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Anmeldenummer / Filing No / N° de la demande : 81 810 180.0

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Bezeichnung der Erfindung: Process for the manufacture of flavour concentrates from vegetable and/or animal substances
Title of invention:
Titre de l'invention :

Klassifikation / Classification / Classement : A23L 1/221

ENTSCHEIDUNG / DECISION
vom / of / du 8 November 1988

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent / Titulaire du brevet : CPC International Inc. et al

Einsprechender / Opponent / Opposant : Société des Produits Nestlé S.A.

Stichwort / Headword / Référence : Flavour Concentrates/CPC

EPÜ / EPC / CBE Article 54

Schlagwort / Keyword / Mot clé : novelty (denied)

Leitsatz / Headnote / Sommaire

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Case Number : T 303/86 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 8 November 1988

Appellant : (Opponent)
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Decision under appeal :
Decision of Opposition Division of the European Patent Office dated 1 July 1986 rejecting the opposition filed against European patent No. 0 040 178 pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : K. Jahn
Members : R. Spangenberg
G.D. Paterson

Summary of Facts and Submissions

I. The grant of European patent 40178 relating to European patent application 81 810 180.0 was published on 1 August 1984 (Bulletin 84/31). The patent specification contained eleven claims, Claim 1 reading as follows:

"1. Process for the manufacture of flavour concentrates from vegetable and/or animal substances by extraction with fats or fat-like solvents in the presence of water, characterised in that the material for extraction is subjected to a heat treatment with the extracting agents in a closed pressure vessel, with the proviso that the amount of water is such that the water activity, a_w, (also known as "relative moisture content of the material" and defined as the ratio of the vapour pressure of the water contained in a solid to the vapour pressure of free water at the same temperature) corresponds to a_w value of not less than 0.5."

II. On 26 April 1985 the Appellant filed an opposition against the above patent. He cited eleven documents and argued that the claimed subject-matter lacked novelty and inventive step (Article 100(a) EPC) and that the disclosure was insufficient (Article 100(b) EPC).

He requested that the patent-in-suit be revoked in its entirety.

III. By a decision dated 1 July 1986 the Opposition Division rejected the opposition. Among the documents considered, the following were the most relevant:

(1) E. Pauli "Technologie culinaire", 1ère édition (1976) édité par l'Union Helvetia, Lucerne et la Fédération suisse de cafetiers, restaurateurs et hoteliers, Zurich, pages 39-40.

(2) SEB (firme SEB, 21 Selongey, France) "300 recettes", 13e édition (1972) Editions Euro-Advertising/ESCO/INCO, Paris et Lyon, pages 81, 85, 98, 99, 156 and 157.

The claimed subject-matter was regarded as novel because documents (1) and (2) relating to cooking or frying procedures did not disclose the claimed process in terms of the water activity value to be maintained and furthermore do not involve a process where the flavour of the original materials can be completely extracted into the fat or fat-like solvent used.

IV. On 1 September 1986 the Appellant gave notice of appeal against the above decision and paid the appeal fee. A Statement of Grounds was received on 29 October 1986. He further relied on additional Examples 3 to 5 submitted by the Respondent in national proceedings in Norway.

Oral proceedings took place on 8 November 1988.

V. The Appellant's main arguments were as follows:

(a) When assessing the novelty of the claimed process it is immaterial whether a given process is said to be a cooking or baking process or a process for extracting flavour from food. The only relevant matter is the identity of starting material and process parameters. The instruction to apply a water activity in a certain range according to the patent in suit is meaningless since such conditions are inevitably met in normal pressure cooking and

frying processes, e.g. as described in (1). Thus, quite unusual measures must be taken if one wishes to obtain water activities of 0.8 or 0.6 when heating meat and fat under pressure. For instance, in Example 3 submitted by the Respondent in the grant proceedings in Norway, a water activity of 0.8 was obtained when beef was pretreated with 1kg of salt per 6kg of beef. According to Example 4 of these additional examples, in order to obtain a water activity of 0.6, one has to dry the beef to a water content of 8% before heating it with fat.

Especially water activities close to 1 are normally maintained in any industrial pressure cooking process which in many cases includes the presence of a fatty phase. The separation of the fatty phase is not envisaged in such cooking processes; however, it is also not a feature of the process of Claim 1 under appeal which therefore includes the manufacture of any fat-rich dish in a pressure-cooker and hence cannot be novel.

(b) The product of the claimed process, which is said to be a "flavour concentrate" in fact is nothing but a flavoured fat or oil since no increase in flavour concentration normally takes place in this process, for instance according to Example 1 of the patent in suit.

At the oral proceedings, the Appellant withdrew his objections under Article 100(b) EPC.

VI. The Respondent's submissions substantially were as follows:

(a) The pressure cooking or frying processes according to (1) and (2) does not result in extracting the

flavour of the cooked food into the fatty phase to leave a material substantially without flavour and a flavoured fat or fat-like solvent. The flavour either remains in the cooked or fried material or in the water phase, unless the water activity value is severely controlled.

(b) The claimed process does not require separation of flavoured fat from the extracted material but it requires formation of a "flavour concentrate", i.e. a flavoured material which is to be diluted before use. Such product is not disclosed in (1) or (2).

(c) The claimed process produces an unexpected result because, contrary to normal frying processes, the "roasted" flavour is not only developed on the surface of the meat but also inside, if the water activity is in the range of less than 0.8, thus providing an unexpectedly high yield of flavour. However, the Respondent admitted that the process of Claim 1 of the patent in suit is not limited to this range of water activities.

VII. The Appellant requested that the decision under appeal be set aside and the patent revoked.

The Respondent requested that the appeal be dismissed and the costs for the oral proceedings be reimbursed.

The reason given for that latter request was that it was the Appellant who requested oral proceedings but he had not produced any new argument in the oral proceedings.

At the end of the oral proceedings the decision was announced that the patent is revoked.

Reasons for the Decision

1. The appeal meets the requirements of Art. 106 to 108 EPC and Rule 64 and is, therefore, admissible.

2. The process of Claim 1 of the patent in suit lacks novelty because it is not distinguished from the known cooking and frying processes disclosed in (1) and (2) by technical features.

2.1 Document (1) relates to a "pressure fryer" in which, according to the explanations of the drawing, meat is heated in oil under the pressure of the vapour escaping from the meat. It is preferably used for frying chickens. In this pressure frying process no special provisions are taken to remove water from the meat before frying it. As shown by the additional examples submitted by the Appellant, under such circumstances a water activity of more than 0.5 will inevitably be obtained and the frying of chickens in this pressure fryer therefore takes place under conditions comprised by Claim 1 of the patent in suit. It is not disputed by the Respondent that some flavour of the fried chicken is extracted into the oil during the frying process even if this is not the desired result of that process.

According to the Respondent, it is not disclosed in (1) that this process produces a "flavour concentrate" within the meaning of the patent in suit, i.e. a flavoured oil which can be used to transfer flavour to food. In the Board's judgement it is immaterial to the question of the novelty of the process of Claim 1 of the patent in suit whether or not the possibility of such use is disclosed in (1), because this use does not form part of the subject-matter of that claim. It is sufficient to destroy the novelty of the claimed process that this process and the known process are identical with respect to starting

materials and reaction conditions since processes identical in these features must inevitably yield identical products.

Claim 1 of the patent in suit therefore comprises the subject-matter known from (1).

2.2 Similar considerations apply with respect to (2), which is a collection of recipes for preparing dishes in a pressure cooker and, on page 98 describes how to prepare Hungarian style lamb shoulder. Cubes of lamb shoulder are boiled together with spices and butter in the pressure cooker, undisputably at a rather constant water activity close to 1, i.e. well above 0.5. The broth containing the butter is removed from the meat and then mixed with crème frâiche. There cannot be any doubt that the butter, after the heating in the pressure fryer, will contain some flavour and that it is used, together with the broth for flavouring the créme frâiche, i.e. as a flavour concentrate within the definition used by the Respondent. According to the Respondent, this cooking process is distinguished from the claimed process because fat and broth are not separated but used together. However, also the process according to Claim 1 of the patent in suit does not require separation of the flavoured fat or fat-like solvent (as has been confirmed by the Respondent several times in the appeal proceedings). The Board therefore concludes that Claim 1 of the patent in suit also includes subject-matter disclosed in (2).

2.3 The two technical features which according to the Respondent distinguish the claimed subject-matter from the above prior art, i.e. that the claimed process should be performed at very specific preselected water activities within the claimed range (see description, page 4, lines 20 and 21) which must be adjusted within narrow limits (see description, page 3, lines 6 and 7),

and that the rate of flavour transfer is substantially complete, do not form part of the subject-matter of the claims of the patent in suit on their proper interpretation. Even if the claims included the first of these features, this would not have been sufficient to clearly distinguish the claimed subject-matter from the above prior art, because it follows from the known concept of water activity that in all cases where fresh materials are employed (e.g. when frying fresh meat according to (1) or excess water is present (e.g. when meat is boiled) a water activity close to 1 is maintained within narrow limits. It is not disputed that under these conditions normally only a part of the flavour and not substantially all of it is extracted into the fat or fat-like solvent. Furthermore, as to the second feature, the claimed process does not require a substantially complete extraction of the flavour. On the contrary, this embodiment is clearly stated in the description as only being preferred but in no way essential (see the description, page 4, lines 35 to 36).

2.4 Also, the Respondent's submission that an unexpected effect is obtained by the claimed process which proves that this process is different from the processes known from (1) and (2) is only applicable to the part of the claimed subject-matter where water activities less than 0.8 are applied and cannot therefore be taken into consideration when assessing the novelty of the whole subject-matter of Claim 1 of the patent in suit.

2.5 The Respondent's arguments therefore must fail for the reasons set out above. Claim 1 of the patent in suit as granted does not meet the requirements of Article 100(a) EPC because its subject-matter is not novel within the meaning of Article 54(1) EPC.

3. As no request has been made to consider the subject-matter of the remaining Claims 2 to 11 separately, these claims must fall together with the above Claim 1.

4. The Respondent's request for reimbursement of costs for attending the oral proceedings is refused because in the Board's view there are no reasons of equity justifying the request.

Under Article 116(1) EPC, oral proceedings are mandatory upon request of a party. A party requesting oral proceedings is of course at liberty to rely on arguments previously presented in writing during the oral proceedings. Such a course does not per se justify a different apportionment of costs.

5. The Respondent filed a letter concerning the subject-matter of the appeal on 12 November 1988, i.e. after the oral proceedings at which the decision of the Board was announced. The letter is accordingly inadmissible, and its contents cannot be considered by the Board.

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**

F. Klein **K. Jahn**