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**Datasheet for the decision
of 27 April 2022**

Case Number: T 0513/19 - 3.3.09

Application Number: 13723704.6

Publication Number: 2846645

IPC: A23F5/40

Language of the proceedings: EN

Title of invention:

COMPOSITION FOR PREPARATION OF A FOOD OR BEVERAGE PRODUCT

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

Koninklijke Douwe Egberts BV

Headword:

Composition for food or beverage/NESTLÉ

Relevant legal provisions:

EPC Art. 56

Keyword:

Closest prior art - same or similar purpose (yes)
Inventive step - (no)

Decisions cited:

T 0513/00

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 0513/19 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 27 April 2022

Appellant: Koninklijke Douwe Egberts BV
(Opponent) Vleutensevaart 35
3532 AD Utrecht (NL)

Representative: Boulton Wade Tennant LLP
Salisbury Square House
8 Salisbury Square
London EC4Y 8AP (GB)

Respondent: Société des Produits Nestlé S.A.
(Patent Proprietor) Entre-deux-Villes
1800 Vevey (CH)

Representative: Plougmann Vingtoft a/s
Strandvejen 70
2900 Hellerup (DK)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 6 December 2018
rejecting the opposition filed against European
patent No. 2846645 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: M. Ansorge
F. Blumer

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal against the opposition division's decision to reject the opposition.
- II. With its notice of opposition, the opponent had requested revocation of the patent based on the ground for opposition under Article 100(a) EPC (lack of inventive step).
- III. The opposition division decided that the subject-matter of claim 1 of the patent as granted involved an inventive step in view of D1 or D4 as the closest prior art.
- IV. In the present decision, reference is made to the following documents:
- D1: WO 2008/052952 A1
D2: US 3,261,689
D3: EP 0 220 889 A2
D4: WO 2011/063322 A1
D6: WO 2010/005604 A1
- V. Claim 1 of the patent as granted (main request on appeal) reads as follows:

"A composition for preparing a food or beverage product, comprising

a) a foamer ingredient releasing gas upon dissolution in aqueous liquid; and

b) a beverage or foodstuff ingredient comprising particles of ground vegetable material in a matrix comprising a vegetable extract; wherein the beverage or foodstuff ingredient has a retarded solubility such that a foam has been formed by the foamer ingredient, before the beverage or foodstuff ingredient has dissolved, when the composition is dissolved in an aqueous liquid to produce a food or beverage product."

VI. The parties' relevant arguments, submitted in writing and during the oral proceedings, are reflected in the reasons for the decision set out below.

VII. Requests

The appellant requested that the decision be set aside and that the patent be revoked in its entirety.

The respondent requested that the appeal be dismissed (main request), or, alternatively, that the patent be maintained on the basis of one of auxiliary requests 1 to 7, all of which were filed with the reply to the grounds of appeal.

Reasons for the Decision

MAIN REQUEST

1. Inventive step
 - 1.1 The appellant argued that D1 was the closest prior art in the present case and that the claimed subject-matter lacked an inventive step in view of D1.
 - 1.2 In the respondent's view, D1 did not qualify as an appropriate closest prior-art document in the present case, so D4 was to be considered to be the closest prior art. The claimed subject-matter involved an inventive step in view of both D4 and D1.
 - 1.3 For the reasons set out in the following, the board does not agree with the respondent that D4 is the only possible closest prior art in the present case. Instead, D1 is a suitable closest prior art.
 - 1.3.1 The closest prior art for assessing inventive step is normally a prior-art document disclosing subject-matter conceived for the same purpose or aiming at the same objective as the claimed invention and having the most relevant technical features in common, i.e. requiring the minimum of structural modifications.
 - 1.3.2 In the respondent's view, the only document on file dealing with exactly the same objective as the patent is D4. D1 does not deal with the problem that particles might get caught in the foam and is consequently unsuitable as a starting point in the assessment of inventive step.

1.3.3 The board does not agree.

As can be taken from paragraph [0012] of the patent, the opposed patent deals with a composition of a foamer ingredient with a coffee ingredient comprising particles of roast and ground coffee beans, for obtaining a product that is useful for preparing a cappuccino beverage with an improved aroma. In addition, the problem that particles of roast and ground coffee beans get caught in the foam can be eliminated or reduced by using a coffee ingredient comprising particles of roast and ground coffee beans in a matrix comprising a coffee extract, the coffee ingredient having a retarded solubility.

Thus, while claim 1 of the main request is worded in a much broader manner, the patent is in essence directed to a cappuccino beverage and is seeking to improve the aroma while not compromising the appearance of the foam.

1.3.4 D1 is the only document discussed by the parties as potentially being the closest prior art which deals with a cappuccino beverage. D4 does not relate to a cappuccino beverage, so D1 is indeed the only document relating to the same product as discussed in paragraph [0012] of the patent. This is already a strong indication that D1 qualifies as a suitable closest prior art document. In this context, the board is of the opinion that when assessing the suitability of a document as the closest prior art, the criterion of having the same purpose also includes that the patent and the closest prior art should deal with the same product. D1 and the patent share the same purpose of providing a cappuccino beverage.

- 1.3.5 D1 does not explicitly mention the presence of particles of roast and ground coffee beans and thus also does not mention a problem associated therewith. However, D1 undoubtedly deals with a soluble cappuccino powder which, upon reconstitution, not only produces a relatively large amount of foam, but also a white foam (see the last paragraph on page 3 of D1). D1 proposes a solution for overcoming the colouration of foam which stems from the soluble coffee powder.
- 1.3.6 Although the presence of particles of ground coffee beans is not explicitly mentioned in D1, providing a white foam undoubtedly creates a visibly attractive foam appearance, so D1 clearly deals with providing a cappuccino beverage having an attractive appearance, as does the patent. Thus, the objective underlying the patent and D1 is at least similar.
- 1.3.7 In view of the similarity of the purpose and the objective when comparing the patent and D1, D1 is a suitable starting point in the discussion of inventive step. By no means could the purpose and the objective be considered to be so remote from those mentioned in the patent that D1 could be considered as an unsuitable starting point in assessing inventive step.
- 1.3.8 Moreover, these conclusions are not at odds with the case law referred to by the respondent. In particular, in T 513/00, the closest prior art relied upon by the opponent concerned an apparatus of a type different from the one of the patent in suit (Reasons 5.1.4). In contrast, in the case at hand the patent and D1 both concern the same type of product, i.e. a cappuccino beverage, whereas D4, which the respondent considers to be the closest prior art, concerns a chocolate

beverage.

- 1.3.9 In view of the above, D1 is a suitable closest prior art in the present case and therefore the question of inventive step is to be assessed in view of D1 as the starting point.
- 1.4 D1 discloses a composition for preparing a beverage or foodstuff (coffee), comprising a foamer ingredient and a beverage or foodstuff ingredient comprising a vegetable extract; delayed solubility being achieved by coating the agglomerated coffee with maltodextrin (see Example 2 of D1).
- 1.5 There was agreement between the parties that the subject-matter of claim 1 of the main request differs from Example 2 of D1 by the presence of particles of ground vegetable material in the matrix (distinguishing feature).
- 1.6 In the respondent's view, the effect resulting from this distinguishing feature is a food or beverage product having an improved aroma and a visibly attractive appearance of the foam.
- 1.7 Even if it is conceded, to the benefit of the respondent, that the objective technical problem is to provide a food or beverage product having an improved aroma without compromising the appearance of the foam, as submitted by the respondent, the claimed subject-matter is obvious in view of D1 as the closest prior art for the reasons set out below.
 - 1.7.1 The respondent did not deny that if the teaching of D1 were combined with the teaching of D2 or D3, this would lead to the claimed invention, and therefore it did not

deny that the skilled person could obtain the beverage composition defined in claim 1 by combining D1 with either D2 or D3. However, what needed to be analysed was whether the skilled person would have done so in the expectation of solving the objective technical problem. In the respondent's view, the appellant has not offered any tenable explanation as to why the skilled person would look at documents, such as D2 and D3, which are not concerned with discolouration of foam, and - at the same time - ignore the teaching of D4. By reference to D6, the respondent further stressed that adding loose ground particles as taught in D6 is also an option, and therefore adding ground particles to the coffee ingredient is not necessary in the case of the coated coffee particles of D1 (this would be necessary in order to arrive at the claimed subject-matter).

- 1.7.2 D4 and D6 were not cited by the appellant as documents to be combined with D1, and therefore they are not considered relevant in the present assessment. The relevant question is whether a skilled person confronted with the objective technical problem to be solved would have taken D2 or D3 into account and in particular whether the proposed solution is obvious in view of D2 or D3.
- 1.7.3 D2 teaches that the aroma of coffee beverages can be improved by the addition of roast and ground coffee in a coffee extract when forming a soluble coffee powder (see column 4, line 58, to column 5, line 2). Similarly, D3 teaches this same advantage resulting from the addition of finely ground roast and ground coffee in soluble coffee powders (column 1, lines 1 to 10).

- 1.7.4 It was common ground between the parties that the addition of roast and ground coffee to a soluble beverage powder improves the aroma of soluble coffee products. Consequently, the question is whether it was obvious for a skilled person to add ground coffee in the matrix of the food or beverage ingredient and whether a skilled person would have expected this measure not to compromise the appearance of the foam.
- 1.7.5 The skilled person seeking to improve the aroma of the cappuccino of D1 would be motivated by the teaching of either D2 or D3 to include roast and ground coffee in the beverage or foodstuff ingredient of D1 having retarded solubility.
- 1.7.6 Both D2 and D3 disclose soluble coffee powders with roast and ground coffee contained within a matrix of the soluble coffee.
- 1.7.7 The substitution of the agglomerated coffee of Example 2 in D1 by the one disclosed in D2 or D3 leads the skilled person to the subject-matter of claim 1. In the board's view, D1 teaches, for example in Example 2, that the soluble coffee component is provided in the delayed solubility ingredient (i.e. in the coated coffee powder), which ensures that improved foam whiteness is achieved. The skilled person would expect not only the soluble coffee component of D1 but also other colourful ingredients in the delayed solubility ingredient to be prevented from colouring the foam. There is no reason why the coating of the coated particles in Example 2 of D1 should not prevent other components from being detrimental to the appearance of the foam, given the fact that the foam is already formed when the coated particle starts to become disintegrated.

1.7.8 Accordingly, the skilled person would add the roast and ground coffee to the delayed solubility ingredient of D1, while expecting the problem posed to be thereby solved. It would have at least been obvious to try adding roast and ground coffee to the delayed solubility ingredient (i.e. the coated coffee powder). In the board's view, loosely adding ground particles to the composition according to D1 as another ingredient, as the respondent suggests, would go against the gist of D1, which is to provide a cappuccino beverage having a white foam.

Therefore, the subject-matter of claim 1 of the main request does not involve an inventive step in view of D1 as the closest prior art when taken in combination with D2 or D3. Thus, the main request is not allowable.

AUXILIARY REQUESTS 1 TO 7

2. The respondent did not provide arguments as to why the limitations introduced into claim 1 of the auxiliary requests should lead to a different assessment compared to the conclusion reached for claim 1 of the main request. Under these circumstances, the board is unable to see why the claimed subject-matter of auxiliary requests 1 to 7 should be judged differently from the assessment of inventive step of claim 1 of the main request.

Thus, the subject-matter of claim 1 of auxiliary requests 1 to 7 is considered to also lack an inventive step in view of D1 as the closest prior art.

CONCLUSION

3. There is no allowable claim request on file.

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:



A. Nielsen-Hannerup

A. Haderlein

Decision electronically authenticated