

Internal distribution code:

- (A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

**Datasheet for the decision
of 27 October 2017**

Case Number: T 1565/14 - 3.3.09

Application Number: 10155137.2

Publication Number: 2208423

IPC: A23L1/228, A23L1/22, A23L1/229,
A23L1/227

Language of the proceedings: EN

Title of invention:
A shelf-stable cooking aid

Patent Proprietor:
Nestec S.A.

Opponents:
UNILEVER N.V. / UNILEVER PLC

Headword:

Relevant legal provisions:
EPC Art. 83, 56

Keyword:
Sufficiency of disclosure
Inventive step

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1565/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 October 2017

Appellants:

(Opponents)

UNILEVER N.V.
Weena 455
3013 AL Rotterdam (NL)

UNILEVER PLC
100 Victoria Embankment
London, Greater London EC4Y 0DY (GB)

Representative:

Tjon, Hon Kong Guno
Unilever N.V.
Unilever Patent Group
Olivier van Noortlaan 120
3133 AT Vlaardingen (NL)

Respondent:

(Patent Proprietor)

Nestec S.A.
Avenue Nestlé 55
1800 Vevey (CH)

Correspondence Address:

Nestec S.A.
CT - IAM - Patents
Av. Nestlé 55
1800 Vevey (CH)

Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 16 May 2014
rejecting the opposition filed against European
patent No. 2208423 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman	W. Sieber
Members:	M. O. Müller
	F. Blumer

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the joint opponents against the decision of the opposition division to reject the opposition against European patent No. 2 208 423.
- II. With their notice of opposition, the joint opponents requested revocation of the patent in its entirety on the grounds under Article 100(a) (lack of novelty and lack of inventive step) and 100(b) EPC.

The documents submitted during the opposition proceedings included:

D1: EP 0 031 162 A1;

D15: Experimental report on the umami and salty taste of six different cooking aid concentrates, two pages;

D16: Experimental report issued 3 February 2005 two pages; and

D22: EP 2 042 043 A1.

- III. The decision of the opposition division was based on the claims as granted.

Claim 1 and and dependent claim 3 as granted read as follows:

"1. A shelf-stable concentrate cooking aid comprising

- an amount of MSG comprised between 1 and 2% and an amount of IMP and GMP comprised between 0.05 and 0.1%,
- between 10 to 20% in weight of food derived acids and sugars and
- between 20 and 45% of macromolecules taken from the group consisting of polysaccharides, proteins and fats."

"3. A shelf stable cooking aid according to any of claims 1 or 2, providing Xian sensory characteristics."

Claims 2 and 4 to 14 as granted are dependent on claim 1. Claim 15 as granted pertains to the use of the cooking aid according to any of claims 1 to 14.

In its decision, the opposition division did not admit D22 into the proceedings and acknowledged sufficiency of disclosure, novelty and inventive step.

As regards novelty, the opposition division held that the amount of MSG in seasoning (A) of example 1 of D1 was not as required by claim 1, the beef soup base of table 5 was not a shelf-stable concentrate cooking aid and the amounts of MSG, IMP and GMP contained therein were not as required by claim 1.

As regards inventive step, the opposition division held that the problem solved over D1 was the provision of a cooking aid that provided an umami taste, as well as further characteristics, which were of a textural nature and that the claimed solution, namely the addition of a certain amount of macromolecules, was not obvious in view of D1.

IV. This decision was appealed by the joint opponents (hereinafter the appellants) with the statement of grounds of appeal including:

D23: WO 2010/108542 A1;

D24: WO 2010/108901 A1;

D25: Nestlé professional nutrition magazine "nutripro", "umami Mushrooms to MSG", 2013, 12 pages; and

D26: Y. Mizuno, Journal of Agricultural Development Studies (Japan), volume 4, 1993, pages 57 to 67.

V. A response was filed by the proprietor (hereinafter the respondent) with its letter of 20 January 2015, requesting that the appeal be dismissed and that the opposition division's decision not to admit D22 be maintained.

VI. With its communication dated 21 April 2017, the board communicated its preliminary opinion to the parties.

VII. With its letter dated 7 June 2017, the appellants provided further comments.

VIII. On 27 October 2017, oral proceedings took place before the board. The appellants maintained their requests submitted in writing. The respondent maintained its request that the appeal be dismissed and submitted an auxiliary request. Since the appellants no longer relied on D22, the board did not need to decide on the admission of this document.

The respondent's main request, i.e. the dismissal of the appeal, implies maintenance of the patent as granted (for the wording of claims 1 and 3, see point III above). The claims of the auxiliary request differ from those of the main request in that claim 3 has been deleted.

IX. So far as relevant to the present decision, the appellants' arguments can be summarised as follows:

Main request

The invention as defined in claim 3 lacked sufficiency of disclosure. It was not clear what the xian sensory characteristics required by this claim were or how they could be achieved.

Auxiliary request

This request should not be admitted into the proceedings since it could have been filed earlier in the appeal proceedings.

The subject-matter of claim 1 lacked inventive step in view of the closest prior art D1. It differed from this document by the presence of certain amounts of sugars and of macromolecules selected from the group consisting of polysaccharides, proteins and fats. As shown by D15, and in view of the fact that the cooking aid of D1 could contain up to 69% of undefined components, the problem referred to by the respondent, i.e. the reduction of the chemical aftertaste while maintaining xian sensory characteristics, was not solved over the entire scope of claim 1. D16 was not relevant in

this respect since it did not refer to cooking aids as defined in claim 1. The objective technical problem was therefore the provision of an alternative cooking aid with umami sensory characteristics. The additional components required by claim 1 were commonly used in cooking aids and their amounts could not contribute to inventive step.

These arguments also applied to claim 1 of the main request.

- X. So far as relevant to the present decision, the respondent's arguments can be summarised as follows:

Main request

The invention as defined in claim 3 was sufficiently disclosed. The feature of xian sensory characteristics was clear and, on the basis of the teaching of the patent, the skilled person knew how to obtain them.

Auxiliary request

The auxiliary request should be admitted into the proceedings since it differed from the main request only in that a dependent claim had been deleted.

The subject-matter of claim 1 was inventive in view of the closest prior art D1. It differed from this document in terms of the amounts of MSG, IMP and GMP and by the presence of certain amounts of sugars and macromolecules. As shown by D16, the problem solved by this difference was to reduce chemical aftertaste while maintaining xian sensory

characteristics. The claimed solution was inventive since D1 did not contain any indication that reducing the amount of MSG would solve this problem.

XI. The appellants requested that the decision under appeal be set aside and European patent 2 208 423 be revoked.

XII. The respondent requested that the appeal be dismissed or, subsidiarily, that the decision under appeal be set aside and the patent be maintained on the basis of the auxiliary request (claims 1 to 14) filed during the oral proceedings before the board.

Reasons for the Decision

Claims as granted (main request)

1. Inventive step

1.1 The opposed patent is related to shelf-stable cooking aids (paragraph [0001]). It aims at overcoming the sometimes incomplete or overly chemical taste of monosodium glutamate (hereinafter MSG) (paragraph [0005]).

1.2 In a similar way, D1 relates to flavouring agents (page 1, lines 3 to 4) and addresses the need to enhance the flavouring characteristics of MSG without giving rise to other undesirable tastes (page 2, lines 16 to 18). In line with the arguments of both parties, and as acknowledged by the opposition division, D1 thus represents the closest prior art.

Example 1 of D1 discloses a seasoning (A) consisting of

- 95.2 wt% of MSG,
- 1.1 wt% of IMP,
- 1.1 wt% of GMP and
- 2.6 wt% of monosodium fumarate (the salt of an acid).

In example 5, this seasoning is added to a soup base.

The cooking aid of claim 1 differs from seasoning (A) of D1 in terms of the amounts of MSG, IMP and GMP and the additional presence of certain amounts of sugars and macromolecules.

1.3 The respondent argued that the objective technical problem in view of D1 was the reduction of the chemical aftertaste while maintaining xian sensory characteristics.

1.3.1 For the following reasons, the board does not agree:

The cooking aid as defined in claim 1 can e.g. contain 1% MSG, 0.05% IMP and GMP, 10% acids and sugars and 20% macromolecules. The remaining components, i.e. up to 68.95% of the cooking aid, are completely undefined in claim 1. It is not credible that no matter what components are chosen for those 68.95%, the chemical aftertaste is reduced while xian sensory characteristics are maintained.

This is confirmed by the fact that xian sensory characteristics are part of a dependent claim only. More specifically, only dependent claim 3 requires the cooking aid according to claim 1 to provide xian

sensory characteristics. Since claim 1 is an independent claim, it must be broader than claim 3 and thus must cover embodiments where xian sensory characteristics are not present or maintained.

This is further confirmed by the experimental tests in D15. In these tests, five cooking aids 1 to 5 with amounts of MSG, IMP, GMP, acid, sugar and macromolecules as required by claim 1 (see table 1 of D15) were added to a dehydrated chicken bouillon. The taste characteristics of the soups so obtained were compared with the chicken bouillon alone, i.e. without any of these cooking aids ("Ref." in D15; table 2). It follows from this comparison that the score of all soups 1 to 5 in taste and of soups 1 to 3 and 5 in umami sensory characteristics was lower than that of the reference soup. According to column 2, lines 37 to 40 of the patent, xian sensory characteristics are more delicious, gratifying and agreeable than umami sensory characteristics. Hence, an inferior rating in taste and umami sensory characteristics implies inferior xian sensory characteristics. It can thus at the very least be concluded from D15 that not all of the cooking aids according to claim 1 maintain xian sensory characteristics.

The problem referred to by the respondent is thus not solved over the entire scope of claim 1.

- 1.3.2 This finding is not changed by the respondent's experimental data in D16.

D16 (table 20) compares three cooking aids, namely xian powders from shaggy mane, bamboo and jinhua ham with a commercial product from Ajinomoto. Contrary to the respondent's assertion, these three xian powders are

not according to claim 1. More specifically, none of the three powders contains any sugar as required by claim 1. Furthermore, these powders do not necessarily have an amount of macromolecules (protein and fat) as required by claim 1. The xian powder from shaggy mane has an amount of protein of 15 to 28.8% and an amount of fat of 0.37%, implying that the amount of macromolecules can be as low as 15.37%, which is below the lower limit of the range required by claim 1. The xian powder from bamboo has at most 13.1% protein and 1.27% fat, implying a maximum amount of macromolecules of 14.37%, which is equally below the lower limit of the range required by claim 1. The xian powder from jinhua ham has an amount of protein of 48.1 to 51.9% and an amount of fat of 3.6%, implying a minimum amount of macromolecules of 51.7%, which is above the upper limit of the range required by claim 1. Since D16 is hence not about any cooking aid according to claim 1, it cannot show that the claimed cooking aids result in any effect, let alone that they solve the problem referred to by the respondent.

Even if one were to assume in the respondent's favour that the three xian powders of D16 were according to claim 1, D16 would still not show that the problem referred to by the respondent is solved. In fact, it would even confirm that part of the claimed subject-matter does not solve this problem. More specifically, the xian powder from meat (jinhua ham) in D16 did not reduce the chemical aftertaste (referred to in D16 as "MSG intensity") but resulted in a chemical aftertaste that was as high as that of the commercial reference product from Ajinomoto (last sentence on the first page of D16). So the problem of reducing the chemical aftertaste is not solved.

- 1.4 The objective technical problem has thus to be formulated less ambitiously as the provision of an alternative cooking aid with umami sensory characteristics. It was accepted by both parties that this problem was solved over D1.
- 1.5 It must be examined whether in view of this problem, the claimed solution is obvious.

The absolute amounts of MSG, IMP and GMP in the cooking aid as indicated in claim 1 are not relevant. In the end, what matters for the sensory characteristics of a dish is the amount of cooking aid added to the dish, since this amount of cooking aid defines the amounts of MSG, IMP and GMP in the dish. This amount is not defined in claim 1.

If anything, what, as regards the claimed amounts, determines the sensory characteristics of the dish is the ratio of the amount of MSG to that of IMP and GMP that is present in the claimed cooking aid and, by way of its addition to the dish, in that dish. This ratio is however already disclosed in claim 2 of D1. More specifically, the ratio of the amount of MSG to the amount of IMP and GMP is disclosed in this claim to be 100 : 0.1 to 15, which overlaps with the range defined in claim 1 (1 to 2% MSG to 0.05 to 0.1% IMP and GMP). Therefore, neither the absolute amounts of MSG, IMP and GMP in the cooking aid, nor the ratio of MSG to IMP and GMP contribute to inventive step.

Furthermore, as not disputed by the respondent, the additional components to be present according to claim 1, i.e. the sugar and the macromolecules selected from polysaccharides, proteins and fats are common

cooking aid ingredients. Therefore, without any effect, their presence does not contribute to inventive step.

The subject-matter of claim 1 is thus not inventive in view of D1 as the closest prior art.

2. Sufficiency of disclosure

During the oral proceedings, sufficiency of disclosure of the invention as defined by claim 3 was discussed. After this discussion, the board announced its conclusion that the invention defined by this claim lacked sufficiency of disclosure. Since, however, the main request is not allowable anyway for lack of inventive step, there is no need to deal with sufficiency of disclosure in more detail in the present decision.

Auxiliary request

3. Admissibility

The appellants requested that this request not be admitted into the proceedings. This request differs from the main request in that claim 3 has been deleted. As it was not contested by the appellants, the deletion of this dependent claim does not confront them with any new issues they were not prepared to deal with during the oral proceedings. The board therefore decided to admit the auxiliary request into the proceedings.

4. Inventive step

Claim 1 of the auxiliary request is identical to claim 1 of the main request. Therefore, for the same reasons as given above with regard to claim 1 of the

main request, the subject-matter of claim 1 of the auxiliary request is not inventive in view of D1.

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