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File Number: T 292/90 - 3.3.2

Application No.: 86 200 519.6

Publication No.: 0 199 397

Title of invention: Process for the preparation of an edible fat-containing product

Classification: A23D 3/02

D E C I S I O N
of 16 November 1992

Applicant: UNILEVER NV, et al

Headword: Reasoning/UNILEVER

EPC Articles 97(1), 111(1) and Rules 67 and 68(2)

Keyword: "Refusal without the required reasoning - substantial procedural violation (yes) - reimbursement of appeal fee"
"Remittal to the Examining Division"

Headnote



Case Number : T 292/90 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 16 November 1992

Appellant : UNILEVER NV
Burgemeesters' Jacobplein 1
P.O. Box 760
NL-3000 DK Rotterdam (NL)

Representative : Land, Addick Adrianus Gosling
OCTROOIBUREAU ARNOLD & SIEDSMA
P.O. Box 18558
NL-2502 EN The Hague (NL)

Decision under appeal : **Decision of Examining Division of the European Patent Office dated 12 September 1989, posted on 20 October 1989, refusing European patent application No. 86 200 519.6 pursuant to Article 97(1) EPC.**

Composition of the Board :

Chairman : P.A.M. Lançon
Members : A.J. Nuss
E.M.C. Holtz

Summary of Facts and Submissions

- I. European patent application No. 86 200 519.6 (publication number 0 199 397) was refused by a decision of the Examining Division for the reason that the subject-matter of the claims corresponding to Appellants' main and second auxiliary request did not involve an inventive step and that the subject-matter of the claims corresponding to Appellants' first auxiliary request did not meet the requirements of Article 123(2) EPC.

In the reasons for the decision, the Examining Division included a short summary of the content of the following prior art documents:

- (1) WO-A-8 303 222
- (2) EP-A-101 104
- (3) GB-A-1 327 511
- (4) GB-A-944 705

The subsequent paragraphs of the decision were worded as follows:

"Investigation of the main request:

novelty - as far as no document discloses all the features of the claimed process, subject-matter is novel.

inventive step - claimed process results in an obvious juxtaposition of the teaching of documents 2/, 3/ or 4/, as far as each of them refers to the preparation of crystallized margarines by mixing a crystallised fat phase and an aqueous phase and processing this mixture in

a mechanical device (rotation device according to document 3/ or static cavities according to document 4/)

and document 1/ referring to a mixing device suitable for the processing of margarines, the cavities of this device being displaceable, viz. in rotary motion, this disposition being described as replacing advantageously the former mixing devices (to which belong the devices of documents 3/, 4/ !);

hence Claim 1 defines no patentable matter having regard to Article 56 EPC.

The more specific features of the corresponding sub-claims are known from the prior art or derivable in obvious manner and cannot contribute to patentability.

Investigation of the subsidiary request:

the rpm limit values of the new Claim 4 have been taken from individual examples of the description as filed and generalised; this generalisation goes however beyond the application as filed, at least because these general rpm values were originally bound to one specific apparatus described on page 16 lines 10 to 15, whereas all specific features of these examples are absent from the new claim; thus this request cannot be accepted having regard to Article 123(2) EPC.

Investigation of the sub-subsidiary request

novelty - as no individual document discloses the totality of the features of the combination, this subject-matter is novel;

inventive step - as it can be seen at least from document 3/ that the known ranges of fat phase and aqueous phase, fat content of the phases and crystallized fat content are at least partially included in the figures of the sub-claims, the subject-matter of the combination remains obvious and is not patentable under Article 56 EPC.

Application is therefore rejected according to Article 97(1) EPC".

II. The Appellants lodged an appeal against this decision.

In the Statement of Grounds of Appeal, the Appellants set out the reasons for which the decision of the Examining Division was contested.

III. In a communication pursuant to Article 110(2) EPC, the Board informed the Appellants that, as a preliminary conclusion, the contested decision appeared to be a mere statement rather than the reasoning required under Rule 68(2) EPC and that, therefore, it would be inclined to consider this as a procedural violation, warranting a remittal to the first instance on purely formal grounds. This gave rise to the question whether under these circumstances the Appellants would consider to file an appropriate request, having regard to Rule 67 EPC on the conditions for reimbursement of the appeal fee.

IV. In answer to the communication of the Board, the Appellants request that

- the case be remitted to the Examining Division, and
- the appeal fee be reimbursed.

Reasons for the Decision

1. The appeal is admissible.

2. Although it is clear from paragraph I above that the Examining Division did not allow Appellants' main request on the ground of lack of inventive step (Article 56 EPC), the decision does not contain those arguments which, in logical sequence, would justify such findings because the statement that the claimed process results in an obvious juxtaposition (emphasis added) of the teaching of documents (2), (3) or (4), as far as each of them refers to ... and document (1) referring to ..., does not make clear how the Examining Division had arrived at that appreciation. Consequently, such statement is nothing else than an unsubstantiated allegation. This is contrary to Rule 68(2) EPC which requires, inter alia, that "decision of the European Patent Office which are open to appeal shall be reasoned". The purpose of this requirement is of course to enable the Appellant and, in case of an appeal, also the Board of Appeal to examine whether a certain decision could be considered to be justified or not. Therefore, all facts, evidence and arguments which are essential to the decision must be discussed in detail in the decision. Consequently, when deciding upon inventive step, like in the present case, the logical chain of reasoning used to justify the conclusion that the claimed subject-matter does not involve an inventive step should have been included in the decision, so that it could be readily comprehended why the Appellants' arguments in support of an inventive step had to fail.

Moreover, nothing can be seen in the minutes of the oral proceedings or in the communication of the Examining Division which could be considered as a proper reasoning to be imported in the decision.

It follows from the above that, contrary to appearances, the decision under appeal is in fact unreasoned insofar as it concerns the refusal of Appellants' main request; it therefore contravenes the provisions of Rule 68(2) EPC. Thus, the decision is not valid.

2. The Board holds that as far as the refused main request is concerned, the de facto absence of reasoning is a substantial procedural violation of a basic principle under the EPC. This alone must have the consequence that the decision under appeal is to be set aside and the case remitted to the first instance in application of Article 111(1) EPC, without decision on the merits of the case.
3. In view of the preceding, the Board considers that the reimbursement of the appeal fee is equitable and, therefore, must be ordered under Rule 67 EPC.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examining Division for resumption of the proceedings.
3. The reimbursement of the appeal fee is ordered.

The Registrar:

The Chairman:

P. Martorana

P. Lançon