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**Datasheet for the decision
of 2 March 2018**

Case Number: T 1722/14 - 3.3.09

Application Number: 07110028.3

Publication Number: 2025247

IPC: A23L1/0522, A23L1/39, A23L1/40

Language of the proceedings: EN

Title of invention:

Packaged concentrate for preparing a bouillon, soup, sauce, gravy or for use as a seasoning, the concentrate comprising modified starch

Patent Proprietor:

Unilever N.V.
Unilever PLC

Opponent:

NESTEC S.A.

Headword:

Relevant legal provisions:

EPC Art. 56, 83
RPBA Art. 13(1), 13(3)

Keyword:

New main request - admitted into the proceedings
Sufficiency of disclosure (yes)
Inventive step (yes)

Decisions cited:

T 0608/07

Catchword:



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Case Number: T 1722/14 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 2 March 2018

Appellant: NESTEC S.A.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 July 2014 concerning maintenance of European
patent No. 2025247 in amended form.**

Composition of the Board:

Chairman	M. O. Müller
Members:	N. Perakis
	D. Prietzel-Funk

Summary of Facts and Submissions

I. This decision concerns the appeal filed by the opponent against the interlocutory decision of the opposition division maintaining the patent in amended form (claims 1-11 filed as a main request during the oral proceedings of 9 April 2014). Independent claims 1, 9 and 11 read as follows:

"1. Packaged concentrate for preparing a bouillon, broth, soup, sauce, gravy or for use as a seasoning, said concentrate comprising:

- 20-80% water (weight % based on total packaged concentrate),
 - 10-30% (weight % based on water content of concentrate) of a modified starch,
 - 15-30% (weight % based on water content of concentrate, preferably 15-26%) of salt,
 - 0.5-60% (weight % based on the total composition) of taste imparting components, and
- wherein the concentrate has the rheology of a gel."

"9. Process for preparing a concentrate for preparing a bouillon, broth, soup, sauce, gravy or for use as a seasoning, said concentrate comprising:

- 20-80% water (weight % based on total packaged concentrate),
 - 10-30% (weight % based on water content of concentrate) of a modified starch,
 - 15-30% (weight % based on water content of concentrate, more preferably 15-26%) of salt,
 - 0.5-60% (weight % based on the total composition) of taste imparting components, and
- wherein the concentrate has the appearance of a gel, the process comprising the steps of mixing the ingredients, filling the mixture into the packaging or

moulds, closing the packaging, whereby a heating step is applied prior to, and/or during and/or after filling into the packaging or moulds."

"11. Use of a concentrate according to claims 1-8 for preparing a bouillon, broth, soup, sauce, gravy or for use as a seasoning."

The documents filed during opposition included the following:

D1: US 2003/0044503 A1;

D3: K.Y. Lee *et al.*, "Effects of α -glycanotransferase treatment on the thermo-reversibility and freeze-thaw stability of a rice starch gel", *Carbohydrate Polymers*, 63 (2006), pp 347-354;

D5: G.O Phillips and P.A. Williams, *Handbook of Hydrocolloids*, 2000, pp 41-65;

D8: EP 1 145 646 A1;

D10: EP 1 091 658 B1;

D11: J.M. Light, "Modified Food Starches: Why, What, Where and How", *Cereal Food World*, 1990, 35(11), 21 pages;

D13: Chiharu Inoue, "Experiments relating to gelled concentrates", submitted by Unilever with letter of 16 September 2011;

D15: WO 01/72148 A1;

D16: EP 1 962 619 B1;

D17: Experimental Report of Nestlé, dated
20 December 2013;

D18: EP 0 970 620 A2;

D19: Experimental Report of Nestlé, dated
7 February 2014;

D20: Annex 2 submitted with the notice of opposition (a
clear copy was received on 29 January 2010);

D21: Experimental Report from Unilever submitted
with a letter of 17 September 2010;

D22: Experimental Report of Wageningen UR (Dr G. Sala)
dated 22 December 2010 and submitted with a letter
of 23 February 2011;

D23: Experimental report of Unilever dated
6 March 2014;

D24: Experimental report of TNO dated 4 April 2014.

II. The opposition division held that the invention as claimed in the main request was sufficiently disclosed and that the subject-matter of this request was not only clear but also novel over D1 and D8 and, moreover, involved an inventive step in view of each of D1 and D8 as the closest prior art. Therefore, it maintained the patent on the basis of the claims of the main request.

As regards sufficiency of disclosure, the opposition division considered that, since the experimental data filed by the parties (in particular D19 and D23) were conflicting, it had to take into account the scientific

literature (D5) in this technical field. On that basis, it decided, on the balance of probabilities, that the claimed invention was sufficiently disclosed.

As to whether the claimed subject-matter was novel over D1, the opposition division held that it was, since the skilled person had to carry out multiple selections in order to arrive at it.

Lastly, the opposition division held that regardless of which of D1 or D8 was considered to be the closest prior art, the claimed subject-matter involved an inventive step. The technical problem was seen in the provision of an alternative culinary concentrate gel, the solution to which would not have been obvious without the benefit of hindsight. Moreover, in the absence of technical evidence, the assertion that the technical problem had not been solved across the whole scope of the claims had to be disregarded.

III. This decision was appealed by the opponent (in the following: the appellant), the statement setting out the grounds of appeal containing the following additional documents:

D25: EP 2 005 838 A1;

D26: Mini Review, D.R. Picout *et al.*, "Rheology of Biopolymer Solutions and Gels", *The Scientific World JOURNAL*, 2003 (3), pp 105-121;

D27: EP 1 384 727 A1;

D28: WO 01/05251 A1;

D29: EP 0 400 484 B1;

D30: WO 00/30460 A1;

D31: Collection of data sheets of various modified starches produced by Ingredion Inc. (in particular modified starches sold as NovationTM2560, 4300, 4600, 5300, 5600 and 6260, respectively);

D32: D.J. Thomas and W.A. Atwell "Starches", Eagan Press Handbook Series, 1999, pp 25-29 and 43-47.

The appellant requested that the interlocutory decision of the opposition division be set aside and that European patent No. 2 025 247 be revoked in its entirety.

IV. The response of the joint patent proprietors (in the following: the respondents) included auxiliary requests 1 to 4 and the following additional document:

D33: USDA National Nutrient Database for Standard Reference, Basic Report 01009, Cheese, Cheddar, Release 27, 20 March 2015.

The respondents requested that the appeal be dismissed (i.e. that the patent be maintained on the basis of the claims as upheld by the opposition division) or, alternatively, that the patent be maintained on the basis of the claims of any of auxiliary requests 1 to 4. They also requested that the late-filed documents D25-D28 not be admitted into the proceedings.

V. With a letter of 24 June 2015, the appellant filed further arguments with respect to the outstanding issues.

VI. On 30 January 2018, the board issued a communication in preparation for the oral proceedings.

VII. Subsequently, the respondents filed the further document:

D34: Das Rheologie Handbuch Thomas Mezger,
Curt R. Vincentz-Verlag, 2000, pp 136-143.

VIII. Oral proceedings were held before the board as scheduled. During the oral proceedings the respondents withdrew their objection to the admission of late-filed documents D25 to D28 and submitted a new auxiliary request 1, which they later amended and which ultimately became their new main request.

Independent claims 1, 9 and 11 of the new main request correspond to independent claims 1, 9 and 11 of the main request as upheld by the opposition division (see point I above) except that in these claims the suitability of the packaged concentrate has been limited to: "for preparing a bouillon or broth".

The appellant objected to the admission of the new main request into the proceedings. With respect to its patentability, the appellant raised objections only under Article 83 and 56 EPC.

IX. The relevant arguments put forward by the appellant in its written submissions and during the oral proceedings may be summarised as follows:

- The new main request should not be admitted into the proceedings because it was late-filed and did not change the suitability requirement of the claimed product. As there was no factual change in

the claimed subject-matter, the same objections arose.

- The patent in suit did not disclose the claimed invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. Firstly, the patent did not define the "rheology of a gel" and did not disclose how this property should be measured. Secondly, it did not provide the skilled person with the guidance required to reproduce the invention since the experimental evidence submitted by the appellant (D19 and D20) showed that it had not been able to obtain a gel when repeating the examples in the patent. Lastly, the skilled person was not able to carry out the invention across the entire scope of the claimed invention because the examples in the patent were carried out with one specific modified starch and the skilled person was aware that not every modified starch would provide a gel in the presence of salt.

- Claim 1 of the main request lacked inventive step. D1 was the closest prior-art document. The only difference between the claimed food product and the food product of example 1 in D1 was the higher salt content in the claimed food product. However, no technical effect was associated with such a higher salt content. Thus the technical problem was simply to provide an alternative food product. The skilled person starting from the food product of D1 and looking for an alternative food product would have found in the table in paragraph [0036] of D1 the motivation to increase the salt content to the range of claim 1. Thus the subject-matter of claim 1 was obvious in view of D1 alone.

X. The relevant arguments put forward by the respondents in their written submissions and during the oral proceedings may be summarised as follows:

- The new main request should be admitted into the proceedings because the amendments did not raise any new issues and *prima facie* overcame the inventive-step objection which had been raised against the subject-matter of claim 1 of the main request as upheld by the opposition division.
- The claimed invention was sufficiently disclosed. Although the patent in suit did not define the "rheology of a gel" this was a well-known parameter and the skilled person would have no difficulty in measuring it. In any event, the appellant had not filed any evidence proving the contrary. With regard to the examples in the patent, not only the respondents but also two external institutes had repeated them and had succeeded in obtaining a gel (D21, D22, D23 and D24). As regards the inability to reproduce the invention with every type of modified starch, the appellant had not submitted any experimental evidence to substantiate its assertions. The technical literature submitted related to the gelling of modified starch but not to the gelling of modified starch in the claimed amount and in combination with the claimed amount of salt.
- The subject-matter of claim 1 involved an inventive step. Taking into account the problem cited in the patent (see paragraph [0006]), D15 should have been considered the closest prior art. However, even if D1 was considered for this purpose, the subject-

matter of claim 1 would still be inventive. The claimed food product differed from that of example 1 in D1 not only as regards its salt content but also as regards its suitability for preparing a bouillon or broth. The technical problem was the provision of an alternative food product which was a gel. The solution was not obvious since neither D1 nor any other prior-art document would have motivated the skilled person to modify the butter garlic of example 1 in D1 by increasing its salt content. In view of the general disclosure of D1, the butter garlic in example 1 was to be used as a topping for a food item (paragraphs [0021] and [0044]). The table in paragraph [0036] of D1 concerned the ranges within which the ingredients of the (end) food products of D1 typically varied; it did not hint that a specific (end) food product such as the butter garlic in example 1 could be modified in accordance with the ranges of that table. Nor was there any suggestion in D1 that the butter garlic in example 1 could be used as a concentrate for preparing a bouillon or broth. The appellant's arguments were based on hindsight.

XI. The appellant requested that the decision under appeal be set aside and that European patent No. 2 025 247 be revoked in its entirety.

XII. The respondents requested that the decision under appeal be set aside and that the patent be maintained on the basis of claims 1 to 11 submitted as the new main request during the oral proceedings of 2 March 2018 and description pages 2 to 5 equally submitted during those oral proceedings.

Reasons for the Decision

1. Admission of the new main request

The main request, i.e. the claims as upheld by the opposition division's interlocutory decision, was withdrawn during the oral proceedings before the board and replaced by a new main request. The independent claims of the new main request differ from those of the main request upheld by the opposition division in that the characterisation of the claimed packaged concentrate as being

"for preparing a bouillon, broth, soup, sauce, gravy or for use as a seasoning"

has been replaced by

"for preparing a bouillon or broth".

Hence, the suitability of the packaged concentrate has been limited such that it relates only to a "concentrate for preparing a bouillon or broth".

The appellant objected to the admission of the new main request into the proceedings at this late stage. The board does not agree with this objection. The amendment does not raise issues which the board or the appellant could not reasonably be expected to deal with without adjournment of the oral proceedings. In fact, the amendment merely consists of the deletion of several alternatives present in the independent claims of the previous main request. The appellant itself acknowledged that no factual change had occurred and that the objections which had been raised against the

previous main request were also relevant for the new main request. Therefore the board admitted the new main request into the proceedings in accordance with Article 13(1) and (3) RPBA.

2. The appellant attacked the new main request on the basis of lack of sufficiency of disclosure and lack of inventive step.
3. Sufficiency of disclosure
 - 3.1 In a first attack, the appellant argued that the skilled person was not able to reproduce the claimed invention because the patent in suit did not give any definition of the "rheology of a gel" or any method or set-up for measuring the relevant parameters from which the rheology of a gel could then be determined. In a second attack, the appellant argued that the skilled person was not able to reproduce the examples in the patent in suit and obtain food products having the rheology of a gel. In a third attack, it argued that the skilled person was not able to reproduce the claimed invention across the entire scope of the claimed invention, i.e. with any type of modified starch.
 - 3.2 The appellant's first attack
 - 3.2.1 The patent in suit does not contain any definition or method or set-up for measuring the rheology of the concentrate. However, the skilled person in the field of food technology on the basis of his common general knowledge is aware of its meaning and how it is to be measured. As regards the common general knowledge of the skilled person at the priority date of the patent in suit, reference is made to D3 (section 2.5); D25

(paragraph [0033]); D26 (pages 113 and 114); D27 (paragraph [0019]) and D28 (page 9, lines 4-19).

- 3.2.2 The appellant argued that the rheology of the concentrate depended on the measurement temperature. Since the temperature was not defined in the patent, the feature that the concentrate had a rheology of a gel was unclear and the invention thereby insufficiently disclosed. However, the claim refers to a packaged concentrate for preparing a bouillon or broth, so it is clear that the concentrate has to have the rheology of a gel when packaged, i.e. at room temperature. There is thus no ambiguity, and as a consequence, no insufficiency arising out of ambiguity.
- 3.2.3 Furthermore, the appellant has not shown that any other parameters of the measurement method have an impact on the rheological values obtained by the measurement. And even if this were the case, it would, without any proof to the contrary, create ambiguity only at the edges of the definition of the concentrate having the "rheology of a gel". The board endorses the finding in T 608/07 (Reasons 2.5.2) that for an insufficiency arising out of ambiguity it is not enough to show that an ambiguity exists, in this case at the edges of the rheology of a gel due to the lack of any indication of the measuring method. It will normally be necessary to show that this ambiguity deprives the skilled person of the promise of the invention. However, the appellant - who bears the burden of proof in this respect - did not submit any experimental evidence in that direction.
- 3.2.4 The appellant's argument directed to the rheology measurement is thus not convincing.

3.3 The appellant's second attack

3.3.1 As regards sufficiency of disclosure, namely whether the patent in suit gives the skilled person the guidance necessary to reproduce the claimed gel, the parties filed contradictory technical evidence. The appellant filed D17, D19 and D20. The respondents filed D21, D22, D23 and D24. Of the latter, D22 was carried out by Dr Guido Sala of Wageningen University and Research Center and D24 by TNO, The Netherlands Organisation for applied scientific research.

In respondent's D22 an external institute carried out example a in the patent in suit and obtained a gel. In D24 another external institute carried out examples a and b in the patent in suit and obtained gels as well. Thus two external institutes repeating the examples in the patent were able to obtain gels.

In D21 the respondents repeated example a in the patent and obtained a gel. In D23, the respondents prepared compositions with components and amounts thereof as defined in claim 1 and obtained gels.

In D19 and D20 the appellant reproduced example a in the patent but failed to obtain a gel.

As the opposition division correctly observed, there is no obvious explanation as to why the appellant failed to obtain a gel when repeating the examples in the patent, while the respondents and the two external institutes succeeded in doing so.

3.3.2 The appellant speculated that the reason why the respondents were able to prepare gels was that their recipes contained several "magic" components or that

some "magic" parameters had been applied which had not been indicated in claim 1 or disclosed in the patent. These "magic" components and parameters were:

- the presence of sugar,
- the salt content of the yeast extract,
- the water and/or solids content of the beef broth and
- a slow cooling rate and an ageing process.

However, D23 contains examples 5 and 8, the recipes for which do not contain any sugar or beef broth but which nevertheless give a gel. Hence it is not true that a gel was obtained by the respondents only because their recipes contained sugar or a beef broth having a certain water and/or solids content.

Furthermore, as explained by the respondents during the oral proceedings, the amount of yeast extract in the examples in the patent is rather low (7.3% in example a and 7.2% in example b). Hence, even if the yeast extract contains some salt, its contribution to the overall salt content of the concentrate is small. Without any proof from the appellant, it is therefore not credible that it was the amount of salt in the yeast extract that enabled the respondents to prepare gels.

Lastly, it is common general knowledge that a composition needs time to set to a gel. The skilled person applying his common general knowledge would thus have applied an appropriate cooling and ageing step to prepare the gel.

3.3.3 In view of the above, in particular the respondents' evidence D21 to D24, the board considers that the

burden of proving that the claimed invention cannot be carried out was on the appellant and it was up to it to submit any counter-evidence supporting its position. Furthermore, on the basis of the available technical evidence, in particular the evidence provided by the two external independent institutes, it appears, on the balance of probabilities, that it is more likely than not that a gel is formed following the instructions provided in the patent in suit.

3.3.4 Consequently, contrary to the appellant's argument, examples a and b in the patent in suit result in a gel as required by claim 1.

3.4 The appellant's third attack

3.4.1 The appellant argued that the patent in suit, which exemplified the claimed invention only with one specific modified starch, namely the acid thinned starch Flojel 70, did not provide the skilled person with the guidance required to obtain the claimed gel with any type of modified starch.

3.4.2 The board disagrees. The appellant, who bears the burden of proof, did not submit any experimental evidence to substantiate its assertion. The appellant's experimental evidence in D13 is irrelevant since it does not concern the claimed combination of a modified starch and salt in the claimed amounts. In fact, the appellant did not provide any substantiated arguments based on this document.

The appellant referred to the technical literature but this does not corroborate its assertions either:

The appellant argued that D5 and D32 did not describe starches as usable for gelling. However, the fact that a certain document does not address gelling of starch by no means amounts to proof that such gelling is impossible.

The appellant also stated that it could be derived from D11 that modified food starches could be starches obtained by hybridization, chemical modification or physical modification. However, this document does not provide any teaching regarding the behaviour of the starch in the context of the claimed invention, let alone state that gelling with these starches is not possible.

D31, a collection of data sheets of starches of the trade mark IngredionTM, discloses the viscosity profile of those starches over time but not necessarily at a concentration as required by claim 1, and is therefore irrelevant.

As regards D32, an excerpt from a handbook, the appellant argued that it related to the gelatinisation of starches and that this was different from gelling. However, this is irrelevant to the question whether gelled concentrates can be obtained with starches different from the one applied in the examples in the patent.

As regards D10, a patent document, it discloses that chloride inhibits gelatinisation (page 2, last line). However, even if gelatinisation is the same as the gelling required by claim 1, such a general statement cannot provide any proof that in the specific context of claim 1, i.e. for a concentrate with specific amounts of modified starch, salt, taste imparting

components and water, the presence of salt renders the gelling of the concentrate impossible. It thus cannot be concluded from D10 that claim 1 covers embodiments that do not work.

Hence, the appellant's third attack must also fail.

3.5 In view of the above, the board concludes that the invention as defined in claim 1, and by the same token that defined in all remaining claims, is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

4. Inventive step

4.1 Closest prior art

4.1.1 According to the patent in suit there was a desire for concentrates for preparing a bouillon or broth which combined some advantages of liquid concentrates (e.g. allowing the use of ingredients which were not fully dried) with some advantages of dry concentrates (e.g. unit dosing) (see paragraph [0006]). Furthermore, there was a need for (alternative) packaged concentrates for use in preparing a bouillon or broth in the form of a jelly which could dissolve in boiling water within reasonable time (paragraph [0008]). The patent in suit achieves this by the packaged concentrate of claim 1.

4.1.2 The appellant considers D1 to be the closest prior art.

D1 relates to food products and, more specifically, to gel-based food products that can be used to enhance the flavour and/or texture of consumable food items (paragraph [0001]). The gel-based products are self-sustaining, comprise an edible gel having one or more

flavouring and/or texturising components distributed uniformly throughout them and are substantially solid at ambient temperature and liquefy or otherwise change in texture at an elevated temperature (paragraph [0012]). These products may include an edible heat-reversible gelling agent which causes partial or complete gelling of the product at ambient temperature and allows melting of the gel structure when a food item topped with the product is heated (paragraph [0021]). Modified starches are suitable gelling agents (paragraph [0029]). The composite product may be bagged or canned, i.e. it is packaged (paragraph [0042], last sentence). Hence, in the same way as the patent in suit, D1 discloses packaged food products in the form of a gel.

The board can therefore accept D1 as a suitable starting point for assessing inventive step.

- 4.1.3 In its attack, the appellant focused on example 1 in D1. This example concerns a butter garlic which comprises 35 wt.% water based on total product, 12.5 wt.% modified waxy maize starch based on the water content of the product and 5.4 wt.% of salt based on the water content of the product. The amount of taste imparting components (garlic powder and natural flavours), based on the total product, is 2.0 wt%.

The butter garlic thus comprises all components required by claim 1. The amounts of water, modified waxy maize starch and taste imparting components are as required by claim 1.

Since D1 relates to gels (see paragraph [0042] and claim 1), the exemplified butter garlic must be a gel

and thus complies with the feature of having the rheology of a gel as required by claim 1.

- 4.1.4 The food product of claim 1 differs from the butter garlic of example 1 in that it is a (packaged) concentrate suitable for preparing a bouillon or broth.

D1 does not clearly and unambiguously disclose that the butter garlic of example 1 is a concentrate suitable for preparing a bouillon or broth. D1 discloses contact of the servable food portion, e.g. the butter garlic of example 1, with a servable food item portion to form a food-item combination in which the servable food portion, e.g. the butter garlic, is arranged on top of the food (paragraphs [0021] and [0044]). Since no dilution is required, the skilled reader would not consider the butter garlic topping of D1 to be a concentrate, let alone a concentrate for preparing a bouillon or broth. This is the first distinguishing feature.

The food product of claim 1 further differs from the butter garlic of D1 in terms of the salt content. The butter garlic of example 1 of D1 comprises 2.0 wt.% salt and 35.0 wt.% water. The amount of salt is thus 5.4 wt% of salt based on the water content of the concentrate (for the way the salt amount is calculated, see paragraph [0011] of the patent in suit), whereas the concentrate of claim 1 requires a salt content of 15-30 wt.%.

Incidentally, it is noted that the same distinguishing features are present in example 3 of D1, which the appellant had cited against novelty of the previously pending main request. This example refers to diced Cheddar, which is not a concentrate for preparing a

bouillon or broth, and the salt amount, in the same way as in example 1, is 5.4 wt.%. In this respect, it is to be noted that the sodium caseinate, sodium citrate and disodium phosphate present in the diced Cheddar cheese are not to be considered salts, since they do not meet the definition of a salt given in paragraph [0013] of the patent in suit. More specifically, this passage requires that the salt be sodium chloride or a product with a taste impression of sodium chloride but the appellant has not shown that sodium caseinate, sodium citrate and disodium phosphate give this taste impression.

4.2 The technical problem and its solution

In view of D1, the technical problem underlying the invention as defined in claim 1 is seen in the provision of an alternative food product which has the rheology of a gel. The examples given in the patent (see paragraphs [0031] to [0034]) show that the set technical problem has indeed been solved.

4.3 Obviousness

The skilled person starting from the butter garlic of D1 and looking for an alternative food product would not find in D1 or any other prior-art document the motivation to modify the disclosed butter garlic in such a way as to arrive at the concentrate of claim 1.

Contrary to the appellant's assertions, the skilled person would not find anything in D1 hinting at modifying the butter garlic such that a bouillon or broth can be prepared from it. Nor would the skilled person have any reason to increase the salt content of the butter garlic. It is certainly possible to

theoretically construct a salt content within the range defined in claim 1 from the information given in the table in paragraph [0036] of D1. This table discloses a typical composite product with a salt amount of 0 to 5% and a water content of 20 to 65%, both values based on the weight of the product. Selecting the upper limit of the salt amount and combining it with the lower limit of the water content results in a salt content of 20% based on the weight of the salt and water. This is within the range of 10 to 30 wt% defined in claim 1. However, these typical composite products disclosed in the table in D1 are ready-to-use products, such as the butter garlic of example 1. The skilled person would not find in D1 any motivation to increase the salt content of these ready-to-use food products to an amount as high as 20 wt%, as theoretically derivable from this table. In fact such a high salt content would be considered by the skilled person only for concentrates, the salt content of which is reduced when the concentrate is later processed into a ready-to-eat product, e.g. when water is added to the concentrate to prepare a bouillon or broth. As set out above, such a concentrate is not, however, disclosed in D1.

Therefore, as the respondents correctly observed, interpreting D1 such that it suggests a concentrate with a salt content as claimed for preparing a bouillon or broth is based on hindsight.

- 4.4 In view of the above, the subject-matter of claim 1 involves an inventive step. Thus claim 1 is allowable under Article 56 EPC.
5. The same distinguishing features are present in independent claim 9, relating to a process for preparing a packaged concentrate, and independent claim

11, relating to the use of a concentrate. Hence, the subject-matter of these claims too is allowable under Articles 56 EPC.

6. Dependent claims 2 to 8 and 10 concern specific embodiments of the subject-matter of independent claims 1 and 9 and are therefore also allowable under Article 56 EPC.
7. During the oral proceedings before the board, the respondents filed an amended description. No objections were raised by the appellant and the board is convinced that it is in line with the requirements of the EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the following documents:
 - claims 1 to 11 submitted as a new main request during the oral proceedings of 2 March 2018,
 - description pages 2 to 5 equally submitted during the oral proceedings of 2 March 2018.

The Registrar:

The Chairman:



M.H.A. Patin

M. O. Müller

Decision electronically authenticated



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Case Number: T 1722/14 - 3.3.09

D E C I S I O N
of the Technical Board of Appeal 3.3.09
of 3 April 2019
correcting an error in the decision
of 2 March 2018

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Decision under appeal: **Interlocutory decision of the Opposition
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Composition of the Board:

Chairman: M. O. Müller
Members: N. Perakis
D. Prietzel-Funk

I.

The decision T 1722/14 - 3.3.09 of 2 March 2018 is corrected under Rule 140 EPC in view of obvious mistakes (obviously incorrect dependencies of claims 3-8 and 10-11). The corrected claims are those filed as main request with the respondent's letter dated 9 January 2019 (see annex). The corrections made in claims 3-8 and 10-11 are highlighted below:

"3. Packaged concentrate according to any of claims 1-~~3~~ **or 2**, wherein the modified starch is a chemically modified starch, preferably an acid modified starch."

"4. Packaged concentrate according to any of claims 1-~~3~~, wherein the taste-imparting components comprise one or more of liquid or dissolvable extracts or concentrates of one or more of meat, fish, herbs, fruit or vegetables, and/or flavours, and/or yeast extract, and/or hydrolysed protein of vegetable-, soy-, fish-, or meat origin and/or herbs, vegetables, fruits, meat, fish, crustaceans, or particulates thereof."

"5. Packaged concentrate according to any of claims 1-~~5~~**4**, wherein the total moisture content of the concentrate is 40-60% by weight (based on the total packaged concentrate)."

"6. Packaged concentrate according to any of claims 1-~~6~~**5**, wherein the concentrate has a water activity a_w of 0.5 to 0.87, preferably 0.7-0.78."

"7. Packaged concentrate according to any of claims 1-~~7~~**6**, further comprising 1-30%, preferably 1-15% (weight % on total packaged concentrate) of emulsified oil and/or fat."

"8. Packaged concentrate according to any of claims 1-~~8~~**7**, wherein the concentrate is packaged in a cup or tub with a seal."

"10. Process according to claim ~~10~~**9**, wherein at least part of the heating step is to a temperature of at least 60°C, preferably of at least 70°C."

"11. Use of a concentrate according to any of claims 1-~~9~~**8**, for preparing a bouillon or broth."

II.

According to Rule 140 EPC, in decisions of the European Patent Office, only linguistic errors, errors of transcription and obvious mistakes may be corrected.

In the present case the corrections requested by the respondents can be granted because they are obvious in the sense of Rule 140 EPC, in particular when comparing the dependencies of claims 3-8 and 10-11 with the respective claims of the main request held allowable in the opposition division's interlocutory decision (see minutes of the oral proceedings of 9 April 2014). This request had been the respondents' main request up to the date of the oral proceedings before the board. During these oral proceedings, this request was modified and filed as new auxiliary request 1 (which later became the new main request) to overcome a lack of inventive step objection raised against the subject-matter of independent claims 1, 9 and 11. However the claim dependencies in claims 3-8 and 10-11 in this new auxiliary request 1 were not correct. On the basis of the dependencies of claims 3-8 and 10-11 in the previous main request, it is obvious what the correction would be. This was not contested by the appellant.

The decision of the Enlarged Board G 1/10 of 27 July 2012 is not applicable in the case at hand since it is not concerned with correction of any other decisions than decisions to grant a patent (reasons, 3).

The Registrar:

The Chairman:



M. Cañueto Carbajo

M. O. Müller

Decision electronically authenticated