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Datasheet for the decision of 15 January 2019

Case Number: T 0757/14 - 3.3.09

Application Number: 02754595.3

Publication Number: 1401296

IPC: A23L1/40, A23L1/29, A23L1/314, A23L1/22, A23L1/325, A23L1/237, A23P1/02, A23P1/08

Language of the proceedings: EN

Title of invention:
SOFT BOUILLON TABLET

Patent Proprietor:
Nestec S.A.

Opponents:
UNILEVER N.V. / UNILEVER PLC

Relevant legal provisions:
EPC Art. 56
RPBA Art. 13(1)

Keyword:
Inventive step - obvious alternative

Decisions cited:
T 0174/14, T 0306/14, T 0068/85

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Beschwerdekammern

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Case Number: T 0757/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 15 January 2019

Appellant: (Patent Proprietor)	Nestec S.A. Avenue Nestlé 55 1800 Vevey (CH)
Representative:	Elleby, Gudrun Nestec S.A. Avenue Nestlé 55 1800 Vevey (CH)
Respondents: (Opponents)	UNILEVER N.V. Weena 455 3013 AL Rotterdam/ UNILEVER PLC Unilever House, Blackfriars London EC4P 4BQ (NL)
Representative:	Reijns, Tiemen Geert Pieter Unilever Patent Group Olivier van Noortstraat 120 3133 AT Vlaardingen (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 6 December 2013 revoking European patent No. 1401296 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	F. Rinaldi
	F. Blumer

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the patent proprietor against the decision of the opposition division to revoke European patent No. EP 1 401 296.

II. In the opposition proceedings, the joint opponents had requested revocation of the patent on the grounds under Article 100(a) (lack of novelty and lack of inventive step) and Article 100(b) EPC.

III. The documents discussed in the appealed decision included:

D8: EP 0 780 058 A1.

IV. In the appealed decision, the opposition division held that the subject-matter of claim 1 of the main request and of auxiliary request 1 lacked inventive step.

V. This decision was appealed by the patent proprietor (appellant).

VI. After their reply to the statement setting out the grounds of appeal, the opponents (respondents) filed, by letters of 24 May 2017 and 11 July 2017, additional arguments and requested that the following documents be admitted into the proceedings:

D18: GNPD database: Products "Oxo" and "Biosun"
D19: English translation of D19a (JP 11-276144)
D19a: JP 11-276144
D20: EP 1 404 188 B1
D21: EP 1 401 295 B1.

VII. By telefax dated 29 August 2017, the appellant filed a new main request. Claim 1 of this request reads:

"1. A soft bouillon and/or seasoning tablet, which comprises, in total tablet weight %, from 3 to 60%, preferably from 10 to 60%, and more preferably from 15 to 60% of an oil and possibly fat, from 5 to 70% of a fine filler, up to 79% of a coarse filler, and, in total oil and fat weight %, up to 5% or preferably up to only 1% fat, as well as optionally spices, flavours, dehydrated vegetables, herb leafs and/or plant extracts;
wherein the fine filler is a milled crystalline ingredient, the fine filler comprising fine particles having a mean diameter of from 5 to 80 µm;
and wherein the total amount of fine filler is up to 70%."

The appellant also filed the following document:

D22: WO 2006/063690 A1.

VIII. The parties were summoned to attend oral proceedings held on 15 January 2019.

IX. Final requests:

The appellant requested that the decision under appeal be set aside and the patent be maintained on the basis of the new main request filed by letter dated 29 August 2017.

The respondents requested that the appeal be dismissed.

X. The arguments of the appellant pertinent to the present decision may be summarised as follows:

D19 did not disclose: (a) soft bouillon tablets; (b) milled crystalline ingredients; and (c) the claimed mean particle size for the fine filler. Moreover, the skilled person would disregard D19 as the closest prior art to solve the technical problem of providing a soft bouillon tablet because it did not refer to soft bouillon tablets.

XI. The arguments of the respondents pertinent to the present decision may be summarised as follows:

D19 was the closest prior art. The only difference was the mean diameter of the fine filler, which did not have any technical effect. Thus, the technical problem was the provision of alternative bouillon tablets. However, the skilled person would inevitably arrive at the claimed mean diameter. D8 confirmed this.

Reasons for the Decision

1. *Amendment to the parties' cases*

In the present case, both parties have substantially amended their cases after the filing of the grounds of appeal and the corresponding reply: The respondents filed D18 to D21 including new arguments, and the appellant filed a new main request and D22. These amendments to the parties' cases were triggered by the outcome of two earlier technically related cases involving the same parties, T 174/14 and T 306/14. Both the parties and the board were aware of the relevant

issues and had ample time to consider these. Since, furthermore, there was no request to not admit any of the new submissions, the board exercised its discretion to admit all new submissions into the proceedings (Rule 13(1) RPBA).

2. During the oral proceedings, the discussion focused on whether the subject-matter of the main request was novel over D19 and, if novelty were acknowledged, if it involved an inventive step.

3. *Main request - inventive step*

3.1 As set out in the opposed patent (paragraph [0004]), the invention relates to a soft bouillon tablet which only or mainly contains oil, especially a healthy oil rich in monounsaturated fatty acids and/or polyunsaturated fatty acids, and no or only little amounts of fat apart from non-fat conventional bouillon ingredients.

3.2 Prior art document D19

The respondents argued that if novelty over D19 were to be acknowledged, this document represented the closest prior art.

D19 relates to a powdery food (seasoning composition) and a method for manufacturing it. In the process of D19, a mixture of fat/oil and a powdery food is compressed to reduce the oozing out of fat/oil onto the surface of the obtained product. The addition of water is not necessary (paragraph [0007]). As described in paragraphs [0041] and [0042], a seasoning composition

was prepared by adding extra virgin olive oil (20 g) to a mixture of 30 g of dextrin, 20 g of powdery vinegar, 28 g of salt and 2 g of sodium glutamate. The combined ingredients were mixed, the resulting uniform mixture was compressed by a compressive granulation machine and roll pressure was applied. The product was moulded into a plate shape, which was further processed to a powder (paragraph [0042]). The products of D19 can be made in various sizes and dosage forms, including tablets (paragraph [0043]).

3.3 The appellant argued that D19 did not disclose the following three features of claim 1, namely:

(a) **soft** bouillon tablets;
(b) **milled** crystalline ingredients; and
(c) a mean diameter of from 5 to 80 µm for the fine filler.

3.4 Feature (a): soft bouillon tablets

3.4.1 The expression "soft bouillon tablet" is open to interpretation due to the qualifier "soft" which is a relative term. Although claim 1 defines some of the ingredients to be used in the tablet, it does not further define or limit the expression "soft".

3.4.2 According to the appellant, the term "soft bouillon tablet" had a specific meaning in the art which did not apply to the product of D19. In this context, it referred to D22, a patent application filed in the name of Unilever PLC (one of the joint respondents) and Hindustan Lever Limited. D22 discusses on page 1 (under the header "Background of the invention") that in industry a distinction is made between hard and soft

bouillon cubes and how these two types of cubes behave when squeezed between fingers.

3.4.3 However, the definition in D22 has no bearing on how to interpret the expression of claim 1 of the main request. Firstly, D22 was published in 2006, some five years after the effective filing date of the opposed patent, and D22 is a patent application. It is therefore not convincing that D22 provides evidence on how a skilled person would have interpreted the term "soft bouillon tablet" in claim 1 at the effective filing date of the patent.

3.4.4 Secondly, and more importantly, there is no need to rely on D22 for interpretation because the opposed patent itself provides in paragraph [0011] a definition for the term "soft bouillon tablet". According to this passage, it means "tablet obtained by forming a pasty mass of a mixture of powdered bouillon components with oil and possibly fat into a tablet shape".

It follows from this definition that a tablet falling under the scope of claim 1 can be obtained by mixing powdered bouillon components with oil (and possibly fat) to form a pasty mass. The bouillon tablets described in D19 (paragraph [0041] to [0043]) were prepared by combining bouillon ingredients in dry, powdered form with a considerable amount of oil (20% by weight), mixing these ingredients and shaping the mixture into a plate or eventually into tablets. Thus, what is disclosed in the opposed patent concerning the soft bouillon tablet does not appear to differ from the disclosure of D19.

3.4.5 In view of these considerations, the board can only arrive at the conclusion that the bouillon tablet

obtainable from the composition described in D19, and which includes 20% by weight of olive oil must be regarded as a soft tablet.

3.4.6 The appellant referred to T 68/85 to support its argument that it was permissible to define the claimed subject-matter using a functional feature, which in the context of the present case was "soft bouillon tablet". Such a feature had to be understood as a distinguishing feature. The board agrees with the appellant that the term "soft" cannot be neglected when assessing the scope of claim 1 and the distinguishing features with respect to D19. However, the board considers this feature implicitly disclosed in D19. In view of this, it serves no purpose to further discuss to what extent T 68/85 may be pertinent to the present case.

3.5 Feature (b): milled crystalline ingredients

3.5.1 The appellant argued that the crystalline ingredients (salt and sodium glutamate) used in D19 were not milled.

3.5.2 As pointed out by the respondents, it is almost inconceivable that the salt and the sodium glutamate used in the composition of D19 had not been subjected to a previous milling step. However, in view of the meaning the patent itself gives to the term "milled", it is irrelevant whether an ingredient has actively undergone a milling step.

In paragraph [0013] of the patent specification, it is stated that "the expression 'fine filler' means 'a powdered filler which has been milled to an especially fine granulometry or which has an especially fine granulometry'". Thus, if anything, the patent

associates a rather undefined granulometry with the term "milled". Only the alleged distinguishing feature (c) attempts to define the granulometry of the fine filler more precisely via the mean diameter.

3.5.3 In view of the above, the crystalline ingredients of D19 (salt and sodium glutamate), which are in the form of a powder must be considered "milled" within the broad meaning given to this term by the patent.

3.6 Feature (c): the mean diameter of from 5 to 80 µm

3.6.1 It was a matter of dispute how the feature "the fine filler **comprising** fine particles having a mean diameter of from 5 to 80 µm" had to be interpreted. In contrast to the appellant, the respondents considered that the mean diameter did not relate to all fine particles. According to them, the term "comprising" allowed for a fine filler to contain only two particles with a mean diameter of 5 to 80 µm. It was not conceivable that the crystalline ingredients used in D19 did not have two particles with this mean diameter. Therefore, the mean diameter was also not a distinguishing feature.

3.6.2 However, in favour of the appellant, the board interprets claim 1 in such a way that the mean diameter of from 5 to 80 µm relates to all particles of the fine filler, at the very least to give this feature stemming from granted claim 5 a sensible technical meaning.

3.6.3 D19 does not disclose the claimed mean diameter. Thus, the subject-matter of claim 1 differs from D19 only by feature (c). It goes without saying that therefore the respondents' novelty objection fails.

3.7 Closest prior art

3.7.1 The appellant contested that D19 can be regarded as the closest prior art because it did not address providing soft bouillon tablets.

3.7.2 However, as discussed above, the board is of the opinion that the tablet described in D19 is a soft bouillon tablet. Thus, for this reason alone the appellant's argument does not succeed. In addition, D19 describes bouillon tablets which incorporate oil and do not contain fat. This too justifies the choice of D19 as the closest prior art.

3.8 The objective technical problem

3.8.1 The appellant, in line with paragraph [0004] of the opposed patent, regards the technical problem as the provision of a soft bouillon tablet which only or mainly contains oil and no or only little amounts of fat apart from non-fat conventional bouillon ingredients.

3.8.2 However, the opposed patent is silent as to the role of the fine filler which is a milled crystalline ingredient with particles having a mean diameter of from 5 to 80 µm. There is nothing in the specification discussing the importance of the mean diameter, let alone any experimental results or comparative tests demonstrating an effect.

3.8.3 As D19 already discloses a soft bouillon tablet which only contains oil (and no fat), the objective technical problem has to be seen as the provision of an alternative soft bouillon tablet. The board considers that this technical problem is solved.

3.9 Obviousness

3.9.1 The board agrees with the respondents that it is conventional in the field of bouillon tablets to use milled crystalline food ingredient having a mean diameter within the range of from 5 to 80 µm.

3.9.2 In this context, the respondents cited D8, which also relates to bouillon or stock products in the form of tablets (page 2, line 15). As to the ingredients of such tablets, D8 discloses the following on page 2:

> "The crystalline food ingredient may be salt but, if crystalline flavour enhancers are used, the food ingredients are preferably a mixture of salt and the crystalline flavour enhancers; for example salt and monosodium glutamate." (line 49 and 50).
>
> "Preferably the crystalline food ingredients are milled to a particle size less than about 40 µm; more preferably less than about 30 µm; for example about 15 µm to about 20 µm." (line 58 and 59).

3.9.3 In view of this, the board agrees with the respondents that the provision of milled crystalline ingredients salt and sodium glutamate having a mean diameter in the range of from 5 to 80 µm is a conventional measure. In other words, it is an obvious alternative suggested by the prior art.

3.10 Conclusion

The subject-matter of claim 1 does not involve an inventive step, Article 56 EPC.

4. As the main request (sole request) does not comply with the requirements of inventive step, it was not necessary to decide on the other objections raised by the respondents.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Cañueto Carbajo W. Sieber

Decision electronically authenticated