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Case Number: T 2303/14 - 3.3.01

Application Number: 04735764.5

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Language of the proceedings: EN

Title of invention:
LIQUID DOUGH CONDITIONER

Patent Proprietor:
Cereform Limited

Opponent:
PURATOS N.V.

Headword:
Liquid dough conditioner/CEREFORM

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
All requests: amendments - allowable (no)

Decisions cited:
T 0175/97

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Case Number: T 2303/14 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 4 December 2018

Appellant: (Patent Proprietor)	Cereform Limited Weston Centre Bowater House 68 Knightsbridge London SW1X 7LQ (GB)
Representative:	Turner, Craig Robert A.A. Thornton & Co. 10 Old Bailey London EC4M 7NG (GB)
Respondent: (Opponent)	PURATOS N.V. Zone 1, Industrialaan 25 B-1702 GROOT-BIJGAARDEN (BE)
Representative:	De Clercq, Ann G. Y. De Clercq & Partners Edgard Gevaertdreef 10a 9830 Sint-Martens-Latem (BE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 30 September 2014 revoking European patent No. 1633195 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman A. Lindner
Members: M. Pregetter
M. Blasi

Summary of Facts and Submissions

I. European patent No. 1633195 is based on European patent application No. 04735764.5, filed as an international application published as WO2004/105494.

II. The present appeal lies from the decision of the opposition division to revoke the patent. The main request and auxiliary requests 1 to 6 were found not to meet the requirements of Article 123(2) EPC. Auxiliary request 7 lacked novelty, and auxiliary request 8 was found not to be inventive.

III. With the statement setting out the grounds of appeal, the patent proprietor (appellant) submitted sets of claims of a main request and eight auxiliary requests. The claims of auxiliary request 8 correspond to those of auxiliary request 8 of the opposition proceedings. The appellant furthermore requested the opportunity to amend the pH ranges in the independent claims of these requests. No such amendments were in fact submitted by the appellant.

IV. Independent claim 1 of the main request reads as follows:

"1. A liquid dough conditioning composition comprising one or more enzymes, an oxidant and a water soluble antioxidant; characterised by further comprising sugar in a quantity of between 10 wt% and 40 wt% and salt in a quantity of between 10 wt% and 40 wt% wherein wt % is the percentage by weight of water, sugar and salt present in the composition, and wherein the composition comprises a water soluble alkali and has a pH of from 3.0 to 8.0."

Claim 1 of auxiliary requests 1 to 7 differs from claim 1 of the main request in that the following features are added:

Claim 1 of auxiliary request 1 further defines the presence of "a hydrocolloid".

In addition to the amendments made to claim 1 of auxiliary request 1, claim 1 of auxiliary request 2 defines that the water soluble antioxidant is "selected from sodium metabisulphite, sulphur dioxide, sodium sulphite, sodium hydrogen sulphite, potassium metabisulphite, calcium sulphite, and calcium hydrogen sulphite".

In addition to the amendments made to claim 1 of auxiliary request 2, claim 1 of auxiliary request 3 defines that the oxidant is "selected from ascorbic acid, potassium bromate, potassium iodate, calcium peroxide, and azodicarbonamide".

In addition to the amendments made to claim 1 of auxiliary request 2, claim 1 of auxiliary request 4 replaces the term "oxidant" by the term "ascorbic acid".

Claim 1 of auxiliary request 5 corresponds to claim 1 of the main request, but with a pH range of from 4.0 to 8.0.

Claim 1 of auxiliary request 6 corresponds to claim 1 of the main request, but with a pH range of from 4.5 to 8.0.

Claim 1 of auxiliary request 7 corresponds to claim 1 of the main request, but with a pH range of from 5.0 to

8.0.

Claim 1 of auxiliary request 8 reads:

"1. A process for preparing a liquid dough conditioning composition comprising one or more enzymes, an oxidant and a water soluble antioxidant, wherein the water soluble antioxidant is added to water before the oxidant is added to said water, wherein said water comprises dissolved sugar and dissolved salt; wherein, after said water soluble antioxidant is added, a water soluble alkali is added so as to adjust the pH to approximately 4 to 8."

V. In its reply to the statement setting out the grounds of appeal, the respondent requested, inter alia, that the main request and auxiliary requests 1 to 7 not be admitted into the proceedings.

VI. A summons to oral proceedings was issued on 28 March 2018. In a subsequent communication pursuant to Article 15(1) RPBA the board drew the attention of the parties to issues under Article 123(2) EPC.

VII. Oral proceedings were held on 4 December 2018 in the absence of the appellant, which had communicated its intention not to attend the oral proceedings to the board in a letter of 10 October 2018.

During the oral proceedings the respondent did not pursue the issue of admittance in respect of any of the claim requests under consideration.

VIII. The appellant's arguments, as presented in writing and where relevant to the present decision, can be summarised as follows:

When carrying out amendments it was permissible to extract the feature specifying the weight percentage ranges for sugar and salt from the paragraph at the bottom of page 3 and top of page 4 of the application as filed because the skilled person would understand that the features discussed in this paragraph were general features of the invention and not limited to recitation only in combination with those features with which they were explicitly disclosed. This was because the paragraph was not presented in the application as a specific isolated embodiment, but as global teaching. For example, the paragraph referred not only to the antioxidant sodium metabisulphite, but also to lots of additional antioxidants that might be used. Additionally, the paragraph also referred to a variety of different enzymes that could be used. The hydrocolloid and water soluble alkali were also first presented in general terms, followed by a specific example of each.

No arguments were provided concerning the accuracy of the values defining the pH range in claim 1 of auxiliary request 8.

IX. The respondent's arguments, where relevant to the present decision, can be summarised as follows:

The technical features defining sugar and salt in a certain weight range were not present in the claims as filed. These features could only be found in the passage bridging pages 3 and 4 in the context of a specific embodiment. The respective claims 1 of the main request and auxiliary requests 1 to 7 were the result of several selections and generalisations based on this specific embodiment. Such selections and

generalisations generated new subject-matter and therefore constituted unallowable amendments. Furthermore, the feature that the wt% in the context of the concentrations of sugar and salt was "the % of weight of water, sugar and salt present in the composition" was said to be derivable from the passage bridging pages 3 and 4. However, in this passage there were contradictory statements concerning the possible interpretations of the basis to which the term "wt%" related. Such contradictory passages did not constitute an unambiguous disclosure.

Claim 1 of auxiliary request 8 defined that the pH was adjusted to "approximately 4 to 8". These numerical values related to measurements and were therefore subject to measurement errors which place limits on their accuracy. Applying the general convention in the scientific and technical literature that the last decimal place of a numerical value indicated its degree of accuracy resulted in error margins for the values of 4 and 8 of, respectively, 3.5 to 4.4 and 7.5 to 8.4 (see T 175/97). The application as filed, when referring to pH ranges, always referred to pH values as 4.0 and 8.0 (the error margins being respectively 3.95 to 4.04 and 7.95 to 8.04). Due to the larger error margins, claim 1 of auxiliary request 8 extended beyond the content of the application as filed.

X. The appellant requested in writing that the decision of the opposition division be set aside and that the patent be maintained in amended form on the basis of the claims of the main request, or alternatively, based on one of the sets of claims of auxiliary requests 1 to 8, all filed with the statement of grounds of appeal.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. The appellant, which had been duly summoned, had chosen not to attend the oral proceedings, as communicated to the board by the letter of 10 October 2018. According to Rule 115(2) EPC and Article 15(3) RPBA, the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned. In line with these provisions, the board decided to continue the proceedings in the appellant's absence and treated it as relying only on its written case. The board was thus in a position to announce a decision at the conclusion of the oral proceedings, as provided by Article 15(6) RPBA.

3. All claim requests were filed with the statement setting out the grounds of appeal. In accordance with Article 12(2) RPBA they are considered to form part of the appeal proceedings. In view of the circumstance that the respondent did not pursue any further the issue of admittance under Article 12(4) RPBA in respect of any of the claim requests, the board has no reason not to take them into account.

4. *Main request and auxiliary requests 1 to 7*

The subject-matter of claim 1 of the main request and of auxiliary requests 1 to 7 contravenes Article 123(2) EPC.

Claim 1 of the main request and of auxiliary requests 1 to 7 defines, inter alia, a liquid dough conditioning

composition comprising sugar in a quantity of between 10 wt% and 40 wt% and salt in a quantity of between 10 wt% and 40 wt%, wherein wt% is the percentage by weight of water, sugar and salt present in the composition.

There is no unambiguous general disclosure of a product comprising salt and sugar in the concentration ranges defined in the respective claims 1 of the main request and auxiliary requests 1 to 7 to be found in the application as filed. All passages cited below refer to the application as filed.

The appellant has invoked the paragraph bridging pages 3 and 4, arguing that said passage constituted a general disclosure. However, said passage is part of an embodiment disclosed on page 3, penultimate paragraph to page 4, second paragraph.

The board cannot agree with this line of argument. Said embodiment has to be considered as a specific disclosure only allowing for variations for some features (e.g. alternatives for metabisulphite as described below). The reason for this assessment lies in the way said embodiment is disclosed. The first indication that said embodiment is not a general disclosure stems from the fact that it is described as a "0.25% aqueous solution of dough conditioner", i.e. a dough conditioner in a form that allows for its use at 0.25% (page 3, last paragraph). Secondly, sodium metabisulphite is to be employed. Although some alternatives for sodium metabisulphite are suggested, a concentration is only taught specifically for sodium metabisulphite. There is no disclosure for concentrations of antioxidants in general. On page 4, second paragraph, the combination of ascorbic acid and

sodium metabisulphite is discussed in detail. The importance of adding these particular two compounds in a certain order is stressed. The board notes that ascorbic acid is the only "oxidant" mentioned (chemically, ascorbic acid is not an oxidant). After this very specific part, a more general part on the addition of alkali solution, enzymes and hydrocolloid follows. The concentration ranges for salt and sugar cannot be isolated from the more specific technical features of the embodiment under consideration. Said embodiment cannot consequently form a basis for the introduction of the technical features relating to the concentration ranges for salt and sugar into a more general product claim, as defined in the respective claims 1 of the main request and the auxiliary requests 1 to 7. Although the auxiliary requests contain additional features, mostly taken from the discussed embodiment (although the list of oxidants in claim 1 of auxiliary request 3 cannot be found in said embodiment, and nor can the more limited pH ranges of auxiliary requests 5 to 7), the subject-matter of all auxiliary requests is still more general than the disclosure of the embodiment.

A further issue is the basis for the calculation of weight percent of salt and sugar. An explicit basis for the calculation of weight percentages is only given for sodium metabisulphite. The amount of sodium metabisulphite in the embodiment under consideration is defined as wt% "of the final liquid composition ready for use" (last sentence in the paragraph bridging pages 3 and 4). In the same paragraph, sugar and salt contents are discussed. The passage starts by stating that "sugar, salt and sodium metabisulphite are dissolved in the water by stirring" (page 3, lines 2 and 3 from the bottom). It thus has to be assumed that

the disclosure of sugar, salt and sodium metabisulphite is to be seen in the context of their presence in the same composition. The passage goes on to state that sugar and salt may each be added in the quantity of 10-40 wt%, a solution having "been used with 23 wt% sugar, 20 wt% salt and 57 wt% water". The following questions arise: is said solution to be seen as consisting solely of sugar, salt and water, since the amounts add up to 100%? What about the amount of sodium metabisulphite? What about the amounts of the further ingredients of the 0.25% aqueous solution of dough conditioner making up the embodiment, namely ascorbic acid, sodium hydroxide solution for adjusting the pH, enzyme and hydrocolloid? Since the embodiment under consideration does not provide any answers to these questions, the statement that a solution having "23 wt% sugar, 20 wt% salt and 57 wt% water" cannot be interpreted as a basis for specifying that the sugar and salt contents are to be based on the weight of sugar + salt + water. Consequently, there is no unambiguous disclosure of the basis on which the weight percent values relating to salt and sugar are to be calculated.

To summarise, the disclosure of said embodiment is not a general disclosure that can serve as a "reservoir" of technical features that can be introduced into the claims, independently from other features of said embodiment. Furthermore, said embodiment provides no clear information on the basis on which the percentages are to be calculated.

Consequently, the disclosure of said embodiment cannot form the basis for the subject-matter of claim 1 of the main request and the respective claims 1 of auxiliary requests 1 to 7. No further basis in the application as

filed has been identified by the appellant.

5. *Auxiliary request 8*

Claim 1 of auxiliary request 8 defines a pH range of "approximately 4 to 8".

The application as filed and the patent as granted consistently disclose and/or define pH values to one decimal place: The broadest disclosure is the pH range of approximately 3.0 to 8.0.

In the application as filed, the term "approximately", in combination with specifying the pH range to one decimal place, allows for variations in the pH range due to potential measurement errors, in line with decision T 175/97, Reasons 2.6.

pH can be measured very precisely and with great accuracy. Taking this into account, the meaning of the term "approximately" when used to define a pH range of 4 to 8 cannot be seen as describing a potential measurement error. Such a description does not make technical sense. Consequently, the term "approximately" as used in claim 1 of auxiliary request 8 must be construed to have a different meaning. No basis for such a different meaning can be found in the application as filed, and so there is no direct and unambiguous disclosure of a pH range of approximately 4 to 8.

The subject-matter of claim 1 of auxiliary request 8 contravenes the requirement of Article 123(2) EPC.

Hence, as none of the sets of claims submitted by the appellant is allowable, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

M. Schalow A. Lindner

Decision electronically authenticated