patentability of the subject-matter of auxiliary requests 5 to 7 (lack of novelty against claim 1 of auxiliary requests 5 and 6 and lack of clarity against claim 1 of auxiliary request 7). It also filed a copy of E16 with photographic images in colour.
- XII. By letters dated respectively 4 March 2015 and 6 March 2015 the opponent and the patent proprietor announced that they would not attend the oral proceedings. Both parties maintained their requests on file.
- XIII. On 12 March 2015 oral proceedings were held before the board in the absence of the parties under Rule 115(2) EPC and Article 15(3) of the Rules of Procedure of the Boards of Appeal.
- XIV. The patent proprietor requested in writing that the decision of the opposition division be set aside and that the patent be maintained on the basis of the claims of the main request or any one of auxiliary requests 1 to 7, all requests filed with letter of 17 January 2014 (erroneously dated 2013). It further requested that document D11 not be admitted into the proceedings.

XV. The opponent requested in writing that the decision of the opposition division be set aside and that the patent be revoked in its entirety. It further requested that document D11 be admitted into the proceedings.

Reasons for the Decision

1. The appeals are admissible.

2. Admittance of D11

2.1 The board acknowledges that D11 was submitted by the opponent well outside the nine-month period set by Article 99(1) EPC, namely together with the statement setting out the opponent's grounds of appeal.

2.2 However, according to Article 114(1) and (2) EPC, the European Patent Office shall examine the facts of its own motion or may disregard facts or evidence which are not submitted in due time.

2.3 According to decision G 1/84 (OJ EPO 1985, 299, point 3 of the reasons, first sentence) "... the elaborate provisions in the EPC for substantive examination and opposition are designed to ensure that **only valid European patents should be granted and maintained in force**, so far as it lies within the power of the EPO to achieve this" (emphasis added by the board).

This was confirmed by T 156/84 (OJ EPO 1988, 372), which stated in its headnote:

"The principle of examination by the EPO of its own motion (Article 114(1) EPC) takes precedence over the possibility of disregarding facts or evidence not submitted in due time. This follows from the EPO's duty

vis-à-vis the public not to grant or maintain patents which it is convinced are not legally valid."

It follows from the above that a document late filed in opposition-appeal proceedings may be admitted by the board, in particular in a situation where it is *prima facie* prejudicial to the maintenance of the patent (see also T 1002/92, OJ EPO 1995, 605, headnote).

- 2.4 In the present case, the patent proprietor did not dispute that D11 was novelty-destroying for the subject-matter of claim 1 of the main request and auxiliary requests 1 to 4 (see letter of 17 January 2014, page 4). On the contrary, this was implicitly acknowledged when the patent proprietor justified the late filing of auxiliary requests 5 to 7 with the necessity to deal with the novelty objection (against the hierarchically higher requests) in view of D11.
- 2.5 In view of the undisputed relevance of D11, this document was admitted into the proceedings.
3. Main request (Novelty)
- 3.1 Claim 1 relates to:
- (i) a gelatin-free dairy dessert comprising
 - (ii) less than 10 %w/w fat and
 - (iii) an unsaturated emulsifier
 - (iv) which constitutes of a mixture of mono- and diglyceride glycerol glycol esters of unsaturated fatty acids and
 - (v) is present in an amount of 0.2-2.5 %w/w.
- 3.2 The board concurs with the opponent that the subject-matter of claim 1 of the main request (see above point V) lacks novelty in view of D11.

Specifically, D11 discloses in claim 1 a zero-fat frozen dessert product comprising:

- milk solid not fat, whey solids of mixtures thereof,
- carbohydrates, sugar alcohols or mixtures thereof,
- stabilizer,
- from 0.1 to 3% by weight of emulsifier.

Page 8, lines 18 to 26, exemplifies zero-fat whipped frozen dessert products which, according to the following recipe, are gelatin-free:

- skimmed milk powder 12%;
- sugars 22%;
- stabilizer blend 0,35%;
- emulsifier(s) 0.6-1%;
- vanilla/cream flavour 0.3-0.4%;
- colour 0.0325%;
- water up to 100%.

Thus, the recipe explicitly discloses features (i), (ii) and (v) of claim 1 of the main request.

According to table 1 and page 9, lines 19-24, all emulsifiers used in the examples mainly comprise mono- and diglycerides. The unsaturated nature of the emulsifier is clearly shown by the iodine value in table 1, which for experiments 3 and 6 to 11 is at least 10. As pointed out on page 2, lines 29-31 of D11, it is common practice to regard fatty acids or derivatives thereof having an IV of larger than 3 as being at least partly unsaturated. Thus, at least experiments 3 and 6 to 11 also have features (iii) and (iv) of claim 1 as granted.

Accordingly, the subject-matter of claim 1 of the main request lacks novelty in view of D11 so that the main request is not allowable.

4. Auxiliary request 1 (Novelty)

4.1 The subject-matter of claim 1 of auxiliary request 1 (see above point V) differs from that of the main request only in that the dessert comprises a hydrocolloid. However, the zero-fat whipped frozen dessert products from the recipe on page 8 of D11 also comprise a hydrocolloid. The stabilizer blend used in the recipe contained locust bean gum and carrageenan (page 8, lines 28-33). The patent in suit itself acknowledges that these compounds are examples of hydrocolloids known in the art (paragraph [0018]). Thus, the subject-matter of claim 1 of this request also lacks novelty in view of at least experiments 3 and 6 to 11 of D11.

4.2 The alternative dessert of claim 2 of auxiliary request 1 (see above point V) differs from claim 1 of the main request only in that the amount of unsaturated emulsifier has been restricted to 0.6-2.5 %w/w. This range is not new in view of experiments 3 and 6 to 11 of D11, which disclose an emulsifier content of 0.7% and 1% by weight, respectively (see table 1). Thus also claim 2 of this request lacks novelty in view of D11.

4.3 Consequently, auxiliary request 1 is not allowable.

5. Auxiliary request 2 (Novelty)

Claim 1 of auxiliary request 2 (see above point V) merely combines the two alternatives of claims 1 and 2 of auxiliary request 1 in a single claim. As already set out above regarding auxiliary request 1, none of these alternatives is novel in view of D11. Therefore auxiliary request 2 is not allowable.

6. Auxiliary request 3 (Novelty)

Claim 1 of auxiliary request 3 (i.e. the request maintained by the opposition division, see point III above) is identical to claim 2 of auxiliary request 1, which as set out above lacks novelty in view of D11. Therefore auxiliary request 3 is not allowable either.

7. Auxiliary request 4 (Novelty)

The subject-matter of claim 1 of auxiliary request 4 (see point V above) differs from that of claim 2 of auxiliary request 1 only in that the gelatin-free dairy dessert comprises a hydrocolloid. However, the dessert disclosed on page 8 of D11 comprises a stabilizer blend, which, as set out above, is a blend of hydrocolloids (see point 4.2 above).

Therefore the subject-matter of claim 1 lacks novelty in view of D11, with the consequence that auxiliary request 4 is not allowable either.

8. Auxiliary request 5 (Novelty)

The subject-matter of claim 1 of auxiliary request 5 (see point VII above) differs from claim 1 of auxiliary request 1 in that the dessert is further defined as a non-aerated dessert or an aerated mousse or an aerated creme.

However, the added features cannot establish novelty with respect to D11. In particular, the first paragraph on page 9 of D11 makes it clear that the mixtures of table 1 are stored overnight at about 5°C before being aerated. The board agrees with the opponent that such "intermediate" mixtures meet all the requirements of

the claim with respect to the alternative "non-aerated" dessert. These "intermediate" mixtures are certainly suitable for use as a dairy dessert and there is nothing about such mixtures that would make them unsuitable for consumption, an argument which was not challenged by the patent proprietor.

Thus D11 is novelty-destroying also for the subject-matter of claim 1 of this request so that auxiliary request 5 is likewise not allowable.

9. Auxiliary request 6 (Novelty)

The subject-matter of claim 1 of auxiliary request 6 (see point VII above) differs from that of auxiliary request 5 only in that the unsaturated emulsifier is present in a more restricted amount, namely 0.6-2.5 %w/w.

As set out in point 4.2 above, in experiments 3 and 6 to 11 of D11, 0.7% and 1% by weight of emulsifier was used. Consequently, the subject-matter of claim 1 of auxiliary request 6 lacks novelty in view of D11 and this request is not allowable.

10. Auxiliary request 7 (Clarity)

Claim 1 of auxiliary request 7 (see above point VII) relates to a composition comprising:

- 20-70 w/w% unsaturated emulsifier,
- 1-30 w/w% spray drying aid, and
- 3-90 w/w% filling agent,
- 2-10 w/w% of milk protein and/or soy protein, and
- 20-78 w/w% carbohydrates.

[amendments over claim 9 as granted (see point I above) underlined]

The introduction into the subject-matter of claim 1 of auxiliary request 7 of a spray drying aid at 1-30 w/w% and a filling agent at 3-90 w/w% in addition to the other constituents of the composition leads to the skilled person being in doubt as to the possible amounts of each component which should be present.

In particular, the claim requires the presence of 20-78 w/w% carbohydrates and 3-90 w/w% filling agent. However, according to paragraph [0017] of the patent specification, carbohydrates have an important role as a filling agent. Thus, the claim defines one and the same constituent in two different ways, namely in structural terms (carbohydrates) and functional terms (filling agent). This leads to a significant contradiction since on the one hand up to 90 w/w% of carbohydrates might be present as a filling agent, yet this would not be possible since the upper limit for carbohydrates is 78 w/w%.

The same argument applies to milk protein and soy protein which are spray drying agents (see paragraph [0015] of the patent specification).

For this reason claim 1 of auxiliary request 7 lacks clarity, with the consequence that this request is not allowable.

11. Since none of the requests is allowable the patent has to be revoked.

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