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D E C I S I O N
of 18 July 1997

Case Number: T 0898/91 - 3.3.4

Application Number: 87200394.2

Publication Number: 0237120

IPC: A23D 3/00

Language of the proceedings: EN

Title of invention:
Spread

Patentee:
UNILEVER N.V., et al

Opponent:
Winner Livsmedel AB
Kerry Group plc
Krayner, Warner Dirk

Headword:
Spread/UNILEVER

Relevant legal provisions:
EPC Art. 84, 123(2)

Keyword:
"Admissibility of opponent 02 as a party to the present appeal proceedings (no)"
"Main request - amendments - added subject-matter (yes) - clarity (no)"
"First auxiliary request - added subject-matter (yes) - clarity (no)"
"Second auxiliary request - clarity (no)"
"Third auxiliary request - added subject-matter (yes)"
"Fourth auxiliary request - added subject-matter (yes) - clarity (no)"

Decisions cited:
G 0009/91, G 0010/91, G 0009/92, G 0004/93

Catchword:

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Case Number: T 0898/91 - 3.3.4

D E C I S I O N
of the Technical Board of Appeal 3.3.4
of 18 July 1997

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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 7 November 1991
revoking European patent No. 0 237 120 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: L. Galligani
Members: R. E. Gramaglia
S. C. Perryman

Summary of Facts and Submissions

- I. European patent No. 0 237 120 based on application No. 87 200 394.2 was granted for the designated Contracting States, the claims for the states other than Austria reading as follows:

"1. Spread containing less than 35 wt.% fat, comprising from 10 to 35 wt.% continuous fat phase and from 90 to 65 wt.% dispersed aqueous phase, characterized in that the composition constituting the aqueous phase is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec.⁻¹ and a temperature of 5°C.

2. Spread according to claim 1, wherein the viscosity is at least 25 mPa.s at a shear rate of 17090 sec.⁻¹ and a temperature of 5°C.

3. Spread according to claim 2, wherein the viscosity is at least 30 mPa.s at a shear rate of 17090 sec.⁻¹ and a temperature of 5°C.

4. Spread according to any one of claims 1 to 3, wherein the viscosity at 17090 sec.⁻¹ and 5°C is not higher than 200 mPa.s.

5. Spread according to claim 4, wherein the viscosity at 17090 sec.⁻¹ and 5°C is at least 35 and at most 100 mPa.s.

6. Spread according to any one of claims 1 to 5, wherein the water content of the composition constituting the aqueous phase is at least 60 wt.%.

7. Spread according to claim 6, wherein water content is at least 75 wt.%.

8. Spread according to any one of claims 1 to 7, wherein the aqueous phase composition comprises 1-25 wt.% gelling agent.

9. Spread according to claim 8, wherein the aqueous phase composition comprises from 10 to 20 wt.% gelling hydrolysed starch derivative.

10. Spread according to claim 8, wherein the aqueous phase composition comprises from 1 to 10 wt.% gelatin, carrageenan or a mixture thereof.

11. Spread according to claim 10, wherein the aqueous phase composition comprises from 2 to 5 wt.% gelatin, carrageenan or a mixture thereof.

12. Spread according to claim 8, wherein the aqueous phase composition comprises from 3-20 wt.% gelling hydrolysed starch derivative and 0.5-5 wt.% other gelling agent.

13. Spread according to claim 12, wherein the aqueous phase composition comprises 5-17 wt.% gelling hydrolysed starch derivative.

14. Spread according to claim 13, wherein the aqueous phase composition comprises 5-15 wt.% gelling hydrolysed starch derivative and 0.5-4 wt.% other gelling agent.

15. Spread according to any one of claims 1 to 14, wherein the aqueous phase composition comprises up to 20 wt.% non-gelling hydrolysed starch derivative.

16. Spread according to claim 15, wherein the aqueous phase composition comprises from 10 to 15 wt.% non-gelling maltodextrin.

17. Spread according to any one of claims 1 to 16, comprising 15 to 30 wt.% fat.

18. Spread according to claim 17, comprising 17 to 25 wt.% fat.

19. Spread according to any one of claims 1 to 18, further comprising, dispersed therein, bits of edible matter."

II. Three oppositions were filed on the grounds of Articles 100(a) and 100(b) EPC, i.e., lack of novelty, lack of inventive step and insufficiency of disclosure relying inter alia on the following documents:

(1) GB-B-1 564 800;

(3) GB-A-2 035 360;

(4) EP-A-0 011 344.

All these documents were earlier patent applications of the present appellant, and were part of the state of the art. Document (1) related to a low fat spread being an emulsion of the water-in-oil type, which compared with butter or margarine, had a considerably reduced fat content, e.g. 25-65%, preferably 30-50% by weight of the emulsion. The low fat spread comprised a continuous fatty phase, and a dispersed proteinaceous aqueous phase, which was gelled by means of a gelling agent of a slip melting point of 25-35°C, any

undissolved protein particles having an average major dimension of no more than 5 microns. The suggested gelling agents included gelatin, and the weight percentage of gelling agent suggested was 0.2-6%.

Document (3) related to a process for preparing a fat-continuous emulsion of a fat content of 15-35% by spraying an aqueous phase into a liquid phase, steadily increasing the content of the aqueous phase until a percentage of 65-85% had been reached while maintaining conditions of sufficient shear to increase the viscosity to such an extent, that upon cooling and working of the emulsion so obtained, a droplet size of 4-20 μm of at least 80% of the droplets was achieved. Example II disclosed an aqueous phase containing 0.619 wt.% carrageenan and 0.316 wt.% locust bean gum.

Document (4) related to emulsions, particularly low-fat spreads, comprising a continuous fatty phase and a dispersed aqueous phase, which was gelled with a gelling system of a softening point of at least 33°C and which showed a sharp decrease in gel strength at 45-70°C, the gelled aqueous phase being of a gel strength at a temperature below the softening point of between 0.1 and 30 N/cm^2 , as measured by the Instron apparatus, using it in the linear compression test method. The weight ratios between the continuous fatty phase and the dispersed phase of between (18-82):(82-18) were claimed. Example I related to an emulsion of less than 22% fatty phase, in which the aqueous phase contained 0.75 wt% carrageenan and 0.511% locust bean gum as gelling agents.

III. On 7 November 1991 the opposition division issued a reasoned decision whereby the European Patent was revoked pursuant to Article 102(1) EPC. The opposition by opponent 02 was held to be inadmissible for failure to comply with Rule 55(c) EPC requiring an indication

of the facts, evidence and arguments presented in support of the grounds under 100(a) and (b) EPC alleged. Lack of novelty had been argued over a product allegedly manufactured and sold by opponent 02 before the date of the claims, but material details sufficient to identify this product had not been given because allegedly confidential, and no indication of any facts or evidence relating to insufficiency was filed within the nine month period allowed for an opposition. The opposition division further decided that, while the subject matter of claim 1 met the requirements of Article 83 EPC, it was not new over documents (1), (3) and (4).

IV. The appellants (Patentees) lodged an appeal against this decision. In their statement of grounds of appeal (received on 10 March 1992) the main request was that the patent be maintained as granted, and they also made four auxiliary requests, referring to accompanying sets of claims headed auxiliary request A, B, C and D respectively.

V. The respondents (opponents 01 and 03) filed counterarguments, and opponent 03 by letter of 13 January 1993 submitted, as highly relevant to the question of insufficiency,

document (13) a copy of a letter dated 29 October 1991 of the appellants on another of the appellants' patents, EP 398,411 (application 90201123.8), stating that "EP 0 237,120 [ie. the patent here in dispute] does not provide an enabling disclosure of fat-continuous gelatin containing products having a fat level of less than 23%."

This patent 398,411 which was revoked by the opposition division by a decision dated 30 May 1994, formed the subject of appeal T 582/94 by the same appellants before this Board.

VI. By letter of 14 October 1993, the appellants withdrew their previous main request, and made auxiliary request A their new main request, while maintaining the other auxiliary requests.

VII. The Board issued a communication accompanying the summons to oral proceedings, indicating *inter alia* its provisional view on preliminary matters to the effect that:

- Only the appellants and opponents 01 and 03 were parties to the appeal, but opponent 02 was not a party as his opposition had been found inadmissible. Accordingly while opponent 02 could send representatives to the oral proceedings as members of the public, they could not be heard, unless the Board was first persuaded, contrary to its provisional view, that opponent 02 should be treated as a party to the appeal.

- In view of the close relationship between the subject matter of the patents in this appeal T 898/91 and appeal T 582/94, the Board would propose to hear them on consecutive days in any event. Though the respondents (opponents) were not the same in the two cases, the parties were asked to indicate whether they consent to the two appeals being dealt with in consolidated proceedings pursuant to Article 9(2) of the Rules of Procedure of the Boards of Appeal. If all parties did so consent the board would consolidate

the proceedings, with one hearing following on the other and the decisions being given only after the parties had been heard in both cases.

- Document (13) submitted by opponent 03 was considered *prima facie* highly relevant to the issues of inventive step and sufficiency as argued by the opponents. It was information known to the appellants, and it could not be considered as not submitted in due time, as the opponent could obviously not have been aware of it during the opposition proceedings. The board would thus propose to admit it into the proceedings pursuant to Article 114 EPC.

VIII. Oral proceedings took place on 22 February 1996. Opponent 02 made no submissions in response to the communication accompanying the summons to oral proceedings, and was not represented at the oral proceedings. The appellants and the respondents (opponents 01 and 03) were represented at the oral proceedings, and consented to the proceedings being consolidated with those on appeal T 582/94.

IX. During the oral proceedings the appellants modified the first auxiliary request, and filed a fourth auxiliary request (auxiliary request E). The main request (auxiliary claims A filed on 10 March 1992) finally read as follows (for ease of comparison, additions to Claim 1 as granted have been indicated in claims 1, 2 and 3 by the Board in bold italics):

"1. Spread containing less than 35 wt% fat, comprising from 10 to 35 wt% continuous fat phase and from 90 to 65 wt% dispersed aqueous phase, characterized in that ***the composition contains less than 25 wt% fat and*** the composition

constituting the aqueous phase is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C.

2. Spread containing less than 35 wt% fat, comprising from 10 to 35 wt% continuous fat phase and from 90 to 65 wt% dispersed aqueous phase, characterized in that the composition constituting the aqueous phase **comprises more than one gelling agent, said gelling agents comprising gelatin,** and is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C.

3. Spread containing less than 35 wt% fat, comprising from 10 to 35 wt% continuous fat phase and from 90 to 65 wt% dispersed aqueous phase, characterized in that the composition constituting the aqueous phase **comprises both a gelling hydrolysed starch derivative and another gelling agent,** and is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C.

4. Spread according to claim 1, 2 or 3, wherein the viscosity is at least 25 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C.

5. Spread according to claim 4, wherein the viscosity is at least 30 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C.

6. Spread according to any one of claims 1 to 5, wherein the viscosity at 17090 sec⁻¹ and 5°C is not higher than 200 mPa.s.

7. Spread according to claim 6, wherein the viscosity at 17090 sec^{-1} and 5°C is at least 35 and at most 100 mPa.s.

8. Spread according to any one of claims 1 to 7, wherein the water content of the composition constituting the aqueous phase is at least 60 wt%.

9. Spread according to claim 8, wherein water content is at least 75 wt%.

10. Spread according to any one of claims 1 to 9, wherein the aqueous phase composition comprises 1-25 wt% gelling agent.

11. Spread according to claim 10, wherein the aqueous phase composition comprises from 10 to 20 wt% gelling hydrolysed starch derivative.

12. Spread according to claim 10, wherein the aqueous phase composition comprises from 1 to 10 wt% gelatin, carrageenan or a mixture thereof.

13. Spread according to claim 12, wherein the aqueous phase composition comprises from 2 to 5 wt% gelatin, carrageenan or a mixture thereof.

14. Spread according to claim 10, wherein the aqueous phase composition comprises from 3 to 20 wt% gelling hydrolysed starch derivative and 0.5-5 wt% other gelling agent.

15. Spread according to claim 14, wherein the aqueous phase composition comprises from 5 to 17 wt% gelling hydrolysed starch derivative.

16. Spread according to claim 15, wherein the aqueous phase composition comprises from 5 to 15 wt% gelling hydrolysed starch derivative and 0.5-4 wt% other gelling agent.

17. Spread according to any one of claims 1 to 16, wherein the aqueous phase composition comprises up to 20 wt% non-gelling hydrolysed starch derivative.

18. Spread according to claim 17, wherein the aqueous phase composition comprises 10 to 15 wt% non-gelling maltodextrin.

19. Spread according to any one of claims 1 to 18, comprising 15 to 30 wt% fat.

20. Spread according to claim 19, comprising 17 to 25 wt% fat.

21. Spread according to any one of claims 1 to 20, further comprising, dispersed therein, bits of edible matter."

Claim 1 of the first auxiliary request (auxiliary claims B filed at the oral proceedings on 22 February 1996) was as follows (for ease of comparison, additions to claim 1 as granted have been indicated by the Board in bold italics):

"1. Spread containing less than 35 wt% fat, comprising from 10 to 35 wt% continuous fat phase and from 90 to 65 wt% dispersed aqueous phase, characterized in that **the composition contains less than 25 wt% fat and the composition**

constituting the aqueous phase is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C."

Claims 2 to 16 of this first auxiliary request were the same as the corresponding granted claims. Claims 17 and 18 related to granted claims 17 to 19 as follows (deletions indicated by the Board for ease of comparison):

~~"17. Spread according to any one of claims 1 to 16, comprising 15 to 30 wt.% fat. 18. Spread according to claim 17, comprising 17 to 25 wt.% fat.~~

~~18. Spread according to any one of claims 1 to 17, further comprising, dispersed therein, bits of edible matter."~~

Claim 1 of the second auxiliary request (auxiliary claims C filed on 10 March 1992) read as follows (for ease of comparison, additions to claim 1 as granted have been indicated by the Board in bold italics):

"1. Spread containing less than 35 wt% fat, comprising from 10 to 35 wt% continuous fat phase and from 90 to 65 wt% dispersed aqueous phase, characterized in that the composition constituting the aqueous phase **comprises more than one gelling agent, said gelling agents comprising gelatin, and** is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C."

The remaining claims 2 to 19 of the second auxiliary request were claims corresponding exactly to the claims 2 to 19 as granted.

Claim 1 of the third auxiliary request (auxiliary claims D filed on 10 March 1992) read as follows (for ease of comparison, additions to claim 1 as granted have been indicated by the Board in bold italics):

"1. Spread containing less than 35 wt% fat, comprising from 10 to 35 wt% continuous fat phase and from 90 to 65 wt% dispersed aqueous phase, characterized in that the composition constituting the aqueous phase **comprises both a gelling hydrolysed starch derivative and another gelling agent, and** is a gel-forming composition that has a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°C."

The remaining claims 2 to 19 of this third auxiliary request corresponded exactly to claims 2 to 19 as granted.

The claims of the fourth auxiliary request (auxiliary claims E filed at the oral proceedings on 22 February 1996) were identical with the claims of the main request set out above, except for the claim 19 which was altered to read (for ease of comparison deletions have been indicated by the Board as crossed out, and additions in bold italics):

"19. Spread according to any one of claims ~~1~~ 2 to 18, comprising 15 to 30 wt% fat."

At the conclusion of the oral proceedings the decision of the Board was reserved.

X. The objections raised by the Board in the communication accompanying the summons to oral proceedings, and remaining relevant to the requests maintained by the appellants can be summarized as follows:

A. *No fair basis*

- On claims 1 of each of requests A and B, a question arose on the fair basis under Article 123(2) EPC for the feature contains "less than 25 wt% fat". The limitation of original claim 18 was directed to "comprising 17 to 25 wt.% fat": the lower limit had now been omitted and the upper limit been changed to exclude the actual figure of 25 wt.%. There was thus no direct verbal basis for the limitation, and as in document (1) the range of 25 to 65% by weight was merely given as an example of "low fat" , there seemed no reason why the skilled man should not regard something below 25 wt% as also falling within the teaching of document (1), so that the feature below 25 wt% could not necessarily be regarded as a disclaimer of any overlap with any precise range required by document (1).

- The presence in the main request and the fourth auxiliary of three independent claims 1 to 3 with different features distinguishing from the prior art, together with claims 11 to 18 directed to different compositions of the aqueous phase, such claims being potentially dependent on any of these independent claims, seemed to introduce claims (see for example claim 13 when dependent indirectly on claim 3) to compositions for which there was no basis in the original disclosure.

- The requirements of Claim 11 of the third auxiliary request ("gelatin + carrageenan") appeared in conflict with those of claim 1 ("hydrolysed starch derivative and another gelling agent"), and lacked a basis in the original disclosure.
- Claims 19 ("15 to 30 wt%") and 20 ("17 to 25 wt%") of main request (and likewise claims 17 and 18 of the second auxiliary request B) were inconsistent with the amended claim 1 ("less than 25 wt%").

B. *Lack of clarity as a result of amendment*

- The presence in the main request of three independent claims 1 to 3 with different features distinguishing from the prior art, together with claims 11 to 18 directed to different compositions of the aqueous phase, such claims being potentially dependent on any of these independent claims, makes the scope of these dependent claims unclear (see for example claim 13 when dependent indirectly on claim 3).
- The requirements of Claim 11 of the fourth auxiliary request ("gelatin + carrageenan") appear unclear as being possibly in conflict with those the amended claim 1 ("hydrolysed starch derivative and another gelling agent").

C. *Insufficiency*

- The opposition division dismissed the argument that the way to carry out the viscosity test was insufficiently described, though it is not clear that a sufficient speed of rotation to achieve the shear rate at which the measurement to be made can always be obtained with the instrument suggested.

- Newly introduced document (13) threw doubt on whether there is enough information to carry out the invention.

D. *Lack of Novelty (Article 54 EPC)*

- Whereas use of a test for identifying suitable aqueous phase gel forming compositions for a spread, as being those having a viscosity of at least 20 mPa.s at a shear rate of 17090 sec⁻¹ and a temperature of 5°, appears novel on the documents, this does not mean that a spread using such an aqueous composition is novel.
- What was claimed was the spread. Carrying out a test on one component of this at an intermediate stage of manufacture was not even a guarantee that intermediates which behaved differently in this test, would give rise to different end products, though in the absence of contrary evidence the Board was prepared to presume that this was so. However where, as here, the test had no self-evident relationship to any desirable property of the final product, the significant comparison was with what the compositions suggested by the prior art on other grounds, would have shown on this test. If the compositions suggested by the prior art did give parameters as required by the test, it would be irrelevant that the test itself was not suggested in the prior art.
- If one adopted the view of the opposition division that (extrapolated) viscosity measures showed that at least some of the aqueous compositions of document (1), which were gelling compositions, met the claimed viscosity requirement, then the only technical feature in the claim which could be relied on for novelty was the fat wt%. Someone

wishing to practice the invention of document (1) at the lowest end of the low fat range, around 25%, and using these aqueous compositions suggested by document (1) would apparently inevitably make some spreads meeting all the requirements of Claims 1 and 2 of the main request, so that there was lack of novelty.

E. Inventive step (Article 56 EPC)

- The existence of document (13) appeared at the very least to show that the disclosure of the patent in suit was not sufficient to make a spread which would find ready market acceptance, even if a spread of some sort could be made, and the Board was thus unable to accept the appellant's statement of the problem to be solved as being how to prepare a water-in-oil emulsion with a very low fat content that was stable and spreadable at refrigerator and room temperature, that destabilized and released its flavour in the mouth and did not release moisture when spread, because there appeared no guarantee that meeting the criteria in the claim would necessarily achieve this.

- Even if novelty over document (1) were considered to exist because none of the examples of document (1) teach making a spread with such a low fat content, it was known that it would be desirable to have a fat spread with as low a fat content as possible. The problem to be solved over the teaching of document (1), could thus only be seen as putting into practice the teaching of document (1) to make a fat spread with a fat content of below 25 wt%.

- The obvious way to do this was to try out such low fat wt% spreads using the aqueous phase compositions suggested by document (1). These included the composition of Example 9 which, on the respondents' evidence met the viscosity criterion claimed.
- If only compositions meeting the viscosity criterion were suitable, then the claimed composition of spread would be arrived at by routine experimentation starting from document (1), and the claimed matter would be obvious.
- If none of compositions suggested by document (1) were suitable despite meeting all the characteristics now claimed, this would suggest that the present invention could not be carried out throughout the claimed range, and that there are other necessary limitations on the range which gave a suitable spread, but these limitations are not features of the claim. This would be contrary to the requirements of Article 83 EPC.
- If however, compositions of document (1) were suitable irrespective of meeting the now claimed viscosity criterion, this would throw doubt on the whole basis of using this criterion to stake out an invention.
- It was arguable on document (1) that the important criterion was adequate gel strength, and the information in the patent shows that as gel strength was increased by adding more gelling agent, so did the viscosity increase. Thus

something within the claims was likely to be arrived at by routine experimentation on the basis of the prior art suggestion of having a strong enough gel.

- The claims put forward did not allow a distinction between what was an acceptable spread and what was not an acceptable spread on the basis of any criteria other than the gel strength, fat content and the viscosity test. Yet it appeared that these criteria would be met following the suggestions of the prior art. That the product would find little market acceptance did not make the claimed matter anything but obvious.

- In arguing this point, it should be borne in mind that the claims of certainly the main request covered virtually any sort of gelling agent, but contained no requirement that the spread not be unpleasantly chewy, or that it melt in the mouth quickly enough to be tasty. It was these requirements that made document (1) state that the type of gelling agent to be used was critical. The evidence submitted by the appellant merely suggested that experts thought that following the teaching of document (1) would not lead to a spread that would be a market success. But document (13) suggested that this could also be said of at least some of the embodiments of the presently claimed invention, so that this provided no basis for distinguishing over the prior art.

XI. The appellants' arguments relevant to the requests still maintained at the end of the oral proceedings can be summarized as follows:

- There was a basis on page 9, line 25 and in claim 18 of the application as filed for the introduction into claim 1 of the main request and of first and fourth auxiliary requests of the limitation to "less than 25 wt%" for the fat level. Further, the wording "less than 25 wt%" should be regarded as a true disclaimer over document (1) which was not enabling for fat ranges below 25 wt%, ie., the skilled person would not consider spreads with a fat content around 25 wt% as disclosed by document (1).

XII. The respondents questioned under Article 123(2) EPC the introduction of the wording "less than 25 wt% fat" into claim 1 of the main request and of auxiliary requests "B" and "E".

XIII. The appellants requested that the decision under appeal be set aside and the patent be maintained as main request on the basis of auxiliary claims A filed on 10 March 1992 or as first auxiliary request on the basis of auxiliary claims B filed at the oral proceedings on 22 February 1996 or as second or third auxiliary requests on the basis auxiliary claims C or D respectively filed 10 March 1992 or as fourth auxiliary request on the basis of auxiliary claims E filed at the oral proceedings on 22 February 1996.

The respondents requested that the appeal be dismissed.

Reasons for the Decision

1. *Admissibility of appeal and parties to the appeal*

1.1 The appeal by the appellants complies with the requirements of Articles 106 to 108 and Rule 64 EPC, and is thus admissible.

1.2 The opposition division decided not only to revoke the patent on the basis of the objections raised in oppositions 01 and 03, but also that the opposition by opponent 02 was inadmissible. Once this latter part of the decision took full legal effect, opponent 02 ceased to be a party to the opposition proceedings, and thus ceased to be entitled to be a party, pursuant to Article 107 EPC, to any appeal by the patent proprietor. If opponent 02 had wished to be a party to the appeal proceedings, it would have been necessary for him to file an appeal against the decision that his opposition was inadmissible. The suspensive effect of an appeal provided by Article 106(1) EPC would then have preserved his status as a party. The suspensive effect depends on the extent of the appeal, so that here where there is only an appeal by the patent proprietors against the decision to the extent that it revoked his patent, there was no suspensive effect on the decision as to admissibility of opposition 02. The parties to the present appeal proceedings are thus the appellant patent proprietors and the respondents opponents 01 and 03.

1.3 The Board would remark that it is important in both in opposition proceedings, and in any subsequent appeal proceedings to establish clearly who the parties are, and the grounds of opposition that can be considered. That this may be of critical importance appears from

decisions G 9/91 (EPO OJ, 1993, 408), G 10/91 (EPO OJ, 1993, 420), G 9/92 (EPO OJ, 1994, 875) and G 4/93 (EPO OJ, 1994, 875, Footnote) of the Enlarged Board relating respectively to the extent and power to examine grounds for opposition, and to the need for a party to appeal if it wants to challenge the part of a decision that adversely affects it. From a procedural point of view it appears to the Board that it would be more satisfactory, and more in accordance with the intention of Rule 55(1) EPC, if the opposition division indicates its view as to whether or not a notice of opposition is admissible, and if so on what grounds, as early as possible, awaits any comments, and then issues a brief decision on this question alone, without considering other matters. If the notice of opposition is considered inadmissible then the opponent can appeal pursuant to Article 106(3) EPC. If, on the other hand, the notice is considered admissible as regards certain grounds, the decision should allow a separate appeal. Whether or not appeals are then filed, this would achieve clarity at an early stage as to the parties and the grounds of opposition.

2. *Main request*

2.1 Article 123(2) EPC

2.1.1 There is no direct verbal basis for restricting in claim 1 of the above request the fat level to a range **less than 25 wt.%.**, as the originally filed dependent claim 18 and page 9, line 25 on which the appellants rely recited "from 17 to 25 wt.% fat", which also included the upper limit 25 wt.%. The appellants maintain that the wording "less than 25 wt.%" should be seen as a disclaimer. However, the Board cannot share this view. The purpose of a disclaimer is to re-establish the novelty of a claim over the teaching of a

prior art document without introducing new subject matter, so that a precise basis for what is disclaimed must exist either in the original application or in the prior art document. If the appellants' intention were to re-establish novelty over document (1), then it should be noted that the newly introduced expression "less than 25 wt.%" would not achieve this goal. This is because in document (1) (see page 1, 1-h column, line 14: "e.g.") the range 25 to 65% by weight is merely given as an example of "low fat". There seems thus no reason why the skilled person would not regard something **below** but close to 25 wt.% as also falling within the teaching of document (1), so that the feature below 25 wt.% cannot be regarded as a disclaimer of any overlap with any precise range required by document (1). Claim 1 is thus objectionable under the terms of Article 123(2) EPC.

- 2.1.2 Independent claim 3 prescribes that the gelled aqueous phase should comprise a gelling hydrolysed starch derivative and another gelling agent (see section IX *supra*). Claim 10 dependent inter alia on claim 3 further specifies that "wherein the aqueous phase composition comprises 1-25 wt.% gelling agent". Claim 12 dependent on claim 10, and thus inter alia on claim 3, further requires that "the aqueous phase composition comprises from 1 to 10 wt.% gelatin, carrageenan or a mixture thereof". Thus, this latter claim covers a spread which, in addition to a hydrolysed starch derivative (cf. reference to claim 1), comprises up to 10 wt.% gelatin, carrageenan or a mixture thereof. However, the description as filed (see page 8, lines 12 to 16) prescribed the higher boundary value of 10 wt.% for the other gelling agents only if these were used in **replacement** of a gelling hydrolysed starch derivative rather than in combination therewith (see the wording in the original description

"if, **instead** of gelling hydrolysed starch derivative, other gelling agents are used") and nowhere suggested a three gel mixture comprising gelatin, carrageenan and a hydrolysed starch derivative having 10 wt.% as the upper limit amount. Accordingly, claim 12 relates to subject-matter which is neither explicitly nor implicitly derivable from the application as filed and for this reason offends against the requirements of Article 123(2) EPC.

2.2 Clarity (Article 84 EPC)

2.2.1 According to claim 1, the fat content should be less than 25 wt.% (see section IX *supra*). However, in dependent claim 19 a spread "comprising 15 to **30 wt.% fat**" is claimed (emphasis added). Dependent claim 20 concerns a spread "comprising 17 to **25 wt.% fat**" (emphasis added), ie., the boundary value of 25 wt.% is not excluded as in claim 1. These claims 19 and 20 are thus inconsistent with the claim they depend upon and hence this amended set of claims is objectionable under the terms of Article 84 EPC.

2.2.2. Claim 2 prescribes that the gelled aqueous phase should comprise more than one gelling agent, said gelling agents comprising gelatin (see IX. *supra*). Dependent claim 10 concerns an embodiment of the spread according to inter alia claim 2 "wherein the aqueous phase composition comprises 1-25 wt.% gelling agent". Dependent claim 12 relates to a spread according to claim 10 "wherein the aqueous phase composition comprises from 1 to 10 wt.% gelatin, carrageenan or a mixture thereof". The separate mention of carrageenan and of a mixture of gelatin and carrageenan, makes it unclear whether the possibility is now covered that carrageenan be used as a substitute for the gelatin that is an essential feature of claim 2. This

uncertainty and lack of clarity arises from the introduction, by amendment of the granted set of claims, of the new claim 2, while seeking to keep all the dependent claims as filed and as granted and is objectionable under Article 84 EPC.

2.3 In view of the objections above indicated the main request must be refused.

3. *First auxiliary request*

3.1 The objection stated in point 2.1.1 above to claim 1 of the main request, applies also to the identically worded claim 1 of this request. Further, the objection as regards clarity raised under point 2.2.1 applies also to claim 17 of this request because it is worded identically to claim 20 of the main request. The first auxiliary request must thus be refused.

4. *Second auxiliary request*

4.1 Claim 1 of this request corresponds to claim 2 of the main request, and claims 8 and 10 of this request correspond to claims 10 and 12 of the main request. Thus the objection raised under point 2.2.2 as regards to clarity also applies to this request which relates to an amended set of claims, and this request must be refused.

5. *Third auxiliary request*

5.1 Claim 1 of this request corresponds to claim 3 of the main request, and dependent claims 8 and 10 of this request correspond to dependent claims 10 and 12. The objection set out in point 2.1.2 against claim 12 of the main request applies equally against claim 10 of this request, and the request must be refused.

6. *Fourth auxiliary request*

6.1 Claims 1, 12 and 20 of this request are identical to claims 1, 12 and 20 of the main request (see section IX *supra*), and are objectionable for the reasons set out in points 2.1.1 (claim 1), 2.1.2 (claim 12) and 2.2.1 (claim 20). This request must thus be refused.

7. *Article 113 EPC*

7.1 All the requests have had to be refused on grounds of claims being objectionable under Article 123(2) and Article 84 EPC. These objections were already raised in the communication accompanying the summons to oral proceedings, so that the requirements of Article 113(1) EPC have been complied with. As the appellants have failed to meet even the formal objections which had been indicated to them, and because, as set out in section X. above, numerous serious objections remain outstanding, the Board does not think it appropriate to re-open the proceedings to afford the appellants an opportunity to file further requests meeting at least the requirements of Articles 123(2) and 84 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

A. Townend

2119.D



The Chairman:

L. Galligani

Geschäftsstelle
Registrierung/Certified Registry/Greffs
Certifiée conforme:
München/Munich 11. AUG. 1997